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FLORIDA'S APPROACH TO CHOICE-OF-LAW PROBLEMS IN TORT

HAROLD P. SOUTHERLAND* AND JERRY J. WAXMAN**

I. INTRODUCTION

A. *In General*

This article considers significant recent developments in Florida's approach to tort choice-of-law problems.¹ Choice of law or, more commonly, conflict of laws, is a body of largely court-made rules designed to resolve disputes which implicate the laws of two or more states.² One of the aspects of sovereignty in the American

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1. The principal cases are *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980), in which the supreme court receded from its long-standing adherence to the place-of-the-wrong rule, an approach which gives controlling effect in a conflict-of-laws case in tort to the substantive law of the state where injury occurs, and adopted in its stead the approach of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter cited as RESTATEMENT (SECOND)], which, with respect to an issue in tort, applies the law of the state having the "most significant relationship to the occurrence and the parties," *id.* § 145(1); and *State Farm Mut. Auto. Ins. Co. v. Olsen*, 406 So. 2d 1109 (Fla. 1981), the first case after *Bishop* actually to resolve a conflicts issue in tort using the newly adopted second *Restatement* approach.

2. Conflict of laws remains one of the last great preserves of the common law. It is almost entirely judge-made. Legislators rarely give any thought to the extraterritorial consequences of the laws they enact, nor do they ordinarily intend their laws to have effect beyond the borders of their own states. *See, e.g.*, B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 81-82 (1963). Though the exception rather than the rule, there are statutory solutions to certain recurring kinds of choice-of-law problems. For example, FLA. STAT. § 732.502(2) (1983) provides that "[a]ny will, other than a holographic or nuncupative will, executed by a nonresident of Florida . . . is valid as a will in this state if valid under the

federal system is the ability of each state to determine for itself, by constitution, statute, or judicial decision, many of the legal rules by which its citizens will be governed. Nothing in the federal Constitution prohibits different states from making the same determination differently: Florida is free to choose a comparative negligence standard for measuring tort liability; some other state may prefer contributory negligence. Hence the identical course of conduct may give rise to tort liability if it occurs in Florida, but not if it occurs in another state. When the facts of a particular dispute involve both states, conflicts law comes into play: it is a methodology for determining initially which state's legal rules will govern the resolution of the dispute. The importance of conflicts law lies in the fact that the choice-of-law decision itself may often be outcome-determinative.³

During the nineteenth century and for much of the first half of the twentieth, the courts of virtually every state in the United States resolved tort choice-of-law problems in the same way—by using the familiar place-of-the-wrong rule.⁴ This rule, frequently referred to as *lex loci delicti*, assigned determinative significance to the place where a tort occurred.⁵ Once the place of the wrong was

laws of the state or country where the testator was at the time of execution." The Uniform Commercial Code has its own choice-of-law provisions. *See, e.g., id.* § 671.105. Many states have so-called "borrowing statutes," which provide that if a cause of action arises in another state and is barred by the applicable statute of limitations there, then it is likewise barred in the state where enforcement is sought. *See, e.g., id.* § 95.10; Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L. REV. 33 (1962). Florida's wrongful death statute formerly applied only to deaths occurring within Florida; in 1972 it was specifically amended to remove this limitation. *See Florida Wrongful Death Act*, ch. 72-35, § 1, 1972 Fla. Laws 174, 175-78. *Compare* FLA. STAT. § 768.01(1) (1971) ("[w]henver the death of any person in this state shall be caused by the wrongful act") with the current version at *id.* § 768.19 (1983) ("[w]hen the death of a person is caused by the wrongful act"). *See generally* R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 180-96 (3d ed. 1981) [hereinafter cited as R. CRAMTON]; Leflar, *Choice-of-Law Statutes*, 44 TENN. L. REV. 951 (1977).

3. For example, suppose two Florida residents, husband and wife, are vacationing in a distant state where interspousal tort immunity has been abolished. The wife negligently injures her husband. After they return to Florida, the husband brings suit against his wife in a Florida court to recover for his injuries. If Florida law is applied, the suit, otherwise perfectly meritorious, will be barred. *Cf. Hill v. Hill*, 415 So. 2d 20 (Fla. 1982); *Raisen v. Raisen*, 379 So. 2d 352 (Fla. 1979), *cert. denied*, 449 U.S. 885 (1980). If the law of the state of injury is applied, on the other hand, the husband can recover. Which state's law will be applied depends on Florida's conflict-of-laws rule then in effect. Any fact situation imaginable that can give rise to a lawsuit in a purely domestic sense can take on an added conflict-of-laws dimension if any of the facts or circumstances involves another state.

4. *See, e.g.,* E. SCOLES & P. HAY, *CONFLICT OF LAWS* §§ 2.4-.5, 17.2 (1982); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* § 6.1 (2d ed. 1980).

5. *E.g.,* RESTATEMENT OF CONFLICT OF LAWS § 378 (1934).

located,⁶ the substantive law of that place was then applied to resolve all issues in tort arising out of the occurrence.⁷ The rule was enormously popular with courts. It was certain, predictable, uniform in operation, and simple and easy to apply, involving nothing more than the mechanical task of locating the place where a tort occurred, itself an easy determination in most cases. This was certainly the rule in Florida, although the supreme court did not have occasion actually to say so until 1941, in *Myrick v. Griffin*.⁸

But the place-of-the-wrong rule was not without its detractors, and from the 1930's on it fell increasingly into disfavor with courts and commentators.⁹ A variety of modern approaches evolved, all said to avoid the arbitrary and inflexible characteristics of the rule.¹⁰ In 1980, in *Bishop v. Florida Specialty Paint Co.*,¹¹ Florida joined a majority of other states and abandoned its traditional adherence to *lex loci delicti*. The methodology chosen to replace it was that of the *Restatement (Second) of the Conflict of Laws*, which first identifies, with respect to an issue in tort, the state having "the most significant relationship to the occurrence and the parties" and then applies the substantive law of that state to determine the rights and liabilities of the parties with respect to that issue.¹²

The supreme court remanded *Bishop* for further consideration in light of this radically new approach. Shortly thereafter, in *State Farm Mutual Automobile Insurance Co. v. Olsen*,¹³ the court had its first opportunity to apply the second *Restatement* approach to the merits of a torts dispute. These two cases—*Bishop* and *Olsen*—are the focus of this article. It is our purpose to describe the change effected by the court in Florida's conflict-of-laws doctrine

6. See *id.* § 377. This section provides that "[t]he place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

7. *Id.* § 384.

8. 200 So. 383 (Fla. 1941). This case involved a suit instituted in Florida by a passenger in a car against the driver of a truck to recover for injuries sustained when the truck driver negligently failed to yield the right-of-way, causing the car to crash into a bridge abutment. Though the opinion does not say, both parties were apparently Florida residents. The accident occurred in Alabama, just west of Escambia County, Florida. The only reference in the opinion to choice-of-law theory is the court's statement that "[t]he accident occurred in the State of Alabama and, therefore, the law of the State of Alabama as construed by the Supreme Court of that State is controlling." *Id.* at 384.

9. See, e.g., W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942); E. SCOLE & P. HAY, *supra* note 4, § 2.5.

10. See, e.g., R. WEINTRAUB, *supra* note 4, § 1.5.

11. 389 So. 2d 999 (Fla. 1980).

12. RESTATEMENT (SECOND) § 145.

13. 406 So. 2d 1109 (Fla. 1981).

in tort and to consider the implications of that change for future cases. In the process we attempt to evaluate the soundness of the approach to which Florida, with these two cases, now appears committed.

B. *The Bishop Case: A Paradigm False Conflict*

*Bishop v. Florida Specialty Paint Co.*¹⁴ presented the Florida Supreme Court with a perfect opportunity to recede from its traditional adherence to the place-of-the-wrong rule, for it typified an entire class of cases in which, over the years, courts and commentators had variously castigated the rule as harsh, rigid, mechanical, arbitrary, irrational, or unjust in its operation.¹⁵

The Bishops, all residents of Florida, were guests aboard a small airplane leased by Florida Specialty Paint Company, a Florida corporation. The plane was piloted by the company's president, who was also a Florida resident. They were bound for North Carolina for a holiday weekend, intending thereafter to return to Florida. The plane crashed in South Carolina en route, allegedly due to its negligent operation. The Bishops brought suit in Florida against Florida Specialty Paint and its president to recover for injuries they sustained in the crash. There was in effect in South Carolina an airplane host-guest statute, which required guests in an airplane to show intentional misconduct or recklessness on the part of their host in order to recover. Florida had no such statute, requiring only a showing of simple negligence. The Bishops conceded that they could not meet the higher South Carolina standard. The trial court, following the place-of-the-wrong rule, held that the law of South Carolina, the place where the injury occurred, governed the substantive issues in the case, and granted the defendants' motion for summary judgment.

The First District Court of Appeal affirmed on the authority of existing Florida case law but, obviously troubled by the result, certified to the supreme court the question whether *lex loci delicti* should continue to be the rule in Florida, foreclosing "other rele-

14. 389 So. 2d 999 (Fla. 1980).

15. See, e.g., Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958), reprinted in B. CURRIE, *supra* note 2, at 128 (discussion of the California Supreme Court's decision in *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953)). For an extensive sampling of expressions of judicial and scholarly dissatisfaction with the place-of-the-wrong rule, see Note, *A Suggested Method for the Resolution of Tort Choice-of-Law Problems in Place-of-the-Wrong Rule Jurisdictions*, 1 FLA. ST. U.L. REV. 463, 471 n.41 (1973).

vant considerations, such as the policies and purposes underlying the conflicting laws of a foreign jurisdiction where the tort occurred, and the relationship of the occurrence and of the parties to such policies and purposes."¹⁶

To this question the court answered "no." "Instead of clinging to the traditional *lex loci delicti* rule, we now adopt the 'significant relationships test' as set forth in the *Restatement (Second) of Conflict of Laws* §§ 145-146 (1971) . . ."¹⁷ The reasons for the change were simply stated: *lex loci delicti* was inflexible; in contrast, the second *Restatement* approach recognized "that the state where the injury occurred may have little actual significance for the cause of action. Other factors may combine to outweigh the place of injury as a controlling consideration, making the determination of applicable law a less mechanical, and more rational, pro-

16. 377 So. 2d 767, 768 (Fla. 1st DCA 1979).

17. *Bishop*, 389 So. 2d at 1001. Section 145, entitled "The General Principle," provides:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Section 146, entitled "Personal Injuries," provides:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Section 6, in turn, is entitled "Choice-of-Law Principles" and provides:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

cess."¹⁸ The court added in a footnote that twenty-five states and the District of Columbia had already rejected the place-of-the-wrong rule and "adopted one of several 'multiple factors' theories."¹⁹ Expressing no opinion on whose substantive law, South Carolina's or Florida's, should actually apply, the court remanded the case for reconsideration in light of the newly adopted second *Restatement* approach, only Justice Boyd dissenting, without opinion.²⁰

What the court was confronting in *Bishop* was a frequently occurring class of case known in choice-of-law parlance as a false conflict,²¹ though the court did not characterize it as such and has never used this terminology in any of its decisions. In a broad sense, a false conflict is an otherwise domestic case that implicates the law of another state only because the wrong occurred there. Typically all aspects of these cases except the place of injury will be localized in a single state.²²

Bishop is an excellent example. All of the parties were Florida residents; the host-guest relationship arose in Florida; the trip began in Florida and was to have ended there; and suit was instituted in a Florida forum with jurisdiction over the parties and subject matter of the dispute. South Carolina's only connection with the case was the fortuity of the plane's crashing there. So far as injury to South Carolina residents or their property or any other involvement with that state was concerned, the accident might just as well have never happened. On the other hand, here were Florida plaintiffs suing Florida defendants in a Florida court, on a claim quite possibly valid under well-settled principles of Florida tort law, who were going to be denied any opportunity to redress their injuries because the place-of-the-wrong rule dictated application of South Carolina's negligence standard rather than Florida's.

It is not hard to see injustice in such a result and hence not diffi-

18. *Bishop*, 389 So. 2d at 1001.

19. *Id.* at 1001 n.2. Professor Weintraub put the count at 27 states plus the District of Columbia as of July 1, 1979. R. WEINTRAUB, *supra* note 4, at 205.

20. *Bishop*, 389 So. 2d at 1002.

21. See, e.g., B. CURRIE, *supra* note 2, at 180-81; R. WEINTRAUB, *supra* note 4, § 6.2; Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 667-74 (1959).

22. The term "false conflict" is used throughout this article and is one of its central concepts. The definition given at this point in the text is intended only as a working description of this particular kind of choice-of-law problem. The more specialized and precise definition of this term in the vocabulary of modern interest analysis—the sense in which it will primarily be used in this article—is introduced at a later point. See *infra* notes 125-26 and accompanying text.

cult to understand that false conflicts like *Bishop* lay at the core of judicial dissatisfaction with the place-of-the-wrong rule. Increasingly courts found ways to avoid its rigid inflexibility. This reaction, in turn, was the matrix for the development of more sensitive modern approaches, such as the second *Restatement* and its "most significant relationship" formulation. But if *lex loci delicti* has gradually been supplanted as the sole choice-of-law determinant in torts cases, its influence nevertheless remains profound. As the court took care to point out in *Bishop*, the second *Restatement* does not reject the rule completely.²³ "The state where the injury occurred would, under most circumstances, be the decisive consideration in determining the applicable choice of law."²⁴ The importance of this caveat for conflicts law in Florida can hardly be over-emphasized, as we shall see when we examine the court's use of the second *Restatement* in *State Farm Mutual Automobile Insurance Co. v. Olsen*,²⁵ a case of true conflict in which the states involved, Florida and Illinois, both had the kind of concern for application of their laws that only Florida had in *Bishop*.

As necessary background to understanding the direction Florida is taking with the second *Restatement*, we summarize in the next part of this article the preeminent role that the place-of-the-wrong rule has traditionally played in American conflicts thinking, in Florida and elsewhere, and the reasons why it ultimately proved unsatisfactory as the sole choice-of-law determinant in torts cases. We then consider the modern approaches which have replaced it, in particular the second *Restatement*, and the uses to which that method has already been put in Florida in cases of false conflict like *Bishop*.

II. THE RISE AND FALL OF THE PLACE-OF-THE-WRONG RULE AND ITS REPLACEMENT IN FLORIDA WITH THE SECOND *Restatement*'S "MOST SIGNIFICANT RELATIONSHIP" APPROACH

A. *Territorial Sovereignty in American Conflicts Law: The Origins and Development of the Place-of-the-Wrong Rule*

The place-of-the-wrong rule is one of the chief expressions of territorial sovereignty, a choice-of-law approach that has dominated conflicts thinking in America almost from the beginning.²⁶

23. *Bishop*, 389 So. 2d at 1001.

24. *Id.*

25. 406 So. 2d 1109 (Fla. 1981).

26. See, e.g., R. CRAMTON, *supra* note 2, at 14-18.

Territorial theory itself evolved as a way of resolving disputes among sovereign nations and traces at least to the 1600's and the influential writing of Ulric Huber, a Dutch law professor and judge.²⁷ The theory rests squarely on certain realities inherent in the idea of a sovereign. A sovereign has power to make and enforce rules within its own territory. Within that territory, its power to attach or not to attach legal consequences to particular acts is supreme. Conversely, a sovereign ordinarily has no power to make such decisions respecting conduct occurring beyond its borders; it lacks effective power to enforce those decisions even if made. Most importantly, there is no overarching principle of international law that requires two sovereigns to attach the same legal consequences to the same acts. Thus when a particular dispute involves two sovereigns, and their laws relating to the matter dictate different results, some method becomes necessary for determining which of two equally correct laws will govern, since both obviously cannot.

Territorial theory has emerged as one of the most powerful and enduring techniques for making such determinations: it assigns preeminent significance to the place where events occur.²⁸ Only that place, by virtue of its territorial sovereignty, has power to attach legal consequences to events. If it does not, no other place can; but if it does, the rights and liabilities thereby created are valid and are presumptively entitled to recognition and enforcement everywhere else in the world.

Though the analogy is hardly perfect and has been more or less so depending on the climate of political thought at any particular time, the similarity of the individual states of the United States to the nation-states of the world is evident. Operating within very broad limits set by the Constitution, each state has power to prescribe the legal consequences of events occurring within its borders. Conversely, no state has power to do so for events that occur in other states. Each state is likewise free to attach different legal consequences to the same events. These attributes of sovereignty, coupled with an obviously intense need for a workable mechanism of mediating the conflicts of laws that were bound to arise in a closely knit federation like the United States, made the assimilation of territorial conflicts theory attractive, perhaps inevitable, considering the independent and diverse character of the colonies out of which first a confederacy and then a federal republic was

27. See, e.g., *id.* at 2-3; E. SCOLES & P. HAY, *supra* note 4, § 2.2, at 9.

28. See, e.g., R. CRAMTON, *supra* note 2, at 14.

formed.

Justice Joseph Story's great treatise, *Commentaries on the Conflict of Laws*, first appeared in 1834 and was firmly rooted in territorial principles.²⁹ The rationale for the recognition and enforcement of one sovereign's laws by another was, in his view, one of "comity."³⁰ This meant that when one sovereign gave effect to the laws of another, it was doing so voluntarily, out of deference and respect, and not because it was somehow obligated to do so. Story's influence on the conflicts thinking of nineteenth-century judges was profound.³¹

Hardly less influential was the early twentieth-century work of Professor Joseph Beale, which culminated in 1934 in the first *Restatement of the Conflict of Laws*, for which he served as Reporter, and in his three-volume work, *A Treatise on the Conflict of Laws*, which appeared in 1935.³² Beale's own writing and his appraisal and summation of American conflicts thinking left no room for any theory but a territorial one.³³ His views differed from

29. See *id.* at 4-6; J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 7, 17-24 (1st ed. 1834 & photo. reprint 1972).

30. See R. CRAMTON, *supra* note 2, at 5-6; J. STORY, *supra* note 29, §§ 23-25, 32-38. Story's views were drawn directly from Huber's third axiom, which, in Story's words, held "that the rulers of every empire from comity admit, that the laws of every people in force within its own limits, ought to have the same force every where, so far as they do not prejudice the power or rights of other governments, or of their citizens." *Id.* § 29 (footnote omitted). In defending the idea of comity, he wrote:

It has been thought by some jurists, that the term, "comity," is not sufficiently expressive of the obligation of nations to give effect to foreign laws, when they are not prejudicial to their own rights and interests. And it has been suggested, that the doctrine rests on a deeper foundation; that it is not so much a matter of comity, or courtesy, as of paramount moral duty. Now, assuming, that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions, on which its exercise may be justly demanded. And, certainly, there can be no pretence to say, that any foreign nation has a right to require the full recognition and execution of its own laws in other territories, when those laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or where their moral character is questionable, or their provisions impolitic.

Id. § 33 (footnotes omitted).

31. See, e.g., R. CRAMTON, *supra* note 2, at 3-4; E. SCOLES & P. HAY, *supra* note 4, §§ 12-13.

32. See, e.g., Griswold, *Mr. Beale and the Conflict of Laws*, 56 HARV. L. REV. 690 (1943) ("It is very hard to think of any other field of the law which has been so much 'made' by one man."); see also E. SCOLES & P. HAY, *supra* note 4, § 2.5.

33. See 1 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS §§ 2.3, 4.12 (1935).

There cannot be two independent laws within a territory, even though that territory be subject to the legislative jurisdiction of two independent sovereigns. . . .

The case of the United States offers a peculiar illustration of this principle. The

Story's in one important respect. One state gave effect to rights created under the laws of another because it was obligated to do so; such rights were said to vest at the moment of creation and once vested were entitled to enforcement everywhere.³⁴ Beale found the notion of comity offensive, because it implied discretion where in his view none existed.³⁵ A right had existence only by vir-

smallest legal unit, it is clear, is the state; for the law of each state prevails throughout its territory, while no other state or portion of any state has law in all respects identical. . . . In order to find a larger unit than the single state we must find a single law of that unit prevailing throughout its territory. Such a single law, passing state lines, does not exist. If we take two contiguous states of the Union we find that their laws have certain large common elements, but that they also differ from one another in many particulars. They are, therefore, separate legal units. . . .

It might be argued that the relation of the states to the United States is the same, legally speaking, as that of the municipalities to the states. The answer is that while it might have been so it is not so.

Id. § 2.3, at 17-18.

It follows also that not only must the law extend over the whole territory subject to it and apply to every act done there, but only one law can so apply. If two laws were present at the same time and in the same place upon the same subject we should also have a condition of anarchy. By its very nature law must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction.

Id. § 4.12, at 46.

34. See 2 *id.* §§ 378.2-3.

The existence and nature of a cause of action for a tort is governed by the law of the place where the plaintiff's alleged right to be free from the act or event complained of is alleged to have been violated by a wrongful act or omission. It follows therefore that the law of the place of wrong determines whether or not there is a cause of action for the wrong.

Id. § 378.2, at 1289 (footnote omitted).

If the law of the place where the defendant's act took effect created as a result of the act a right of action in tort this right will be recognized and enforced in another state unless to enforce the right is against the public policy of the forum.

Id. § 378.3, at 1290 (footnotes omitted).

In this regard, the views of Justice O.W. Holmes were similar to Beale's:

The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation . . . which, like other obligations, follows the person, and may be enforced wherever the person may be found. . . . But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation . . . but equally determines its extent.

Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904) (citations omitted).

35. See 3 J. BEALE, *supra* note 33, § 71, app. at 1964-65 (1935); see also R. CRAMTON, *supra* note 2, at 8:

Mr. Justice Story's "comity" theory held that the forum was free to do as it wished; the forum, for reasons of practical convenience or moral obligation, might often permit foreign law to operate. . . . To Professor Beale and other vested-rights theorists, "comity" was a fighting word. The term itself implied that the court possessed an undesirable degree of discretion concerning the applicable law,

tue of the law of the place of its creation and ought to be enforced according to its terms in any other place. Thus with respect to torts, as he put it in the first *Restatement*, "If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states. . . . If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state."³⁶

Whether by reason of comity or vested rights, there was no question that well into the twentieth century almost every state followed the rule that the law of the place of the wrong governed substantive issues in tort, regardless of the law of the place where suit was brought.

Beale's dogmatic and relentless espousal of the place-of-the-wrong rule as the only possible solution to torts conflicts problems embodied a brilliant insight into the paradoxical nature of all such problems. Two states have different and conflicting laws on the same subject. In a sovereign sense, each is equally correct in the rule it has promulgated. But in a lawsuit implicating both rules, only one can prevail. How, rationally, to choose one over the other? The choice could hardly be left to the predilections of individual judges on a case-by-case basis. Inevitably they would choose that state's rule which seemed to them to produce the better, more desirable result in any particular case; or worse, would provincially prefer local litigants over those from other states, or their own law over another state's because it was more familiar or provided a more intelligent, progressive, and enlightened solution to some particular problem. The result of this would be a kind of anarchy. There would be neither predictability nor uniformity of result; and for parties able to pick and choose among the forums available to them, the temptation to forum shop would be irresistible.

What was needed was a conflicts rule that was uniform in operation, always choosing the same law regardless of where suit was brought, hence one that was also predictable; one that transcended debates over which law was "better," the merits of the case, and the personalities of judges and litigants—in short, a neutral principle that first achieved conflicts justice, leaving justice in the case to be worked out in the ordinary way.

and the principle violated their view of the territorial premise. Thus the vested-rights approach stressed a legal obligation to recognize rights based on foreign law: "A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere." 3 Beale, *Treatise on the Conflict of Laws* 1969 (1935).

36. RESTATEMENT OF CONFLICT OF LAWS § 384 (1934).

It was a stroke of genius that Beale saw chance as the perfect arbiter of all these problems. Making the choice-of-law decision in a given case turn on the happenstance of where the wrong occurred—literally on the flip of a coin—seemed to meet every objection, in particular that posed by the seeming impossibility of choosing rationally between two conflicting but equally correct substantive rules. *Lex loci delicti* was first of all perfectly consistent with the principle of territorial sovereignty and with Beale's notion of vested rights. In addition it was eminently uniform, certain, and predictable, always giving the same governing substantive law no matter where suit was brought. Judges would not have to choose the law applicable to a given dispute; it would be given to them, inexorably, by the operation of the rule. It was no small dividend that the rule was simple and ordinarily easy to apply, thus conducive to administrative ease in judicial decision making. To achieve perfect fairness, the place-of-the-wrong rule had to be followed in every state and had to be unswervingly applied in every case. Beale was uncompromising in his insistence that these conditions be met. His conception of conflicts justice could brook no exceptions. Beale sought to devise a system of rules that would achieve perfect conflicts justice.³⁷ If in operation his rules sometimes seemed to produce results that were frustrating and unsatisfying to those who had to live with them, that was simply the price exacted for perfection.

B. *The Erosion of Lex Loci Delicti: Escape Devices*

In 1934, when the first *Restatement* appeared, it seemed that Beale's views had prevailed. But his triumph was short-lived, if not altogether illusory. Courts simply could not or would not separate conflicts justice from their view of what would make for just and sensible results in individual cases. Even before Beale's territorial principles were cast in stone in the first *Restatement*, and increasingly afterward, courts found ways around the inexorable operation of *lex loci delicti* in order to fashion results more consonant with

37. Griswold, *supra* note 32, at 693-94:

Beale's system of the Conflict of Laws was a highly logical structure. He was the arch exponent of the territorial and vested rights points of view. All of his work had the virtue of consistency with that major premise. He would not yield a bit from it, even when his opponents forced him into extreme conclusions. For this reason, especially in later years, his work was subjected to criticism, sometimes almost bitter and often very strong. But always he stood fast on the premise of the territoriality of law.

their notions of justice.³⁸ No court forthrightly abandoned *lex loci delicti*; its roots ran deep and its virtues were real and considerable. Rather, so-called escape devices appeared, to be invoked in any case—almost always false conflicts, like *Bishop*—where rigid application of the place-of-the-wrong rule seemed to produce undesirable results.

These subtle evasions tended to cluster under four headings: *renvoi*, characterization, the substance-procedure distinction, and public policy.³⁹ The techniques they embody are not just of historical interest; even with the new methodologies, they can still be used to argue for or rationalize a particular result. The few cases discussed here, from Florida and other states, are illustrative of many such cases and are systemically representative of problems with which conflicts methodology still struggles. These cases also have a good deal to say about judicial conceptions of just results and why courts felt compelled to avoid *lex loci delicti* without openly abandoning it. The cumulative pressure of many such evasions—dishonest in the sense that they paid lip service to the rule while avoiding its operation—did much to spur the aptly called “choice-of-law revolution”⁴⁰ which ultimately brought down Beale’s systematics and left the way clear for the new approaches.

1. *Renvoi*

In conflicts terminology, a state’s “local law” consists of all of its rules, exclusive of conflicts rules, which are used in the decision of cases.⁴¹ A state’s “whole law” is all of its law, including its conflicts principles.⁴² *Renvoi*—much criticized and seldom utilized—is an almost metaphysical concept that makes use of this distinction.⁴³

In *Haumschild v. Continental Casualty Co.*,⁴⁴ a Wisconsin married couple was involved in a car accident that occurred in California. The wife was injured and subsequently sued her husband for negligence in Wisconsin, at the time a state that followed the

38. See, e.g., *Levy v. Daniels' U-Drive Auto Renting Co.*, 143 A. 163 (Conn. 1928) (characterizing liability as contractual rather than tortious); *Levy v. Steiger*, 124 N.E. 477 (Mass. 1919) (issue of “due care” procedural rather than substantive); E. SCOLES & P. HAY, *supra* note 4, §§ 17.8-10.

39. See generally R. CRAMTON, *supra* note 2, at 63-145.

40. See, e.g., Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 775-77 (1983).

41. See, e.g., RESTATEMENT (SECOND) § 4(1).

42. See, e.g., *id.* § 4(2); R. CRAMTON, *supra* note 2, at 70.

43. See generally R. CRAMTON, *supra* note 2, at 63-75.

44. 95 N.W.2d 814 (Wis. 1959).

place-of-the-wrong rule.⁴⁵ In California, a wife could not sue her husband in tort; in Wisconsin she could. If the Wisconsin Supreme Court followed *lex loci delicti* in the ordinary way, it would look to California's local law and bar the suit by reason of interspousal tort immunity.⁴⁶ But California also had a conflicts rule that made the law of the marital domicile determinative of interspousal capacity to sue. Thus if the court chose to look to California's whole law, it would be referred back by California's conflicts rule to Wisconsin, the state of the parties' domicile, and Wisconsin's law permitting such suits. In the arcane terminology of *renvoi*, this would constitute a "partial acceptance" of the *renvoi*—an acceptance of California's reference back to Wisconsin for decision under Wisconsin law.⁴⁷

But believing that California's reference to the "law" of the parties' domicile apparently meant Wisconsin's whole law (thus including its place-of-the-wrong conflicts rule) and fearing that it would be caught in an endless series of references back and forth between the two states, the court declined to adopt the *renvoi* approach.⁴⁸ Instead it found a way to apply Wisconsin law by characterizing tort suits between husband and wife as matters of family law, to be determined by reference to the law of the parties' domicile.⁴⁹

Two points are noteworthy. First, the case was apparently a false conflict, implicating California only as the place where injury occurred. Second, the actual outcome has a good deal to say about judicial conceptions of just and sensible results in this kind of case. The court's avoidance of *lex loci delicti* permitted the suit to continue, thus giving the plaintiff at least an opportunity to recover for her injuries. This, in turn, necessarily involved the subordination of Beale's ideal of perfect conflicts justice to two other poli-

45. *Id.*

46. *Id.* at 815.

47. *Id.* at 820. See R. CRAMTON, *supra* note 2, at 70:

If the forum state refuses to consider the choice-of-law rules of the state to which it refers, it is said to "reject" the *renvoi*; if it finds in the foreign choice-of-law rule a reference back to the law of the forum and applies its own [local] law, it is said to "accept" the *renvoi*. The *renvoi* is said to be "partial" if the foreign choice-of-law is found to refer to the [local] law of a state and "total" if the foreign reference is also to whole law. . . . See Griswold, *Renvoi Revisited*, 51 Harv. L. Rev. 1165, 1166-70 (1938) For citations to the enormous and largely metaphysical literature on *renvoi* see 1 Rabel, *The Conflict of Laws: A Comparative Study* 75-76 n.6 (2d ed. 1958).

48. *Haumschild*, 95 N.W.2d at 820.

49. *Id.* at 818.

cies: the general one of compensating tortiously inflicted injuries and Wisconsin's own special policy of doing so even in suits between spouses. As the court put it, "[I]n the field of the conflict of laws, absolutes should not be made the goal at the sacrifice of progress in furtherance of sound public policy."⁵⁰ The *renvoi* approach has never been used in Florida. The second *Restatement* rejects the concept for the most part through consistent use of the term "local law" to make clear that what is meant is a state's substantive law, distinct from its conflicts rules.⁵¹

2. Characterization

Haumschild, as it was actually decided, is an excellent example of escaping the place-of-the-wrong rule through characterization. A wife's negligence suit against her husband is certainly a tort action, but whether interspousal tort immunity incapacitates her from bringing such a suit can also be seen as a problem in family law. By characterizing the issue in *Haumschild* as one of family law rather than tort, the Wisconsin Supreme Court could use the rule that referred all such cases to the law of marital domicile and thus achieve the result it thought most desirable.⁵²

From *Myrick v. Griffin*⁵³ in 1941 to *Bishop* in 1980, the Florida Supreme Court only once departed from *lex loci delicti* in deciding the few conflicts cases in tort⁵⁴ that came before it. In *Colhoun v. Greyhound Lines, Inc.*,⁵⁵ the court used characterization as a way of avoiding the rule and permitting the plaintiff, a Florida resident, to pursue her damage suit against a common carrier for injuries she sustained during a bus trip that began in Florida with the purchase of a ticket and ended in an accident in Tennessee. Her complaint alleged both negligence and breach of contract and warranty and was filed after the Tennessee one-year statute of limitations in tort had run, but before the expiration of the Florida three-year contract statute.⁵⁶ The lower courts dismissed her complaint in its entirety on the ground that the law of Tennessee, the

50. *Id.*

51. See RESTATEMENT (SECOND) § 8. The first *Restatement* likewise rejects the concept. See RESTATEMENT OF CONFLICT OF LAWS § 7 (1934).

52. *Haumschild*, 95 N.W.2d at 818.

53. 200 So. 2d 383 (Fla. 1941); see *supra* note 8.

54. See *Colhoun v. Greyhound Lines, Inc.*, 265 So. 2d 18 (Fla. 1972); *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743 (Fla. 1967); *Astor Elec. Serv. v. Cabrera*, 62 So. 2d 759 (Fla. 1952).

55. 265 So. 2d 18 (Fla. 1972).

56. *Id.* at 21.

place of the wrong, was applicable. The supreme court agreed as to the negligence count. But as to the contract count, the court invoked contracts conflicts principles and held that the contract cause of action arose in Florida where the contract of carriage was completed with the purchase of the ticket and thus was timely under the Florida three-year statute of limitations.⁵⁷ The conflict again was false, Tennessee having no connection with the case apart from being the fortuitous place of injury.

3. *The Substance-Procedure Distinction*

In the first *Restatement*, substantive issues in tort were governed by the law of the place of the wrong; procedural matters, however, were determined by the law of the place where suit was brought.⁵⁸ But which questions were substantive and which procedural? The not-always-clear distinction between the two lent itself to judicial manipulation to achieve the results desired.

In 1953, in *Grant v. McAuliffe*,⁵⁹ the California Supreme Court determined that whether a cause of action in tort survived the death of the tortfeasor was a procedural matter to be decided under forum law. Grant and two other persons, all California residents, were injured in a two-car collision that occurred in Arizona. The driver of the other car, Pullen, was also a California resident. Pullen died several weeks after the accident, and McAuliffe was appointed administrator of his estate by a California court. Grant and the two others brought suit in California against McAuliffe to recover for their injuries. Arizona followed the common law rule that tort actions abate with the death of the tortfeasor; California had a survival statute under which they did not.⁶⁰ The first *Restatement* regarded the matter as substantive, hence governed by the law of the place of injury.⁶¹

In a majority opinion by Justice Traynor, the court disagreed: "[A] statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made."⁶² The ancient common law abatement doctrine had its origin in a penal concept of tort liability. But today, Justice Traynor wrote,

57. *Id.*

58. See RESTATEMENT OF CONFLICT OF LAWS ch. 12 (1934).

59. 264 P.2d 944 (Cal. 1953).

60. *Id.* at 946.

61. *Id.* at 947; see RESTATEMENT OF CONFLICT OF LAWS § 390 (1934).

62. *Grant*, 264 P.2d at 948.

tort liabilities of the sort involved in these actions are regarded as compensatory. When, as in the present case, all of the parties were residents of this state, and the estate of the deceased tortfeasor is being administered in this state, plaintiffs' right to prosecute their causes of action is governed by the laws of this state relating to administration of estates.⁶³

It was plainly not lost on Justice Traynor that the court was dealing with a false conflict, Arizona having no connection with the case apart from being the place where the injury occurred. Again, the end result was one in which the forum applied its own law to permit its own residents to recover for tortiously inflicted harm.

4. *Public Policy*

Territorial theory itself recognized that certain foreign laws, otherwise applicable, might be so contrary to the public policy of the forum that they would be denied enforcement. Story wrote that no nation can be required "to enforce doctrines, which, in a moral, or political view, are incompatible with its own safety or happiness, or conscientious regard to justice and duty."⁶⁴ Justice Cardozo's classic formulation in *Loucks v. Standard Oil Co.*⁶⁵ ran to laws that "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." In this sense, a state's public policy is most often expressed in its constitution, statutes, and judicial decisions.⁶⁶ Plainly a mere difference in the laws of two states cannot suffice to invoke the public policy exception, otherwise it would swallow up the place-of-the-wrong rule in every instance; hence most authorities agree that the forum's public policy must be "strongly held" (or the foreign law "pernicious and detestable").⁶⁷ But what consti-

63. *Id.* at 949.

64. J. STORY, *supra* note 29, § 25, at 26.

65. 120 N.E. 198, 202 (N.Y. 1918). The issue in this case was whether New York should close its courts to a cause of action founded on a limited-damages wrongful death statute of Massachusetts, New York, by constitution, specifically forbidding any such limitation. The court declined to do so.

66. *See, e.g., Mertz v. Mertz*, 3 N.E.2d 597, 599 (N.Y. 1936) ("[A] state can have no public policy except what is to be found in its Constitution and laws."). *But cf. Intercontinental Hotels Corp. (P.R.) v. Golden*, 203 N.E.2d 210, 212-13 (N.Y. 1964) ("Public policy is not determinable by mere reference to the laws of the forum alone. Strong public policy is found in prevailing social and moral attitudes of the community.").

67. *See, e.g., H. GOODRICH & E. SCOLES, HANDBOOK OF THE CONFLICT OF LAWS* § 11, at 14-15 (4th ed. 1964).

Proponents of [the public policy] exception hold that the ordinarily applicable

tutes a "strongly held" public policy? A few examples suggest the difficulty of a simple answer.

In *Kilberg v. Northeast Airlines, Inc.*,⁶⁸ a New York resident was killed in a plane crash in Massachusetts. His administrator brought a wrongful death action in New York to recover for his death under a Massachusetts statute which allowed such a suit but limited damages to \$15,000; New York, by its 1894 constitution, not only permitted such suits but specifically forbade any statutory limitation on the amount recoverable.⁶⁹ Prior to this case, both the

conflict of laws doctrine will not be followed when to do so would violate the strong public policy of the forum. As so used the term "public policy" is so vague and general as to defy definition. The strength of the policy necessary to call the exception into operation is unclear and varies with the facts.

Id. § 11, at 14 (footnote omitted).

It has been ably pointed out that in the application of this exception, "public policy" may be used in different ways. First, the forum may refuse to take jurisdiction of the suit and dismiss it without prejudice. . . . Second, the forum, though it has no other contact with the case, may entertain the case but apply its own law to decide the controversy in favor of the plaintiff or the defendant. . . . [Third,] [i]f, as is usually true, the forum has some contacts with the facts of the case, it may entertain the case and seem to vary its usual conflict of laws rule by referring to "public policy" to apply its own law to the case. This is the category into which most cases seem to fall.

Id. § 11, at 15 (footnotes omitted).

Both the first and second *Restatements* specifically provide for the use of the public policy exception in the first class of case, that in which the forum refuses to entertain the suit: "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum." *RESTATEMENT OF CONFLICT OF LAWS* § 612 (1934). Comment b to this section states: "A mere difference between the laws of the two states will not render the enforcement of a cause of action created in one state contrary to the public policy of the other." *See* *RESTATEMENT (SECOND)* § 90 & comment b; *see also* R. LEFLAR, *CONFLICT OF LAWS* § 48, at 80-83 (1959) (public policy must be "strong"); Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26, 33-34 (1938) (foreign law "must appear 'pernicious and detestable'").

It is the third class of case—that in which public policy is used as an escape device, allowing the forum to apply its own law because the otherwise applicable foreign law would violate the forum's "strongly held" public policy—with which this discussion is primarily concerned. *Compare* *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507, 509 (Fla. 1981) ("invocation of strong public policy to avoid application of another state's law is unwarranted in this case") (usury statutes), *rev'g* 354 So. 2d 67, 71 (Fla. 3d DCA 1977) ("to apply Massachusetts law and enforce this agreement would violate Florida's well settled and strong public policy") *with* *Olsen v. State Farm Auto. Ins. Co.*, 386 So. 2d 600 (Fla. 5th DCA 1980) (application of Illinois contributory negligence doctrine violates Florida's strong public policy underlying comparative negligence), *rev'd*, 406 So. 2d 1109 (Fla. 1981) (subsuming issue without specific mention under second *Restatement* analysis). *See generally* R. CRAMTON, *supra* note 2, at 141-45; E. SCOLES & P. HAY, *supra* note 4, §§ 3.15-.16; Paulsen & Sovern, "Public Policy" in the *Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

68. 172 N.E.2d 526 (N.Y. 1961).

69. *Id.* at 527-28.

right to sue for wrongful death and the amount of damages recoverable were considered to be a function of the place of the wrong.⁷⁰ In a decision that evoked much commentary and criticism,⁷¹ the New York Court of Appeals sustained the administrator's right to sue under the Massachusetts wrongful death statute, but without that state's limitation on the amount recoverable.⁷²

That the conflict was false seemed apparent, and the court stressed just how fortuitous the place of injury had become under present-day conditions of air travel. These modern conditions made it

unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they move. . . . An air traveler from New York may in a flight of a few hours' duration pass through several of those commonwealths. His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another. The place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of the lawsuits which result from these disasters.⁷³

The constitutional convention which in 1894 had eliminated ceilings on wrongful death damages had characterized them as absurd and unjust. This absurdity and injustice, the court stated, had "be-

70. See, e.g., *Northern Pac. R.R. v. Babcock*, 154 U.S. 190 (1894) (right to sue); *Frasier v. Public Serv. Interstate Transp. Co.*, 254 F.2d 133 (2d Cir. 1958) (amount of damages recoverable); *RESTATEMENT OF CONFLICT OF LAWS* §§ 391 & comment d, 412 (1934).

71. See, e.g., *B. CURRIE*, *supra* note 2, at 690, 696-98.

72. *Kilberg*, 172 N.E.2d at 529.

73. *Id.* at 527-28. That *Kilberg* was not as false a conflict as might appear was pointed out by Brainerd Currie in his analysis of the case:

Northeast Airlines is a Massachusetts corporation, doing substantial business within the state. Massachusetts has a legitimate interest in limiting its liability for deaths occurring in the course of its business. . . . The conflict in *Kilberg* is simple and clear: Massachusetts has a policy of encouraging enterprise by relieving it of the risk of unlimited liability for death; it has an interest in the application of that policy in *Kilberg* because the defendant is a Massachusetts enterprise. Massachusetts has no interest in the application of its *limitation* policy merely because the wrongful conduct occurred there, or because the injury occurred there, or because the death occurred there.

B. CURRIE, *supra* note 2, at 704 (emphasis in original). This argument also illustrates a point to be developed later—namely, that the fortuity of where an accident occurs is not the sole or even the principal distinguishing characteristic of false conflicts.

come increasingly apparent in the six decades that have followed. For our courts to be limited by this damage ceiling (at least as to our own domiciliaries) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law"⁷⁴ Ultimately the court labeled such limitations as procedural and applied New York law to that aspect of the case, buttressed by that state's "strong public policy as to death action damages."⁷⁵

In New York, limitations on wrongful death damages are prohibited by constitution; in Florida, by statute.⁷⁶ Six years after *Kilberg*, the Florida Supreme Court decided its most notable conflicts case before its watershed decision in *Bishop*. In *Hopkins v. Lockheed Aircraft Corp.*,⁷⁷ a case quite similar on its facts to *Kilberg*, the court declined to separate the amount recoverable in a wrongful death action from the underlying right to bring such an action, either as a matter of public policy or by use of the substance-procedure distinction.

In *Hopkins*, a Florida resident was killed in an airline disaster in Illinois. The plane, operated by Northwest Airlines and manufactured by Lockheed, was en route from Chicago to Tampa at the time of the crash. The Florida resident had purchased his ticket in Tampa for a trip from there to Milwaukee and back. His executrix brought a wrongful death suit in a Florida federal court against Northwest for negligent maintenance and operation of the aircraft, and against Lockheed for negligent design and manufacture resulting in a breach of an implied warranty of fitness. Northwest settled her claim against it for \$32,500. Her suit against Lockheed resulted in summary judgment for Lockheed on the ground that the Illinois wrongful death act was applicable, that it limited recovery to \$30,000, and that she had already recovered more than that amount from Northwest.⁷⁸ On appeal, the Fifth Circuit certified to

74. *Kilberg*, 172 N.E.2d at 528 (citations omitted).

75. *Id.* at 529.

76. From its inception, Florida's wrongful death statute has contained no limitation or ceiling on the total amount of damages recoverable (although the kinds of damages recoverable and by whom have varied over the years). See ch. 3439, § 2, 1883 Fla. Laws 59, and compare with FLA. STAT. § 768.02 (1965) (current version at FLA. STAT. § 768.21 (1983)). For a case which in dictum states that there is no limitation on damages in the statute, see *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743, 748 (Fla. 1967). See generally Wilcox & Melville, *The Computation of Damages Under the New Florida Wrongful Death Act*, 26 U. MIAMI L. REV. 737 (1972).

77. 201 So. 2d 743 (Fla. 1967).

78. *Id.* at 744-45.

the Florida Supreme Court the question whether Florida, for reasons of public policy or otherwise, would refuse to apply the Illinois damage limitation.⁷⁹

In a five-to-two opinion written by Justice Roberts, the supreme court originally held that Florida would refuse to apply the Illinois damage limitation. The court found in earlier cases a strongly voiced policy to give "primary consideration, in choice-of-law cases, to the public policy—legislative as well as organic-or-'any salutary interest' of this state and to decline to enforce a foreign law when contrary thereto" ⁸⁰ Accordingly, the court said, it would have no difficulty in agreeing with the *Kilberg* decision that place-of-the-wrong damage limitations should not be given effect by the forum in wrongful death cases when "contrary to the long-established public policy of the forum state."⁸¹

The court did not rest its decision on that ground. Rather, it took "the one small logical step forward"⁸² and held squarely that "the strict *lex loci delicti* rule should be abandoned in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court."⁸³ It then quoted with apparent approval the "most significant relationship" principle from a tentative draft of the second *Restatement* and stressed the importance of a methodology that analyzed "the policies underlying and the purpose of the conflicting laws and of the relationship of the occurrence and of the parties to such policies and purposes."⁸⁴ The court concluded that

the purely fortuitous circumstance that the plane happened to crash in Illinois does not give that state a controlling interest or concern in the amount to be awarded to a Florida resident, by a Florida court, from a California defendant, on account of the wrongful death of a Florida decedent.⁸⁵

Justice Roberts' opinion is a striking prefigurement of the court's decision in *Bishop* thirteen years later.

79. *Id.* The certificate from the court of appeals is set out in full in the margin of the opinion on rehearing. *Id.* at 749 n.1. See *Hopkins v. Lockheed Aircraft Corp.*, 358 F.2d 347 (5th Cir. 1966).

80. *Hopkins*, 201 So. 2d at 747.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 747-48.

On rehearing granted, however, the court reversed itself.⁸⁶ In a four-to-three opinion it returned to *lex loci delicti*, unpersuaded that "this case presents any necessity or justification for abandonment of guiding principles in past decisions"⁸⁷ The new majority plainly thought the Illinois wrongful death statute the only one applicable to the case; not only had the plaintiff relied upon it, but Florida's statute, at the time, applied only to deaths occurring within Florida.⁸⁸ The court could find no basis in the ordinary rules of statutory interpretation for separating the damage limitation from the underlying right to sue and posed the issue squarely in terms of whether such a limitation was so repugnant to Florida's statutory policy of unlimited damages as to be unenforceable; it found, without discussion, that it was not.⁸⁹ *Kilberg* was sharply distinguished in a footnote as basing its contrary conclusion on a constitutional rather than statutory prohibition of damage limitations.⁹⁰ And, in the majority's view, any discussion of tort conflicts doctrine was inappropriate in a case "explicitly characterized" as a warranty proceeding.⁹¹

From these cases it might be concluded that constitutionally based public policy is strong, whereas that based on statute is not. This conclusion, at least for Florida, would not be correct. In *Gilllen v. United Services Automobile Association*,⁹² decided in 1974, the court held squarely that Florida's public policy forbade giving effect to the "other insurance" clause of an insurance policy, valid in New Hampshire where the policy was delivered and the insured was resident at the time, but invalid under a statute of Florida, where the insured had moved (with notice to the insurance company) and was living at the time he was killed in Florida by the negligence of an uninsured motorist. Public policy, the court stated, "requires this Court to assert Florida's paramount interest in protecting its own from inequitable insurance arrangements."⁹³

Since United Services was present and doing business in Florida, and since the Gillens had not only duly notified it of their permanent change in residence from New Hampshire to Florida but had

86. *Id.* at 749.

87. *Id.* at 752.

88. *Id.* at 751 n.2.

89. *Id.* at 751.

90. *Id.* at 751 n.3.

91. *Id.* at 751.

92. 300 So. 2d 3 (Fla. 1974).

93. *Id.* at 7.

also insured another car after their move, this case, too, was a false conflict.⁹⁴ Although *Gillen* presented a conflicts issue in contract rather than in tort, presumably the implications for what constitutes a "strongly held" public policy would be the same. The holding is difficult to square with the second *Hopkins* opinion and makes even more stark the fact that the supreme court never invoked the public policy exception in a torts case.

5. *Some Generalizations*

This brief survey of techniques for avoiding the place-of-the-wrong rule suggests some general conclusions about the rule itself and the kinds of cases in which courts found it unusually difficult to subordinate their ideas of what would make for a just and sensible result to the more abstract goal of achieving conflicts justice through unswerving application of the rule.

Until the second half of the twentieth century, no court simply rejected the rule and adopted a new one in its stead. There was nothing to replace it with. Scholarly unrest took the form mainly of criticism, not of coherent and unified proposals for change.⁹⁵ The rule undoubtedly worked well much of the time. It had the virtues claimed for it; it was certain, predictable, uniform in operation, dissuasive of forum shopping, and simple, quick, and easy to apply.⁹⁶ Whatever its defects, *lex loci delicti* was too much a part of territorial theory and habitual ways of judicial conflicts thinking to be jettisoned outright.

The cases in which the rule was avoided were almost always false conflicts in the sense in which we have used the term thus far. The state where injury occurred was usually fortuitous, and these cases would have been the same if injury had occurred in the state where suit was brought instead of somewhere else. But much more significantly, the state of injury was essentially indifferent to whether its

94. *Id.* at 4-5.

95. See W. COOK, *supra* note 9; Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws*, 31 COLUM. L. REV. 368 (1931); Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928). Citing the work of Walter Wheeler Cook as an example, Brainerd Currie said: "The territorialist conception has been directly responsible for indefensible results and, what is perhaps worse, has therefore driven some of our ablest scholars to consume their energies in purely defensive action against it." B. CURRIE, *supra* note 2, at 180. See also Korn, *supra* note 40, at 807-11.

96. See, e.g., Korn, *supra* note 40, at 805.

law was applied because it was not the forum where the litigation took place, nor were any of its residents or domiciliaries involved as parties. In none of these cases were the conflicting laws of the kind aimed at regulating the conduct of all persons acting within a state, such as the rules of the road. Invariably the conflicts had to do with so-called loss-distribution rules, those reflecting the policy conceptions of individual states about how the costs of accidents and injury should be allocated.⁹⁷ The fact that these cases involved no residents or domiciliaries of the state of injury, for whose benefit and protection such rules are primarily intended, made it especially difficult to apply that state's law when the necessary effect would be to disadvantage residents and domiciliaries of the state where suit was brought. This disadvantage, in turn, seemed most acute when applying the law of the place of injury meant that residents and domiciliaries of the forum state would be denied an opportunity to recover for tortiously inflicted injuries. Here conflicts justice ran a poor second to justice in some more comprehensive sense.

Thus it is easy to detect the presence of certain biasing factors at work in these cases. The courts involved consistently preferred their own state's law to the law of the state of injury. They also exhibited a decided preference for a law permitting recovery rather than one denying or limiting it, preferring plaintiffs over defendants in consequence. And they ended by preferring local litigants over those from other states.⁹⁸ It is another characteristic of the false conflict that all three of these biases usually coalesce to favor the application of forum law rather than the law of the state of injury.

Finally, in the face of fairly widespread use of escape devices elsewhere during this turbulent transitional period in American conflicts law, the Florida Supreme Court's passivity is striking. Before *Bishop*, its decisions reflected little dissatisfaction with *lex loci delicti*, and correspondingly little inclination to make use of techniques to avoid it. It is true the court decided only a handful of conflicts cases in tort in the forty-year period between *Myrick* and *Bishop*.⁹⁹ But there was no real lack of opportunity in these

97. See, e.g., *id.* at 805-06.

98. Cf. *id.* at 780-81. See *infra* notes 350-59 and accompanying text.

99. See cases cited *supra* note 54. For discussions of the court's equally traditional but more frequent treatment of conflict-of-laws issues in contract, see Hawkes, *The Conflict of Laws and the Florida Usury Case*, 9 FLA. ST. U.L. REV. 545 (1981); Comment, *Conflict of Laws in Florida*, 34 MERCER L. REV. 809, 810-28 (1983).

cases, or in several in which review was denied,¹⁰⁰ either to avoid the rule or to change it. Only once—in *Hopkins v. Lockheed Aircraft Corp.*¹⁰¹—did the court seriously threaten to depart from the place-of-the-wrong rule, and the effort there, as we have seen, came to nought. Whatever the defects of *lex loci delicti*, they were evidently outweighed in the court's mind by its virtues.

C. *Escape Devices in Search of a Theory: Brainerd Currie and Modern Interest Analysis*

Florida, as we have seen, rarely availed itself of any of the techniques for escaping *lex loci delicti*. But elsewhere in the United States, avoidance of the rule was proceeding at a healthy pace.¹⁰²

100. See *Lescard v. Keel*, 211 So. 2d 868 (Fla. 2d DCA), *cert. denied*, 218 So. 2d 172 (Fla. 1968); *Messinger v. Tom*, 203 So. 2d 357 (Fla. 2d DCA 1967), *cert. denied*, 210 So. 2d 869 (Fla. 1968). *Lescard* involved a two-car automobile accident occurring in Georgia in May 1963. The opinion states only that at the time of the accident none of the parties were residents of Georgia and that the defendant was a resident of Indiana. Three attempts were made to sue the defendant in Florida and one in Indiana, all dismissed for lack of jurisdiction. In February 1965, the defendant moved to Florida. In November 1965, after the Georgia two-year statute of limitations had run, plaintiffs succeeded in filing suit in Florida to recover for their injuries. The trial court granted defendant's motion for summary judgment on the basis of Florida's "borrowing statute," FLA. STAT. § 95.10, which denies enforcement of a cause of action barred by the statute of limitations of the state in which it arose. Relying on *Hopkins* and several federal court cases for the proposition that "Florida follows the doctrine of *lex loci delicti*," the district court of appeal affirmed and held the suit barred by the Georgia statute. *Lescard*, 211 So. 2d at 870. Depending on facts about the residence status of the parties not stated in the opinion, it might have been possible for the court to invoke the substance-procedure distinction and apply the Florida statute of limitations rather than Georgia's. See RESTATEMENT OF CONFLICT OF LAWS § 604 (1934) (categorizing this issue as "procedural"); Ester, *supra* note 2.

Messinger afforded an opportunity to employ characterization as a way of avoiding *lex loci delicti*. That case involved only Florida residents and arose out of a single-car collision fortuitously occurring in North Carolina. A wrongful death suit was properly filed in Florida by the minor child of one of the deceased passengers; North Carolina law provided that only the representative of the deceased's estate could maintain such an action. The district court of appeal applied North Carolina law and dismissed the suit with prejudice. *But cf., e.g., Emery v. Emery*, 289 P.2d 218 (Cal. 1955) (capacity of minor child to sue parent a matter of family law to be determined by law of domicile); *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953) (survival of tort action an issue of administration of estates, to be determined under forum law). For an excellent discussion of *Messinger*, see Note, *supra* note 15, at 464-65 ("The not atypical decision in *Messinger* presents the place-of-the-wrong rule at its logical and equitable worst."). In still other cases, *lex loci delicti* was applied by the courts of appeal without review being sought in the supreme court. See *Ganem v. Ganem de Issa*, 269 So. 2d 740 (Fla. 3d DCA 1972), *cert. denied*, 414 U.S. 1113 (1973); *Hall v. Hertz Corp.*, 247 So. 2d 79 (Fla. 1st DCA 1971) (*per curiam*); *Meyer v. Pitzele*, 122 So. 2d 228 (Fla. 3d DCA 1960) (*per curiam*).

101. 201 So. 2d 743 (Fla. 1967).

102. See R. CRAMTON, *supra* note 2, at 63-145; E. SCOLES & P. HAY, *supra* note 4, §§ 17.8-10; R. WEINTRAUB, *supra* note 4, §§ 6.14-15.

The decisions of distinguished courts in cases like *Grant* and *Kilberg* cast grave doubt on the ability of Beale's system to achieve anything like a lasting and satisfactory accommodation of state laws in conflict. The main pressure point was the false conflict, a class of case to which Beale's first *Restatement* was insensitive, treating it like any other conflicts case, but in which the sense of judicial frustration at justice disserved was intense.¹⁰³ In these cases, at least, the price for conflicts justice according to Beale was too high.

Other factors were also at work. When Beale completed his monumental restatement of the American law of conflicts in 1934, the place-of-the-wrong rule was accepted almost everywhere and had been for a century.¹⁰⁴ This fact went hand in hand with the more basic jurisdictional philosophy of *Pennoyer v. Neff*,¹⁰⁵ which gave real significance to the borders of a state and severely constrained its power to affect events occurring beyond. But from the late nineteenth century on, the United States became a vastly more technological, more industrial, more mobile, and more economically interdependent society. The costs in life and limb were high. Beale died in 1943, before the post-World War II exponential increase in automobile and air travel began, much of it interstate,

103. See G. STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 190-91, 206-07 (1963). Referring to the territorial conception and its rules in the context of false conflicts, Brainerd Currie wrote:

The rules so evolved have not worked and cannot be made to work.
 . . . [S]uch rules create problems that did not exist before.
 . . . [T]he false problems created by the rules may be solved in a quite irrational way—*e.g.*, by defeating the interest of one state without advancing the interest of another.
 . . . [D]espite the camouflage of discourse, the rules do operate to nullify state interests. The fact that this is often done capriciously, without reference to the merits of the respective policies and even without recognition of their existence, is only incidental. Trouble enough comes from the mere fact that interests are defeated. The courts simply will not remain always oblivious to the true operation of a system that, though speaking the language of metaphysics, strikes down the legitimate application of the policy of a state, especially when that state is the forum. Consequently, the system becomes complicated. It is loaded with escape devices: the concept of "local public policy" as a basis for not applying the "applicable" law; the concept of "fraud on the law"; the device of novel or disingenuous characterization; the device of manipulating the connecting factor; and, not least, the provision of sets of rules that are interchangeable at will. . . . A sensitive and ingenious court can detect an absurd result and avoid it; I am inclined to think that this has been done more often than not and that therein lies a major reason why the system has managed to survive.

B. CURRIE, *supra* note 2, at 180-81 (footnotes omitted).

104. See, *e.g.*, Korn, *supra* note 40, at 805.

105. 95 U.S. 714 (1877).

bringing with it not only death, injury, and property damage, but a rapidly diminishing sense of the importance of state lines. It would be surprising if all these drastic changes were not reflected in the legal system.¹⁰⁶

The more forward-looking states—usually the wealthier, more heavily populated and industrialized—began to devise ways of taking rational account of the extraordinary costs in life and limb incident to this unprecedented growth and change: workers' compensation legislation;¹⁰⁷ the evolution of strict liability as a tort in its own right;¹⁰⁸ the coming of no-fault insurance;¹⁰⁹ the rapid spread of the comparative negligence doctrine;¹¹⁰ the relaxation of privity requirements in warranty actions;¹¹¹ the abolition of various tort immunities;¹¹² the elimination of host-guest statutes;¹¹³ and the

106. See J. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950); J. HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* (1972).

107. See, e.g., Brodie, *The Adequacy of Workmen's Compensation As Social Insurance: A Review of Developments and Proposals*, in *LABOR, MANAGEMENT, AND SOCIAL POLICY: ESSAYS IN THE JOHN R. COMMONS TRADITION* 161 (G. Somers ed. 1963); Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 *COLUM. L. REV.* 50 (1967).

108. See, e.g., *RESTATEMENT (SECOND) OF TORTS* § 402A (1965). As of 1964, 18 jurisdictions had applied strict liability in cases not involving food or drink. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 97, at 678 (3d ed. 1964). By 1984, nearly all states had done so. W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 98, at 694 (5th ed. 1984). See generally *id.* §§ 97-104A. See also James, *Products Liability*, 34 *TEX. L. REV.* 44 (1955); Keeton, *Products Liability—The Nature and Extent of Strict Liability*, 1964 *U. ILL. L.F.* 693; Wade, *Strict Tort Liability of Manufacturers*, 19 *SW. L.J.* 5 (1965).

109. See, e.g., A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951); R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* (1965); Green, *No Fault: A Perspective*, 1975 *B.Y.U. L. REV.* 79; O'Connell & Wilson, *Public Opinion Polls on the Fault System: State Farm versus Other Surveys*, 1970 *INS. L.J.* 261; Russo, *Florida No-Fault Insurance: Ten Years of Judicial Interpretation*, 6 *NOVA L.J.* 241 (1982); Widiss, *Massachusetts No-Fault Automobile Insurance: Its Impact on the Legal Profession*, 56 *B.U.L. REV.* 323 (1976). See generally W. PROSSER & W. KEETON, *supra* note 108, §§ 82-85.

110. Compare, e.g., *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973) (16 states) (*Hoffman* made Florida the 17th), with *Alvis v. Ribar*, 421 N.E.2d 886, 891-92 (Ill. 1981) (37 states). See also Fleming, *The Supreme Court of California 1974-1975: Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 *CALIF. L. REV.* 239 (1976); Posner, *A Theory of Negligence*, 1 *J. LEGAL STUD.* 29 (1972); Prosser, *Comparative Negligence*, 41 *CALIF. L. REV.* 1 (1953); Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 *YALE L.J.* 697 (1978); Wade, *Current Trends in Negligence Law*, 35 *MISS. L.J.* 270 (1964). See generally W. PROSSER & W. KEETON, *supra* note 108, § 67.

111. See, e.g., *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 90 N.W.2d 873 (Mich. 1958); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960); see also Kessler, *The Protection of the Consumer Under Modern Sales Law, Part 1*, 74 *YALE L.J.* 262 (1964); Prosser, *The Assault upon the Citadel*, 69 *YALE L.J.* 1099 (1960); Prosser, *The Fall of the Citadel*, 50 *MINN. L. REV.* 791 (1966); Weintraub, *Disclaimer of Warranties and Limitation of Damages for Breach of Warranty Under the UCC*, 53 *TEX. L. REV.* 60 (1974).

112. See, e.g., W. PROSSER & W. KEETON, *supra* note 108, § 122 (interspousal and par-

widespread enactment of survival¹¹⁴ and wrongful death statutes, the latter increasingly more liberal in the kind and amount of damages recoverable, and by whom¹¹⁵—all are familiar examples that rapidly became the rule rather than the exception in the states.

Reflecting these compensation-oriented changes and born of the same impulse came subtle and perhaps less conscious pressure for a way to extend them, if necessary, beyond the borders of a state. It did no good for a state to enact enlightened rules for its residents if those rules could be frustrated by the happenstance of an accident occurring in some less progressive state. The mechanism was a generic break with the place-of-the-wrong rule, occurring first in the form of escape devices in avoidance of the rule, then in its outright rejection and the adoption of methods to replace it. This development was powerfully spurred by the overruling of *Pennoyer v. Neff* in *International Shoe Co. v. Washington*¹¹⁶ in 1945, significantly altering conceptions of state boundaries for jurisdictional purposes and inevitably for choice-of-law decisions as well.¹¹⁷ For roughly three decades following the appearance in 1934 of the first *Restatement*, a choice-of-law revolution of sorts was in progress, but with no unifying principle to give it cohesion or direction. That lack was remedied by Professor Brainerd Currie in

ent-child tort immunities), §§ 131-133 (governmental, public official, and charitable tort immunities); see also Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956); James, *Schuster v. City of New York: A Milestone in the Retreat of Governmental Immunity*, 5 HOW. L.J. 218 (1959); McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959); Olson, *Governmental Immunity from Tort Liability—Two Decades of Decline: 1959-1979*, 31 BAYLOR L. REV. 485 (1979); Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956).

113. See, e.g., R. WEINTRAUB, *supra* note 4, § 6.9, at 279 & n.40; Ehrenzweig, *Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws,"* 69 YALE L.J. 595 (1960); Richards, *Another Decade Under the Guest Statute*, 1949 INS. L.J. 659. See generally W. PROSSER & W. KEETON, *supra* note 108, § 34.

114. See, e.g., S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* (2d ed. 1975) (listing all survival statutes in app. A); see also W. PROSSER & W. KEETON, *supra* note 108, §§ 125A-127; Currie, *supra* note 15, at 206.

115. See, e.g., S. SPEISER, *supra* note 114; see also Fleming, *The Lost Years: A Problem in the Computation and Distribution of Damages*, 50 CALIF. L. REV. 598 (1962); Malone, *American Fatal Accident Statutes—Part 1: The Legislative Birth Pains*, 1965 DUKE L.J. 673; Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965); Speiser & Malawer, *An American Tragedy: Damages for Mental Anguish of Bereaved Relatives in Wrongful Death Actions*, 51 TUL. L. REV. 1 (1976). See generally W. PROSSER & W. KEETON, *supra* note 108, § 127.

116. 326 U.S. 310 (1945).

117. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

an influential series of essays in the late 1950's and early 1960's.¹¹⁸

Currie's analysis started with several disarmingly simple propositions. Rarely do the lawmaking bodies of a state give any thought to the extraterritorial consequences of legal rules.¹¹⁹ When the legislature or courts of a state make rules of law, they ordinarily do so with only the domestic situation in mind, intending to affect primarily their own residents and domiciliaries.¹²⁰ Every such law or rule has a purpose and is intended to further some underlying policy or policies.¹²¹ These purposes and policies can be discovered through the familiar processes of statutory interpretation and case analysis that courts use daily in the decision of cases.¹²² If applying a state's substantive rule in a conflicts case would effectuate the purpose of that rule and thus advance its underlying policy, the state was said to have an "interest" in the application of its law.¹²³ These were the predicates of modern interest

118. Most of Currie's writing on conflict of laws appeared originally in law reviews. His major articles are collected in B. CURRIE, *supra* note 2.

119. *See id.* at 81-86.

120. *See id.* at 85.

121. *See, e.g., id.* at 85-86, 141-46, 183.

122. *See id.* at 183-84.

123. *See id.* at 183. In assessing a state's interest in the application of its law in this sense, Currie drew a basic distinction between those legal rules that regulate conduct and all other kinds. The former were intended to apply to all persons acting within the state, and the state would always have an interest in the application of such rules to conduct that occurred within the state. He gave as examples the rules of the road, Sunday laws, and rules deterring dangerous conduct. *Id.* at 60, 701, 702. As to the latter—particularly loss-distribution rules, those allocating the costs of accidents and injuries—a state was interested in the application of those rules only to the extent its own residents or domiciliaries were involved. *Id.* at 60-62, 701-05, 724-25. Thus, in discussing a New York lawsuit arising out of an accident in Saudi Arabia and involving a plaintiff from Arkansas and a defendant from Delaware, he wrote:

Personal injuries, and in particular those arising from automobile accidents, give rise to social and economic problems. The law of New York, particularly the law of torts . . . , expresses a governmental policy with respect to those problems. But New York has an interest in the application of this policy only where its relation to the event or to the parties is such as to bring the matter within the reach of the state's legitimate governmental concerns. New York does not presume to make laws to bind the whole world. New York would be concerned and would have an interest in applying its law and policy, if the injury had occurred in that state. It would likewise be concerned, and would have an interest in applying its law and policy, if the injured person were a resident of, or domiciled in, New York. It is difficult to perceive what interest it has in applying its social and economic policy where the injury occurred in Saudi Arabia, where the injured person was and is a resident of Arkansas, and where the defendant is a Delaware corporation.

Id. at 60-61 (discussing *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956)). This important distinction between conduct-regulating and loss-distribution rules is widely accepted:

analysis.

These considerations led Currie to a somewhat different way of describing false conflicts. A false conflict, or false problem, as he termed it,¹²⁴ was one in which only one of the states was "interested" in the application of its law.¹²⁵ Put another way, it was a conflicts case in which the purposes and policies underlying one state's law would be furthered by application of that state's law, while those underlying the other state's would not.¹²⁶ Currie then asked the obvious question that no one before him had thought to ask: if applying a particular state's law would not advance the policies and purposes for which it was enacted, why apply it? False conflicts, he argued, should be resolved simply by applying the law of the only interested state.¹²⁷ Currie did not invent interest analysis,¹²⁸ but his articulation of it and the common sense way in which it disposed of false conflicts seemed to meet a deeply felt need of

Indeed, when conduct and injury do occur at the same place, there has never been any question under either traditional or modern learning that the *lex loci delicti* should be applied to resolve conflicts involving the so-called "conduct-regulating" rules of tort law, such as speed limits and other "rules of the road," which are addressed in the first instance to the primary, nonlitigative conduct that produces tortious injury rather than to the pursuit of judicial relief for the injury.

Korn, *supra* note 40, at 805. Troublesome conflict-of-laws cases almost invariably involve loss-distribution rules.

124. See, e.g., B. CURRIE, *supra* note 2, at 109.

125. *Id.* at 107. It is in this sense that the term "false conflict" will be used throughout the remainder of this article.

126. *Id.* Included in Currie's definition of false problems (or false conflicts) were the "purely perverse" cases in which application of one state's law would not only fail to advance its underlying policy but would actually subvert the policy embodied in the law of the other state. *Id.* at 96.

127. *Id.* at 184. See also Currie's contribution to *Comments on Babcock v. Jackson*, *A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1233-43 (1963), in which he wrote:

When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.

If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.

Id. at 1242.

128. B. CURRIE, *supra* note 2, at 87 n.18:

The analysis in terms of state interests employed here has been most explicitly suggested by Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1216, 1223 (1946). See also Hancock, *Choice-of-Law Policies in Multiple Contact Cases*, 5 U. TORONTO L.J. 132, 136-37, 142-43 (1943).

the times. In particular, by giving courts a principled and rational basis for resolving false conflicts and thus enabling them to do openly what they had previously done through the legerdemain of escape devices, he opened the door to outright rejection of the place-of-the-wrong rule rather than its avoidance.

The trend was not long in developing. In 1963, just two years after its decision in *Kilberg*, the New York Court of Appeals decided *Babcock v. Jackson*,¹²⁹ in which it chose openly to reject rather than merely avoid the place-of-the-wrong rule. Babcock and a married couple, the Jacksons, all residents of Rochester, New York, left home in Mr. Jackson's car for a weekend trip to Canada. Some hours later, while driving in Ontario, Jackson apparently lost control of his car and ran off the road. Babcock was seriously injured in the crash. She subsequently brought a damage suit in New York against Jackson, alleging that her injuries were caused by his negligent operation of the car. At the time of the accident, an Ontario automobile guest statute absolved the owner or driver of a car from any liability whatsoever for injuries sustained by any guest riding in it.¹³⁰ New York measured a host's liability to a guest by an ordinary negligence standard.¹³¹

The policy underlying Ontario's guest statute, the court found, was the prevention of fraudulent claims against Ontario defendants and their insurance companies by guests in collusion with hosts.¹³² This policy would hardly be furthered by application of the statute to New York residents and their insurance companies:

[Q]uite obviously, the fraudulent claims intended to be prevented by the statute are those asserted against Ontario defendants and their insurance carriers, not New York defendants and their insurance carriers. Whether New York defendants are imposed upon or their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario simply because the accident occurred there, any more so than if the accident had happened in some other jurisdiction.¹³³

On the other hand, New York's policy of requiring hosts to compensate guests for negligently inflicted damages—not to be doubted since “the Legislature of this State has repeatedly refused

129. 191 N.E.2d 279 (N.Y. 1963).

130. *Id.* at 280.

131. *Id.* at 284.

132. *Id.*

133. *Id.*

to enact a statute denying or limiting recovery in such cases"¹³⁴—would obviously be advanced where both host and guest were New York residents.¹³⁵

The conflict was false in every sense. The court drew a sharp distinction between Ontario's interest in the application of its conduct-regulating rules—those determining the "rightness or wrongness"¹³⁶ of conduct, such as the rules of the road—and its loss-distribution rules, which determined how losses resulting from accident and injury would be spread.¹³⁷ The statute here was of the latter kind and Ontario's interest nonexistent in consequence since none of its own residents or domiciliaries were involved. The vested rights theory and *lex loci delicti* ignored "the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues."¹³⁸ Cases which had avoided it were ones in which the state of injury had "no reasonable or relevant interest in the particular issue involved."¹³⁹ A better approach, the court stated, was one "giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."¹⁴⁰ The court applied New York law. Among the authorities cited at various points in the opinion were Brainerd Currie's writing¹⁴¹ and an early draft of the second *Restatement*.¹⁴²

Babcock signaled the beginning of the shift from avoidance of the place-of-the-wrong rule to its outright rejection,¹⁴³ a shift that

134. *Id.*

135. *Id.*

136. *Id.* at 285.

137. *Id.* at 284-85.

138. *Id.* at 281.

139. *Id.* at 283.

140. *Id.*

141. *Id.* at 281 n.4, 283 n.10.

142. *Id.* at 283-84.

143. *See, e.g.,* Korn, *supra* note 40, at 827:

The 1963 decision . . . in *Babcock v. Jackson* is justly considered the watershed decision that at last moved the modern choice-of-law revolution out of the academic journals and into the courts. . . . [It] not only rejected the automatic *lex loci delicti* rule for tort conflicts generally, but rejected it on the basis of principles drawn from leading revolutionary texts and replaced it with an approach formulated largely in terms of the concepts and methodology of the revolution's own "new learning."

See also Schmidt v. Driscoll Hotel, 82 N.W.2d 365 (Minn. 1957), a case that in one commentator's view "might be identified as the case that opened the door to the modern replacement of the place-of-wrong rule with a method of analysis that focuses on the policies un-

had reached epidemic proportions by the time *Bishop* was decided in 1980.¹⁴⁴ Since *Babcock*, a majority of states have receded from *lex loci delicti* and have adopted one or another of the so-called modern approaches in its stead.¹⁴⁵ The most important of these incorporate some form of interest analysis in which the purposes and policies underlying conflicting laws are taken into account.¹⁴⁶ Though these approaches differ from one another, some radically, they have in common the use of interest analysis to identify and dispose of false conflicts.¹⁴⁷ This was Brainerd Currie's profound and enduring contribution to modern conflicts theory. There can be little doubt that it is here that interest analysis finds its greatest and least controversial application. Few of the modern approaches would apply a particular state's law if doing so would not further the purposes and policies underlying it. False conflicts are resolved by applying the law of the only interested state.

To these generalizations the second *Restatement* is no exception, although interest analysis is only one of its several major components.¹⁴⁸ We turn now to a consideration of what is un-

derlying putatively conflicting domestic tort rules." R. WEINTRAUB, *supra* note 4, § 6.16, at 301.

144. See *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 n.2 (Fla. 1980) (25 states and the District of Columbia); R. WEINTRAUB, *supra* note 4, § 6.16, at 305 (27 states plus the District of Columbia as of July 1, 1979).

145. Professor Herma Hill Kay's recent tabulation of choice-of-law theories in the 50 states and the District of Columbia shows that 29 states have adopted one of the modern approaches; 22 states, in whole or in part, retain the traditional territorial or vested rights approach. See *Kay, Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 591-92 (1983). Professor Robert Sedler's count is slightly different: of the 51 jurisdictions, 31 "have adopted a modern approach, at least in torts cases. . . . Sixteen states continue to adhere to the traditional approach. . . . Two states . . . have not directly addressed the issue." Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, 34 MERCER L. REV. 593, 593 n.4 (1983) (citations omitted).

146. See R. CRAMTON, *supra* note 2, at 196-379 (summarizing the principal modern approaches with liberal textual and case excerpts, including citations to other cases and secondary authority); see also E. SCOLES & P. HAY, *supra* note 4, §§ 2.6-15.

147. See R. CRAMTON, *supra* note 2, at 245-46:

"As Currie convincingly and repeatedly demonstrates, in many situations no true conflict exists between the relevant policies of the concerned jurisdictions; in such situations, if the analysis of the various interests in play has been full and accurate, it is hard to see how anyone could fail to find an approach in terms of policies or interests valuable, or could fail to agree upon the solution." Von Mehren, Book Review, 17 J. Legal Ed. 91, 92 (1964). Professor Cavers believes that a "growing group of contemporary [scholars]" including Freund, Morris, Ehrenzweig, Hancock, Weintraub, Baxter, von Mehren, Trautman, and Briggs, as well as Currie and Cavers, would take "much the same approach" to such cases. D. Cavers, *The Choice-of-Law Process* 89-92 (1965).

148. Professor Willis Reese, the Reporter of the second *Restatement*, has written that one of the "values emphasized by the Second Restatement" is

doubtedly the most complex of the modern approaches and examine its use in the resolution of cases of false conflict.

D. The Approach of the Second Restatement and Its Application in Cases of False Conflict

The second *Restatement* appeared in final form in 1971, having been almost twenty years in the making.¹⁴⁹ Much of it is the work of Professor Willis Reese, who served as Reporter.¹⁵⁰ In approaching the second *Restatement*, two broad considerations should be kept in mind. First, it undertakes not just to restate the law in the fashion of restatements generally, but also to supply guidelines for future development.¹⁵¹ This reflects in no small part the fact that it was written, as Professor Reese has elsewhere said, "during a time of turmoil and crisis when former rules of choice of law were being abandoned, when rival theories were being fiercely debated, and when serious doubt was expressed about the practicality, and indeed the desirability, of having any rules at all."¹⁵² For several areas, torts among them, the second *Restatement* provides the unusual combination of a general approach to the solution of choice-of-law problems, designed and intended to permit the development of more specific rules for particular issues through use over time in the decision of cases, coupled with fairly specific indications in many instances of what those rules should be.¹⁵³

Second, unlike the first *Restatement*, whose rules are intended to yield a single state's law to govern all substantive issues in a case, the second *Restatement* is issue-oriented; it invites courts to focus on specific issues in cases and to apply the law of the state which has the most significant relationship to the occurrence and the parties with respect to that issue.¹⁵⁴ It is entirely possible to

that regard should be paid to the policy, or policies, underlying the potentially applicable local law rules of the states having contacts with the case in order to determine which of these states has an interest, or the greatest interest, in having its applicable local law applied. In this way, the Restatement gives support to the views of Professor Brainerd Currie and of those other advocates of what is popularly referred to as the 'governmental interest' approach to choice of law.

Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 508-09 (1983) (footnotes omitted).

149. RESTATEMENT (SECOND), Introduction at ix.

150. *Id.* Professor Austin W. Scott served as Associate Reporter and prepared chapter 10, dealing with trusts. *Id.*

151. See E. SCOLES & P. HAY, *supra* note 4, § 2.13, at 35.

152. Reese, *supra* note 148, at 518-19.

153. See *id.* at 518 (citing RESTATEMENT (SECOND) § 146).

154. See, e.g., RESTATEMENT (SECOND) § 146 (personal injuries).

have one state's law applied to one issue in a case and another's to another.¹⁵⁵

The second *Restatement*, both in its many drafts and in final form, has been subjected to considerable criticism.¹⁵⁶ It will have to be used by many courts in many different kinds of cases before anything like a fair judgment can be passed on its utility as a tool of conflicts resolution. But J.H.C. Morris, currently chief editor of *Dicey's Conflict of Laws*, considers the second *Restatement* "the most impressive, comprehensive and valuable work on the conflict of laws that has ever been produced in any country, in any language, at any time."¹⁵⁷ And, at least for torts cases, it is now the law in Florida.¹⁵⁸

155. *E.g., id.* § 145 comment d, at 417. See E. SCOLES & P. HAY, *supra* note 4, § 2.13, at 36 ("different issues in a single case may be referable to different laws, a splitting process known as *dépeçage*" (footnote omitted)).

156. See E. SCOLES & P. HAY, *supra* note 4, § 2.14.

157. Morris, *Law and Reason Triumphant or: How Not To Review a Restatement* (Book Review), 21 AM. J. COMP. L. 322, 330 (1973).

158. In *Bishop*, the court intimated that it would henceforth resolve all conflicts issues, not just those in tort, by use of the second *Restatement* approach. 389 So. 2d at 1001 n.1 ("Section 6 of the Restatement (Second) lists the following factors as important choice of law considerations in *all* areas of law . . ." (emphasis in original)). In the contracts area, the parallel development that might have been expected has thus far not occurred. See *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507, 511 (Fla. 1981) (Massachusetts law governs loan agreement made subject thereto between Massachusetts real estate investment trust and Florida corporation in suit claiming interest rates violative of Florida usury laws) (citing in support of holding, but not relying upon, RESTATEMENT (SECOND) § 203 (usury)); *Morgan Walton Properties, Inc. v. International City Bank & Trust Co.*, 404 So. 2d 1059, 1063 (Fla. 1981) (parties' choice-of-law provision in mortgage agreement, valid in Louisiana where entered into but invalid under Florida usury statutes, upheld where transaction bears "normal and reasonable relation" to law chosen) (second *Restatement* unmentioned in opinion). Thus, following the decision of the Supreme Court in *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927), Florida apparently will uphold the parties' choice of a particular state's law to govern their agreement if the agreement bears a normal and reasonable relation to that state. Cf. RESTATEMENT (SECOND) § 187(1), which provides that the parties' choice of a particular state's law will be given effect if the issue is "one which the parties could have resolved by an explicit provision in their agreement." The parties' choice of law will similarly be upheld even if the issue is one that could not have been explicitly resolved in their agreement unless "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice." *Id.* § 187(2)(a). Where the agreement itself contains no choice-of-law provision, Florida has traditionally followed the rule that the law of the place where an agreement is made or entered into governs as to matters respecting the validity and interpretation of the agreement, and that the law of the place where the agreement is to be performed governs as to matters of performance. See, e.g., *Morgan Walton Properties, Inc.*, 404 So. 2d at 1061; *Thompson v. Kyle*, 23 So. 12 (Fla. 1897); *Perry v. Lewis*, 6 Fla. 555 (1856). Cf. RESTATEMENT (SECOND) § 188(1), which provides that the law governing in the absence of an effective choice by the parties is the law of the state having "the most significant relationship to the transaction and the parties under the principles stated in § 6." See

The open-ended and highly flexible approach of the second *Restatement* is nowhere more apparent than in section 6, by far its most important single section. Section 6 lists seven choice-influencing considerations that a court is to take into account, absent a statutory directive on choice of law, in selecting the law to be applied to a given issue.¹⁵⁹ These include: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.¹⁶⁰ These considerations are not intended as an exclusive enumeration and are deliberately unranked and unweighted;¹⁶¹ they are applicable to choice-of-law decisions in all areas of law, although some may have more relevance for one area than another.¹⁶² Specific references to the principles of section 6 are incorporated in many of the sections dealing with particular subjects (torts, contracts, and property, for example), and particular issues within those subjects.¹⁶³ Section 6 dominates the entire *Restatement*. It is a compendium of values which, in the judgment of the Reporter and the American Law Institute, are most important in the making of choice-of-law determinations.¹⁶⁴ The ultimate success of the second *Restatement*, Professor Reese believes, largely depends on the correctness of this perception.¹⁶⁵

The concern of modern interest analysis that choice-of-law decisions take account of the interest of a state in having its law applied, in the sense that such application will further the purposes and policies which the law embodies, is reflected in two of the choice-influencing considerations of section 6: "the relevant policies of the forum" and "the relevant policies of other interested states."¹⁶⁶ The Reporter's comments state:

Comment, *supra* note 99, at 810-28.

159. See *supra* note 17 (full text of § 6).

160. RESTATEMENT (SECOND) § 6(2).

161. See *id.* § 6 comment c.

162. See *id.*

163. See, e.g., *id.* § 146.

164. See *id.*, Introduction at vii-viii; Reese, *supra* note 148, at 508-13.

165. See Reese, *supra* note 148, at 516-17.

166. RESTATEMENT (SECOND) § 6(2)(b), (c).

Every rule of law, whether embodied in a statute or in a common law rule, was designed to achieve one or more purposes. A court should have regard for these purposes in determining whether to apply its own rule or the rule of another state in the decision of a particular issue. If the purposes sought to be achieved by a local statute or common law rule would be furthered by its application to out-of-state facts, this is a weighty reason why such application should be made. . . .¹⁶⁷

. . . [T]he forum should give consideration not only to its own relevant policies . . . but also to the relevant policies of all other interested states.¹⁶⁸

These two principles of section 6 and the accompanying comments capture succinctly the underlying predicates of Brainerd Currie's interest analysis approach to the resolution of choice-of-law problems.¹⁶⁹ More recently, Professor Reese has written:

Little need be said here in support of the proposition that in deciding a choice of law question, a court should have regard for the relevant policies of the forum and of the other interested states. Clearly, as a general proposition, a court should seek to apply the law of the state with the dominant interest in the decision of the particular issue. And, equally clearly, a court should seek to avoid applying a law whose underlying policy would not be served by such application.¹⁷⁰

He rejects as "simplistic," however, the view that the policy considerations of interest analysis should be the only decisive factor in choice-of-law determinations.¹⁷¹

167. *Id.* § 6 comment e.

168. *Id.* § 6 comment f.

169. *See* Reese, *supra* note 148, at 508-09.

170. *Id.* at 510.

171. *See id.* at 511 (footnote omitted):

There are other values in choice of law that deserve consideration. Also, sometimes it will be impossible, as even a superficial reading of recent opinions will make clear, to determine with any degree of certainty or objectivity just what the policies are that underlie a given local law rule and particularly whether these policies would be served by application of the rule to out of state facts. It will often be more difficult still in situations in which the policies underlying the potentially applicable rules of two or more states would be served by each rule's application to determine which of the states involved has the dominant interest in having its rule applied. Indeed, a reading of recent opinions leads to the almost inevitable conclusion that courts which purport to take a "governmental interest" approach frequently engage in a judicial masquerade. In actual practice, they

The torts provisions of the second *Restatement* are found in chapter 7, entitled "Wrongs." Section 145 states "the general principle": with respect to an issue in tort, the law of the state with the most significant relationship to the occurrence and the parties under the principles of section 6 determines the rights and liabilities of the parties with respect to that issue.¹⁷² The section then lists four "contacts" which are to be taken into account in applying those principles. These include the place of injury; the place where the injury-causing conduct occurred; the domicile, residence, place of incorporation, and place of business of the parties; and the place where any relationship between the parties is centered.¹⁷³ All of these are to be evaluated "according to their relative importance with respect to the particular issue."¹⁷⁴

The remaining sections of chapter 7 deal with particular torts and particular issues in tort. Of importance to this discussion of Florida decisions is section 146, "Personal Injuries," which figured prominently in *Bishop* and later in *State Farm Mutual Automobile Insurance Co. v. Olsen*.¹⁷⁵ It states:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.¹⁷⁶

This section is a good illustration of two important aspects of the second *Restatement*. One is the way in which fairly specific rules are stated, subject to the overarching choice-influencing considerations of section 6. As Professor Reese puts it, the "rights and liabilities arising from a personal injury are said to be governed by the law of the place where the injury occurred unless the values stated in section 6 point to a different solution."¹⁷⁷ We shall shortly see the importance of the conditional "unless" clause when we ex-

decide first upon the particular rule they wish to apply and then attribute policies to that rule that call for its application.

See also Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 559-60 (1971).

172. RESTATEMENT (SECOND) § 145(1).

173. *Id.* § 145(2).

174. *Id.*

175. *State Farm Mut. Auto. Ins. Co. v. Olsen*, 406 So. 2d 1109, 1111 (Fla. 1981); *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980).

176. RESTATEMENT (SECOND) § 146.

177. Reese, *supra* note 148, at 513.

amine false conflict resolution under the approach of the second *Restatement*.

Another, and related, aspect is the pervasive role that territorial theory continues to play in the second *Restatement*. This is not a retention of the vested rights approach of the first *Restatement*. The Reporter's "Introductory Note" to the torts provisions explicitly rejects this implication.¹⁷⁸ Rather, it is a reflection of Professor Reese's own view of the profound and continuing importance of territoriality in conflicts thinking. He writes that

[t]o ignore the significance of territoriality is to ignore the basic reason for the existence of choice of law. Whether we like it or not, the world is composed of many states, each having its own system of law, and it is customary for persons to travel freely from state to state and to transact their business without much regard for state lines. The purpose of choice of law . . . is to provide a solution for the problems that inevitably arise. People naturally think in terms of territoriality, and so have the courts.¹⁷⁹

Territoriality, in his view, is also important to the issue of fairness. "A person injured in the state of his domicile can hardly complain of the fairness of having the law of his state applied to determine his rights."¹⁸⁰ By the same token, "a person who was not in a state at a given time often could argue justly that in all fairness, the law of that state should not be applied to him."¹⁸¹

Finally, Professor Reese contends that the evolution of any sort of rules conducive to certainty, predictability, and uniformity of result is impossible without regard to territoriality:

Emphasis only on the policies underlying the relevant local law rules of the interested states would make impossible the construction of rules. Also, of course, a state can hardly be considered interested if it does not have some contact with the case, and it is hard to imagine a contact that is not territorial in nature.¹⁸²

In addition to the presumption favoring application of the law of the state of injury contained in the various specific sections of chapter 7, the importance of the place of the wrong can also be

178. RESTATEMENT (SECOND) ch. 7, Introductory Note at 413.

179. Reese, *supra* note 148, at 514.

180. *Id.*

181. *Id.*

182. *Id.* at 515.

seen in two of the four contacts of section 145—"the place where the injury occurred" and "the place where the conduct causing the injury occurred."¹⁸³

How should a case of false conflict like *Bishop* be decided using the "most significant relationship" test of the second *Restatement*? Unlike some of the other modern approaches, the second *Restatement* does not actually dictate the application of the law of the only interested state in a case of false conflict, but it would be difficult to rationalize in other than specious ways any different result. Thus the sensible starting point is with the interest analysis provisions of section 6—the "relevant policies" of the forum and of other interested states.¹⁸⁴

South Carolina, it will be recalled,¹⁸⁵ was the place where a Florida-based airplane carrying all Florida residents fortuitously crashed during the course of a planned weekend trip to North Carolina, allegedly due to the simple negligence of the plane's pilot. In the ensuing Florida litigation, South Carolina's airplane guest statute,¹⁸⁶ which required a showing of intentional misconduct or recklessness as a prerequisite to recovery, was asserted in defense. That statute was enacted in furtherance of South Carolina's particular policy conception of appropriate loss distribution in airplane accident cases; it affords hosts significantly greater protection than they would otherwise have. This policy serves two purposes: to protect the airplane host from suits by ungrateful guests and to protect the host's insurance company from fraudulent claims by guests in collusion with their host.¹⁸⁷

Whatever one's view of the merits of such purposes, they are intended to benefit South Carolina hosts and their insurance carriers. In *Bishop*, all of the parties concerned were from Florida. Hence the policy reflected in the statute would not be furthered by

183. RESTATEMENT (SECOND) § 145(2).

184. *Id.* § 6(2)(b), (c).

185. See *supra* notes 15-16 & accompanying text.

186. S.C. CODE ANN. § 55-1-10 (Law. Co-op. 1976) (no cause of action by nonpaying guest against owner or operator of aircraft unless accident "intentional" or caused by "heedlessness or reckless disregard").

187. No South Carolina cases construing the airplane guest statute were located. Cf. *Ramey v. Ramey*, 258 S.E.2d 883 (S.C. 1979). In *Ramey* the South Carolina Supreme Court struck down its automobile guest statute as violative of the equal protection clauses of the South Carolina and federal constitutions. The court stated that guest statutes were intended "ostensibly to promote the following two goals: (1) the protection of host drivers from suits by ungrateful guests; and (2) the elimination of collusive lawsuits." *Id.* at 884. In a footnote, the court observed that the airplane guest statute "applies the same limitations to aircraft." *Id.* at 885 n.5.

its application. This particular statute is not one intended to regulate the conduct of all persons acting within the state, in which case South Carolina might claim an interest in its application irrespective of the citizenship of the parties; rather, it allocates the burden of losses resulting from airplane accidents. South Carolina has no interest in how this allocation is made except when its own residents, domiciliaries, or their insurance companies are involved.

Also relevant to an assessment of the policy underlying this statute is the strength with which it is held. The South Carolina Supreme Court declared that state's automobile guest statute unconstitutional a year before *Bishop* was decided and indicated in dictum that it would do the same for the airplane statute when an appropriate case arose.¹⁸⁸ The policy expressed in the statute is hardly one to which South Carolina is strongly attached. In contrast, Florida has a vital interest in the application of its ordinary negligence standard. The loss-distribution policy which this rule reflects is one of full recovery for Florida residents injured by the negligence of others, whether in a host-guest relationship or otherwise.¹⁸⁹ Applying Florida law where all parties are Floridians, as in *Bishop*, would plainly further this policy. Conversely, Florida's policy would be totally frustrated by the application of South Carolina law, with no corresponding advancement of any relevant concern of that state.

The use of the second *Restatement* interest analysis provisions makes plain that *Bishop* is a false conflict and that Florida is the only state with any interest in the application of its law. It could easily be concluded for that reason alone that Florida's relationship to the standard-of-care issue is the "most significant" and that its law should therefore be applied. This conclusion, we think, would clearly be correct, and analysis ordinarily could end at that point. But it is important to see that in paradigm false conflicts like *Bishop*, the conclusion initially reached through interest analysis will always be reinforced by the other relevant provisions of

188. See *supra* note 187. In its footnote reference to the airplane guest statute, *Ramey*, 258 S.E.2d at 885 n.5, the court cited "in this connection" *Messmer v. Ker*, 524 P.2d 536 (Idaho 1974), in which the Idaho Supreme Court held its airplane guest statute unconstitutional on equal protection grounds. The holding in *Ramey* was made applicable "with modified prospectivity to all similar pending and future actions." 258 S.E.2d at 886.

189. Florida has never had an airplane guest statute. Its automobile guest statute was enacted in 1937, see ch. 18033, § 1, 1937 Fla. Laws 671, 671, and codified at FLA. STAT. § 320.59. It applied to nonpaying guests injured in an accident caused by the "gross negligence or willful and wanton misconduct" of the host. The statute was repealed in 1972. See ch. 72-1, § 1, 1972 Fla. Laws 113, 113.

the *Restatement*.

The first of section 6's choice-influencing considerations, "the needs of the interstate system,"¹⁹⁰ reflects concern for the working of the federal system. Choice-of-law decisions should promote harmonious relations and intercourse among the states and should take into account the functioning of the federal system as a whole.¹⁹¹ This principle is strongly reminiscent of the idea of comity, which requires one state to give deference and respect to the laws and policies of other states. Here is a basic caution that states are not free to pursue their own selfish interests at the expense of other states, preferring in a choice-of-law context their own laws and their own citizens over those of other states without a principled basis for doing so. South Carolina, however, has no interest in whether its constitutionally suspect policy of loss distribution in airplane accident cases is applied in this Florida litigation between Florida residents and is unlikely to be disturbed if it is not. That state will neither know nor care if Florida law is applied, and to do so could not possibly contribute to any lack of harmonious relations between the two states.

As the comments to section 6 suggest, "the protection of justified expectations"¹⁹² ordinarily plays no role in negligence cases because "the parties act without giving thought to the legal consequences of their conduct or to the law that may be applied."¹⁹³ As to the "basic policies underlying the particular field of law,"¹⁹⁴ it is certainly clear that compensation for wrongfully inflicted injuries is the major purpose of modern torts law.¹⁹⁵ This factor points strongly to the application of Florida law, since otherwise the Bishops would be left with no opportunity to recover for their damages. The determination reached through interest analysis that Florida is the only state interested in the application of its law is a simple and straightforward one in cases of false conflict like *Bishop*, thus

190. RESTATEMENT (SECOND) § 6(2)(a).

191. See *id.* § 6 comment d:

Probably the most important function of choice-of-law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states.

192. *Id.* § 6(2)(d).

193. *Id.* § 6 comment g.

194. *Id.* § 6(2)(e).

195. See, e.g., R. WEINTRAUB, *supra* note 4, § 6.32; Reese, *supra* note 148, at 513.

conducive to "ease in the determination and application of the law to be applied."¹⁹⁶ If this mode of analysis is consistently applied and false conflicts resolved under the law of the only interested state, the values of "certainty, predictability and uniformity of result"¹⁹⁷ will likewise be served.

False conflicts are cases in which all of the choice-influencing considerations of section 6 typically point to the only interested state as the state with the "most significant relationship" and hence to application of its law. This means, in turn, that they are the cases in which the normally operative presumption favoring application of the law of the place of the wrong, as stated in section 146 and other sections, will be displaced by the principles of section 6. That the only interested state is the state of "most significant relationship" likewise means that its law will be applied under section 145(1), making it unnecessary to consider the four contacts of section 145(2). Even there, it is apparent that the fact that the state where injury occurs has no interest in the application of its law means also that two of the four contacts of section 145—"the place where the injury occurred" and "the place where the conduct causing the injury occurred"¹⁹⁸—will be irrelevant to the advancement of any "relevant policy" of the state of injury. By the same token, the remaining two contacts, which refer to the parties' domicile or residence and the place where their relationship is centered,¹⁹⁹ will be highly relevant to the policy of the only interested state.

In our view, if *Bishop* had been decided on the merits in the supreme court, Florida law would have been applied. No similar case has reached the court since. But the decisions in Florida's lower courts under the second *Restatement* have thus far disposed of false conflicts by applying the law of the only interested state.²⁰⁰

196. RESTATEMENT (SECOND) § 6(2)(f).

197. *Id.* § 6(2)(g).

198. *Id.* § 145(2)(a), (b).

199. *Id.* § 145(2)(c), (d).

200. See *Hayden v. Krusling*, 531 F. Supp. 468 (N.D. Fla. 1982) (Florida wrongful death statute rather than Death on the High Seas Act governed in diversity action arising out of crash of Florida-based airplane in Gulf of Mexico during flight originating and to have ended in Florida) (applying Florida conflict-of-laws rule adopted in *Bishop*); *Pennington v. Dye*, 456 So. 2d 507 (Fla. 2d DCA 1984) (Ohio law applicable to various claims arising out of two-car collision in Florida where all parties were Ohio residents and both vehicles were insured in that state); *Krasnosky v. Meredith*, 447 So. 2d 232 (Fla. 1st DCA 1983) (Florida rather than Georgia the state of "most significant relationship" in host-guest suit arising out of single-car collision with tree in Georgia where decedent-host, plaintiff-guest, and all defendants either Florida residents or, in case of decedent's insurance carrier, licensed to do

Harris v. Berkowitz,²⁰¹ decided in 1983 by the Third District Court of Appeal, serves as a good illustration. Two Florida residents were killed in a single-car accident in Maine, where they were attending summer camp. The driver's negligence caused the accident. Wrongful death litigation followed in Florida between the personal representatives of the two decedents, both also Florida residents. The car had been registered and insured in Florida. Liability was conceded, and the only issue concerned the measure of damages in wrongful death suits. Florida's statute provided for unlimited recovery, Maine's for limited damages.²⁰² The trial court applied Florida law, and its decision was affirmed on appeal.

In her opinion for the court, Judge Baskin sensibly concluded:

All parties to this action are permanent residents of Florida. It is therefore impossible to ascertain any policy Maine might have in the application of its limitation on damages insofar as recovery by Florida residents for the death of a Florida decedent resulting from the negligence of another Florida decedent is concerned. Because Florida has the most significant relationships to the occurrence and to the parties, its wrongful death recovery provisions govern the award of damages.²⁰³

What is particularly noteworthy is that it was the absence of any interest on Maine's part in the application of its law that the court found decisive. No matter what policy Maine's limitation on wrongful death damages serves, it would not be furthered by applying that limitation in a Florida lawsuit between Florida residents, arising from the deaths of Florida residents in a car regis-

business in Florida); *Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290 (Fla. 3d DCA 1983) (Florida's wrongful death damages provisions, far less favorable than North Carolina's, applied in suits arising out of fortuitous crash in North Carolina of aircraft owned and negligently maintained by Florida resident defendants, where decedents were students temporarily resident in Florida, and plaintiffs (decedents' personal representatives and administrator) were domiciled in New York and Massachusetts, respectively) (choice limited to either Florida or North Carolina law); *Harris v. Berkowitz*, 433 So. 2d 613 (Fla. 3d DCA 1983) (Florida's unlimited rather than Maine's limited wrongful death damages provisions applied in suit arising out of single-car collision in Maine, where decedents and all parties were Florida residents); *Futch v. Ryder Truck Rental, Inc.*, 391 So. 2d 808 (Fla. 5th DCA 1980) (Florida's comparative negligence standard rather than Maryland's contributory negligence doctrine applied where plaintiff's injury fortuitously occurred in Maryland but was caused by negligently maintained or equipped truck contracted for, delivered, and serviced and maintained by defendant in Florida).

201. 433 So. 2d 613 (Fla. 3d DCA 1983).

202. *Id.*

203. *Id.* at 615.

tered and insured in Florida.

In false conflicts, the place of injury will frequently be "fortuitous." *Bishop* is a good example. But it is not that element that makes these conflicts false. In *Berkowitz* the presence of the two decedents in Maine was hardly happenstance; they were there for the summer and their fatal car trip apparently began and was to have ended there. The injury and the conduct causing it occurred in Maine. But those contacts did not give Maine an interest in the application of its law. Rather, it was the fact of common Florida domicile that gave Florida an interest in the application of its law and Maine none. The distinction is a critical one. The failure to make it leads into the quagmire of counting and weighing contacts. It can ultimately result in an inability to identify false conflicts with consistency or, more importantly, to distinguish them from true conflicts.²⁰⁴

204. *Cf. Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290 (Fla. 3d DCA 1983). This unusual case involved wrongful death suits brought in Florida by the surviving parents of three young men—Vital, Valsecchi, and Scileppi—who were killed in the crash of a private plane in North Carolina in November 1976. All three were students at Embry-Riddle University in Daytona Beach and were temporary residents of Florida. The pilot, Vital (age 21), was a domiciliary of Massachusetts; Valsecchi and Scileppi (both age 20), passengers in the aircraft, were domiciled in New York. The three had rented a small plane from DeLand Aviation, a Florida corporation, for a Thanksgiving trip home. On the return trip to Florida, the plane crashed in North Carolina, due, as a jury later determined, to DeLand Aviation's negligent maintenance of the plane's electrical system. DeLand, its two owners, and its insurance carrier, Proprietors Insurance Company, were named defendants in the ensuing litigation. At the time of the accident, North Carolina's wrongful death statute provided for liberal recovery in these circumstances. Florida's statute did not, because the supreme court, in 1976, had construed the legislature's 1973 change in the age of majority from 21 to 18 as similarly amending *sub silentio* the definition of "minor child" in the wrongful death statute. *Id.* at 300 (Schwartz, C.J., dissenting). The trial court, under the then-applicable *lex loci delicti* rule, held that North Carolina rather than Florida law governed; under that law, the jury awarded "the estates of Valsecchi, Scileppi, and Vital \$750,000 each from [each of the two individual owners] and DeLand." *Id.* at 292. On appeal, the Third District reversed in a two-to-one decision and held that Florida's wrongful death statute applied.

The court considered itself limited to a choice between Florida and North Carolina law. *See id.* at 295 n.5 ("The question of whether the law of New York or of Massachusetts applies is not properly before this court."); *id.* at 301 n.9 (Schwartz, C.J., dissenting) ("Because the appellants argue only that Florida, instead of North Carolina, law should apply, we are not informed—and need not concern ourselves—of the contents of the laws of New York and Massachusetts."). So limited, the conflict was false. Florida was interested in the application of its law because the defendants were Florida residents; North Carolina, on the other hand, had no interest in the application of its recovery policy because none of its residents or domiciliaries were involved. In this sense, Florida was the only interested state, and the majority was correct in holding that Florida law applied.

There are at least two problems with this analysis. The first was forcefully pointed out by Chief Judge Schwartz in his dissent. He framed the issue in terms of which state had the most significant relationship under *Bishop*, then stated, correctly, that in resolving that

Berkowitz represents the mode of analysis that the second *Re-*

question

it is necessarily first required that we identify the content and bases of the laws of the competing jurisdictions. (Indeed, the majority's total failure even to undertake this task is, I believe, a reflection of its basic error; it does not recognize that it is the conflict only as to the *particular issue* in question with which we are, or rather should be, concerned.)

Id. at 300 (emphasis in original). Analyzing the policies underlying the two statutes, he found North Carolina's to be "the recovery of a broad panoply of tangible and intangible losses sustained by the decedents' survivors." *Id.* Florida's policy, as reflected in current Florida law, was virtually the same because the legislature had acted in 1977 to cure its "inadvertence" in changing the definition of "minor child," thus "recreating a substantial cause of action for the parents of . . . Valsecchi and Scileppi," and had again amended the statute in 1981 so that Vital's parents would likewise be able to recover. *Id.* If the chief judge read the legislative record correctly, the policy embodied in Florida's wrongful death statute was not one of limiting damages in such a drastic fashion in these particular circumstances, either at the time of the accident or thereafter. Florida could hardly be said to be interested in the application of its law to further an unintended "policy" present in the statute only through legislative oversight. Granted, the court was not free to rewrite the statute, and if the second *Restatement* otherwise required the application of Florida law, that law would have to be applied as written. As is not infrequently the case in statutory interpretation, however, the "relevant policy" embodied in a statute may not be accurately reflected by its words. *Cf., e.g., Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). Thus in an interest analysis sense, neither state had any interest in the application of its law because the "relevant policies" of neither would be furthered by such application. The normally operative presumption of application of the law of the place of injury should have been given effect. *See RESTATEMENT (SECOND) §§ 145, 171, 175; see also Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980).

Even had Florida's wrongful death statute been intentionally rather than inadvertently fashioned to reflect the policy it did in 1976, the subsequent legislative amendments repudiated that policy. The effect of post-occurrence changes on interest analysis in conflict-of-laws cases is a much-debated subject, but there was ample precedent for looking to the policy embodied in the statute at the time of decision rather than at the time of the accident. *See Miller v. Miller*, 237 N.E.2d 877, 882 (N.Y. 1968) (post-accident repeal of Maine's limitation on wrongful death damages (coupled with defendant's change of residence) erases that state's interest in application of limitation in effect at time of accident occurring in Maine) ("for the very same acts committed today Maine would now impose the same liability as New York"); *cf., e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (plaintiff's post-accident move gives new state of residency an interest in application of its law). *See generally RESTATEMENT (SECOND) ch. 7, Introductory Note at 414* (existing authority too sparse to warrant dealing with problem); Korn, *supra* note 40, at 872-73.

The second problem—and the one from which the court's difficulty really stemmed—was that *Valsecchi* was not a false conflict, but a true one. Taking the statute as it had been construed to read in 1976, the time of the accident, Florida was interested in the application of that statute because the defendants were Florida residents; North Carolina had no interest in the application of its law because its residents and domiciliaries were not involved. But Massachusetts and New York, the domiciles of the decedents and of the plaintiffs, had an obvious interest in the application of their wrongful death statutes, at least to the extent that they provided for their domiciliaries (as New York's certainly would) a more substantial recovery than did Florida's. It is our view, to be developed below, that the supreme court's decision in *State Farm Mut. Auto. Ins. Co. v. Olsen*, 406 So. 2d 1109 (Fla. 1981), stands for the proposition that the decisive consideration in true conflicts is the place of injury. The court did not have to concern itself with the content of New York or Massachu-

statement contemplates in its invitation to consider the "relevant policies" of the forum and those of other states whose conflicting laws are ostensibly implicated in a dispute. In this case the court correctly saw that the common Florida domicile of all concerned meant that Maine had no interest in the application of its law limiting recovery. Before *Bishop*, without question, this case would have been woodenly resolved under the law of Maine. The contrast could not be greater, or more welcome.

III. THE FLORIDA SUPREME COURT'S APPROACH TO THE RESOLUTION OF TRUE CONFLICTS: THE RETURN OF THE PLACE-OF-THE-WRONG RULE

A. *True Conflicts and the Decision in State Farm Mutual Automobile Insurance Co. v. Olsen*²⁰⁵

In false conflicts, as we have seen, the state where an injury occurs will by definition have no interest in the application of its law in a lawsuit brought elsewhere. Hence, except in a vested rights system such as *Beale's*, the place of the wrong will ordinarily have little relevance to the choice-of-law decision in such cases.

True conflicts, on the other hand, are another matter altogether. A true conflict exists when each of two or more states is interested

sets law, whether counsel had properly raised the issue of the possible application of those laws, or whether either or both of those states might have a more "significant relationship" to the case than did Florida; it would have sufficed for application of North Carolina law that the court recognized that it was dealing with a true and not a false conflict.

In attempting to meet these difficulties, the majority stated that "[c]ases applying a Restatement (Second) approach generally do not employ an 'interest analysis' test." *Valsecchi*, 435 So. 2d at 294. This is difficult to accept in view of the language of § 6(2)(b) and (c), the accompanying comments, and Professor Reese's own interpretation. See *supra* notes 166-71 and accompanying text. To buttress its conclusion that Florida's relationship to the occurrence and the parties was the "most significant," the majority engaged in the familiar process of counting "contacts":

[P]rior to the fatal accident, the decedents resided in Florida where they became acquainted while attending aeronautical school. The plane was rented in Florida from Florida residents, defendants in the action. The plane was hangared and negligently maintained in Florida. The flight began and was to end in Florida.

Ancillary estates were opened in Florida, and the lawsuits were filed here.

Valsecchi, 435 So. 2d at 295. Yet, as the same court seemed to recognize in *Berkowitz*, these contacts are significant only as they relate to the policies embodied in the ostensibly conflicting laws (see RESTATEMENT (SECOND) § 6(2)(b), (c)) and to the other choice-influencing considerations of that section. The only "contact" of significance in this sense was the fact that the defendants were Florida residents. That fact alone gave Florida an interest in a § 6(2)(b) sense in the application of its "inadvertent" wrongful death statute, an interest that could only be furthered at the expense of the basic compensatory policy of modern torts law. See *id.* § 6(2)(e).

205. 406 So. 2d 1109 (Fla. 1981).

in the application of its law to a dispute because the purposes and policies embodied in each law would be furthered by its application.²⁰⁶ *Bishop*, for example, would have been a true conflict if the defendant president of Florida Specialty Paint, the plane's pilot, had also been a South Carolina resident. In this variation, each party would seek the application of his own state's law because it favors his cause. This is the paradigm true conflict situation and the one most frequently encountered. Occasionally each party will seek the application of the law of the other party's state because his own disfavors his cause. This is the "unprovided-for" case, so called because modern interest analysis seemed to make no provision for it, predicated as it was on the idea that states legislated primarily for the benefit and protection of their own residents and that application of a given state's law in a dispute would serve this purpose.²⁰⁷ Unlike false conflicts, true conflicts have proven profoundly difficult of resolution. It is not too much to say that none of the approaches so far devised has worked to everyone's satisfaction.²⁰⁸

Virtually all of the methodologies which have supplanted *lex loci delicti* employ some form of interest analysis.²⁰⁹ In cases of true conflict, almost all try to weigh or balance the interests of the concerned states in an effort to determine which has the greater or more significant interest in the application of its law.²¹⁰ Brainerd

206. See, e.g., B. CURRIE, *supra* note 2, at 117-21, 181-82.

207. See *id.* at 152-53; cf. Twerski, *Neumeier v. Kuehner: Where Are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 107-08 (1973) ("Having defined the interests as domiciliary oriented when you run out of domiciliaries to protect you run out of interests. The emperor indeed stands naked for all to see." (footnote omitted)).

208. See, e.g., R. CRAMTON, *supra* note 2, at 260-65.

209. See, e.g., Korn, *supra* note 40, at 816.

210. See, e.g., R. CRAMTON, *supra* note 2, at 260; Ehrenzweig, *A Counter-Revolution in Conflict Law? Beale to Caverts*, 80 HARV. L. REV. 377, 389 (1966); Note, *supra* note 15, at 467 & n.16. The second *Restatement*, in its interest analysis provisions, decidedly allows for the interest-weighting process, though it does not require it: § 6 directs a court only to consider the relevant policies of the forum and of other interested states. RESTATEMENT (SECOND) § 6 (2)(b), (c). Comment f, however, states that

the forum should give consideration not only to its own relevant policies . . . but also to the relevant policies of all other interested states. The forum should seek to reach a result that will achieve the best possible accommodation of these policies. . . . In general, it is fitting that the state whose interests are most deeply affected should have its local law applied. Which is the state of dominant interest may depend upon the issue involved.

Thus the door is unlocked, if not actually opened, for courts to make the subjective determination that one of two interested states is "more" interested in the application of its law than the other. Here, too, is the place for the reinsertion of the concept of "strongly held" public policy. In the hypothetical variant on *Bishop*, for example, in which the plane's pilot

Currie thought this wrong. To him it was clear that "where several states have different policies, and also legitimate interests in the application of their policies, a court is in no position to 'weigh' the competing interests, or evaluate their relative merits and choose between them" ²¹¹ In elaborating his contention that courts were inherently unsuited to engage in the process of interest weighing, he argued that

assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy. It is a function that courts cannot perform effectively, for they lack the necessary resources. . . . This is a job for a legislative committee, and determining the policy to be formulated on the basis of the information assembled is a job for a competent legislative body. ²¹²

In this argument, Currie restates the fundamental paradox of conflicts law that stems from the fact that each state in the United States has sovereign power to attach different legal consequences to the same events. ²¹³ To Currie, there was no rational way for a court to determine which sovereign's interest should yield in a case of true conflict. In such cases he proposed that the forum court simply apply its own law: "The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state." ²¹⁴

This proposal has the additional virtue of taking into account the working realities of judicial decision making. A forum court will ordinarily better understand, or will more easily and confidently be able to discover, the purposes and policies underlying its own laws than those of another state. ²¹⁵ In *Bishop*, for example, a superficial glance at the South Carolina statutes might fail to re-

is a South Carolina resident, thus creating an interest on South Carolina's part in the application of its guest statute, it is easy to characterize that constitutionally suspect statute as embodying a weak or nonexistent policy and finding it outweighed by Florida's "strongly held" policy favoring full recovery in such cases.

211. B. CURRIE, *supra* note 2, at 181.

212. *Id.* at 182.

213. *See id.* at 178-79.

214. *Id.* at 119.

215. *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302, 326 & n.14 (1981) (Stevens, J., concurring).

veal that the airplane guest statute had been declared all but unconstitutional and that in consequence South Carolina's interest in its application was virtually nonexistent. The importance which a state attaches to the policy underlying any particular statute is likely to vary from one statute to another.²¹⁶ Some policies are strongly held, others are not. Assessing the strength and importance of underlying policies is tricky enough at home, but infinitely more so when the laws of other states are involved. Finally, Currie's approach has the virtue of easily, uniformly, and expeditiously disposing of cases that seem to defy rational analysis anyhow, something that any busy court will understand and appreciate.

But the presumptive application of forum law in true conflict cases has proven no more satisfactory than Beale's presumptive application of the law of the place of the wrong. No state has adopted it as a conflicts rule of decision, though expressions of preference for forum law are common enough and, in several states, occur with such regularity as to amount to the same thing.²¹⁷ The criticisms are many and varied.²¹⁸ For one thing, it can be shown that systematic application of forum law tends to encourage forum shopping to a greater degree than some other approaches.²¹⁹ For another, there is something about any presumptive solution that is likely to prove offensive to judges accustomed to exercising independent judgment and to the frequent making of nice decisions requiring the weighing and balancing of interests in conflict.²²⁰ Particularly is this so when the presumption calls for a parochial or, some might say, atavistic preference for local over foreign solutions to all problems, regardless of their nature. By acknowledging defeat at the outset, Currie's approach cuts at the roots of a system committed, as is ours, to the belief that rational solutions exist and can be discovered for any problem, however thorny.²²¹ Finally, recent decisions of the United States Supreme Court have made it much less certain today than in the 1960's when Currie wrote that application of forum law in true conflict situations is the "clearly constitutional thing for any court to

216. Compare, e.g., *Gillen v. United Servs. Auto. Ass'n*, 300 So. 2d 3 (Fla. 1974), with *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507 (Fla. 1981).

217. See, e.g., *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972); *Savchuk v. Rush*, 272 N.W.2d 888 (Minn. 1978), *rev'd*, 444 U.S. 320 (1980).

218. See, e.g., R. CRAMTON, *supra* note 2, at 260-62.

219. See, e.g., Note, *supra* note 15, at 473-75.

220. See, e.g., Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845, 852-55 (1961).

221. See B. CURRIE, *supra* note 2, at 121.

do."²²²

The first conflicts case in tort to reach the Florida Supreme Court after its decision in *Bishop* was a true conflict. It was the first such torts case ever decided by the court, and of course the first in which the court actually applied the newly adopted "most significant relationship" test of the second *Restatement*. In sharp contrast to *Bishop*, *State Farm Mutual Automobile Insurance Co. v. Olsen*²²³ illustrates just how difficult and complex such cases can be; more importantly, it offers valuable insight into how the court intends to make use of the second *Restatement* in cases of true conflict. In *Bishop* the court stressed that the second *Restatement* does not reject the place-of-the-wrong rule completely: "the state where the injury occurred would, under most circumstances, be the decisive consideration in determining the applicable choice of law."²²⁴ *Olsen* amply demonstrates the force of this cautionary language.

In 1976, Johnnie Olsen, a Florida resident, was killed in an automobile accident in Illinois. The driver of the other car was an uninsured Illinois motorist. Both were negligent. Mr. Olsen was insured by State Farm Mutual Automobile Insurance Company under an automobile liability policy that had been issued in Florida and that contained the virtually standard uninsured motorist provisions obligating State Farm to pay all sums which the insured or his legal representative "shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle" because of death or bodily injury sustained by the insured in an accident.²²⁵

At the time of the accident, Illinois was a contributory negligence state. Mr. Olsen's widow filed a demand with State Farm for arbitration of any uninsured motorist benefits due under the policy and sought to have the arbitration governed by the substantive law of Florida, comparative negligence, rather than by the Illinois contributory negligence rule. Thereupon State Farm filed suit for a declaratory judgment that any uninsured motorist claim by Mrs. Olsen would be governed by Illinois rather than Florida law and moved for summary judgment on the ground that under the *lex loci delicti* doctrine the substantive law of Illinois controlled the

222. *Id.* at 119. *But cf.*, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Rush v. Savchuk*, 444 U.S. 320 (1980).

223. 406 So. 2d 1109 (Fla. 1981).

224. *Bishop*, 389 So. 2d at 1001.

225. State Farm Mutual Automobile Insurance Company Policy No. 2057 126 59 B, Coverage U, at 10, Record, *State Farm Mut. Auto. Ins. Co. v. Olsen*, 406 So. 2d 1109 (Fla. 1981).

issue of the uninsured motorist's liability. The trial court granted the motion. On appeal the Fifth District Court of Appeal reversed,²²⁶ holding that the contributory negligence doctrine was contrary to the public policy of Florida, as evidenced by the supreme court's 1973 decision in *Hoffman v. Jones*²²⁷ discarding that doctrine and replacing it with comparative negligence, and by the subsequent legislative recognition of that decision in 1976 in the Uniform Contribution Among Tortfeasors Act.²²⁸ As the court put it,

the findings by the Florida Supreme Court in *Hoffman* and the subsequent recognition and implementation of that decision by the Florida Legislature clearly imply that the concept of contributory negligence as a bar to recovery is contrary to the public policy of this state. (As such, that concept should not be applied by the courts of this state under the doctrine of *lex loci delicti*.)²²⁹

In its innovative use of the public policy exception to the place-of-the-wrong rule, the court drew on two of the possible sources of public policy, statute and judicial decision. But at the time—August 1980—*Bishop* was pending in the supreme court. Aware of this and deeming the matter to be one of great public importance, the Fifth District certified the following question to the supreme court: "In a personal injury suit filed in Florida for a tort alleged to have occurred outside of Florida, can the contributory negligence defense bar recovery?"²³⁰

In a slip-sheet majority opinion by Justice Adkins, released on June 4, 1981,²³¹ the supreme court answered this question affirmatively, holding that Illinois law controlled and that the Illinois doctrine of contributory negligence barred Mrs. Olsen's recovery.²³² Chief Justice Sundberg dissented in an opinion in which Justice England, the author of the *Bishop* opinion, concurred.²³³ In April, shortly before this opinion was released, the Illinois Supreme Court decided *Alvis v. Ribar*,²³⁴ in which it abandoned its tradi-

226. *Olsen v. State Farm Auto. Ins. Co.*, 386 So. 2d 600 (Fla. 5th DCA 1980), *quashed and remanded*, 406 So. 2d 1109 (Fla. 1981).

227. 280 So. 2d 431 (Fla. 1973).

228. FLA. STAT. § 768.31(3)(a) (Supp. 1976).

229. *Olsen*, 386 So. 2d at 601.

230. *Id.*

231. *State Farm Mut. Auto. Ins. Co. v. Olsen*, 6 Fla. L.W. 367 (Fla. June 4, 1981).

232. *Id.* at 368.

233. *Id.*

234. 421 N.E.2d 886 (Ill. 1981).

tional adherence to the contributory negligence doctrine and with liberal citation to *Hoffman v. Jones* adopted pure comparative negligence in its stead. This change in effect made the law of Illinois and Florida the same, mooted the actual controversy although not the conflicts question involved. In response to a motion for rehearing filed on Mrs. Olsen's behalf,²³⁵ the court withdrew its original opinion and on November 25, 1981, substituted a new one for it.²³⁶ It was substantially the same except that it replaced the reference to the Illinois doctrine of contributory negligence with "Illinois law."²³⁷ Justice England had left the court in the interim, and his concurrence in the chief justice's dissent, which remained unchanged, was deleted.²³⁸

The court ended, then, by holding that Illinois law controlled. Emphasizing the portions of sections 145 and 146 favoring application of the law of the place of injury²³⁹ and the language from *Bishop* that "[t]he state where the injury occurred would, under most circumstances, be the decisive consideration in determining the applicable choice of law,"²⁴⁰ the court stated that "[c]ertainly, Illinois has the most significant relationship with the occurrence since the accident happened there."²⁴¹ So far as the choice-influencing considerations of section 6 were concerned,

Illinois has an interest in the rights of its citizens who are subject to subrogation by the insurer on any uninsured motorist coverage it pays, which interest, in this case, is paramount to the relevant policies of Florida as the forum state. Finally, to reiterate our position in *Bishop*, for reasons of uniformity and ease in determination and application of the law, (barring other factors, not existent here, which may outweigh the place of the injury as a controlling consideration), we deem Illinois law to be controlling.²⁴²

235. Respondent's Motion for Rehearing (June 15, 1981), *State Farm Mut. Auto. Ins. Co. v. Olsen*, No. 59,639 (Fla. S. Ct.).

236. Letter from Sid J. White, Clerk, Florida Supreme Court, to Charles D. Nelson, West Publishing Co. (Nov. 25, 1981).

237. Order Granting Motion for Rehearing (Nov. 25, 1981), *Olsen* ("That portion of this Court's decision which states that the Court holds that Illinois doctrine of contributory negligence bars recovery in this case is amended to state that Illinois law should be applied to this case.").

238. See *Olsen*, 406 So. 2d at 1111-12.

239. *Id.* at 1110-11.

240. *Id.* at 1111 (quoting *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980)).

241. *Olsen*, 406 So. 2d at 1111.

242. *Id.*

The opinion was very brief. Chief Justice Sundberg alone dissented; he would not have concluded "automatically" that Illinois law controlled.²⁴³ Conceding that Illinois had an interest in the occurrence,²⁴⁴ he nevertheless thought that

the relationship between the insurer and the insured must be taken into account. Since the insured was a Florida resident under a policy issued in Florida, presumably pursuant to underwriting considerations applicable to Florida, this state also has an interest. Which of the two states has the *most* significant relationship to the total transaction or occurrence is a determination for the trial court²⁴⁵

He would have remanded the case to the trial court for application of the principles of sections 6, 145, and 146.²⁴⁶

The result reached in *Olsen* is sound in our view, but the brevity of the opinion belies both the actual complexity of the case and the full range of its implications for future conflicts decisions in Florida. Underlying the court's choice-of-law determination were two important considerations neither identified nor discussed in the opinion. The first concerns the interpretation of the statutory language "legally entitled to recover damages"²⁴⁷ and explains why a dispute between an insured and her insurance company over the terms of an insurance contract was conceptualized as a tort action and also why it was a true conflict. The second consideration has to do with the more fundamental question of legislative jurisdiction,²⁴⁸ or the court's power under the Constitution to treat *Olsen* as a case involving a choice-of-law determination. Given the court's interpretation of "legally entitled to recover" and the facts in the case, it is far less clear than the court makes it seem that any law other than Illinois' could have been applied.

243. *Id.* (Sundberg, C.J., dissenting).

244. *Id.*

245. *Id.* at 1111-12 (emphasis in original).

246. *Id.* at 1112.

247. *See, e.g.*, FLA. STAT. § 627.727(1) (1975) (in effect at time of accident in *Olsen*).

248. For a discussion of the concept of legislative jurisdiction, see Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1978): "Legislative jurisdiction . . . is the power of a state to apply its law to create or affect legal interests. . . . [P]roblems of legislative jurisdiction will arise almost exclusively in situations where a state seeks to apply its law to foreign facts."

B. Florida's Interpretation of the Statutory Language "Legally Entitled To Recover Damages"

For over twenty years, Florida has required by statute that automobile liability insurance policies issued in Florida offer the insured uninsured motor vehicle coverage.²⁴⁹ The relevant statutory language, virtually unchanged since its inception in 1961,²⁵⁰ provides:

No motor vehicle liability insurance policy shall be delivered or

249. Uninsured motorist coverage traces originally to about 1925 when so-called "unsatisfied judgment insurance" first became available. Under this coverage, the insured was first required to obtain a judgment against the tortfeasor and then show that the judgment was uncollectible before he could recover from his own insurance company. See A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 1.9 (1969). Following World War II, there was an alarming increase in automobile accidents and, concomitantly, in uncompensated injuries resulting from them. *Id.* § 1.1; see also 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 11.1 (1956). In the 1950's, in response to general legislative agitation for solutions to this problem and motivated in part no doubt by a desire to forestall compulsory insurance and other financial responsibility legislation, the insurance industry itself devised and began to offer a new coverage called the uninsured motorist endorsement. See A. WIDISS, *supra*, §§ 1.6, 1.8. This coverage was intended to put the insured in the same position he would have been in if the other motorist had been insured. The insured was required to show that he had been injured by the negligence of an uninsured motorist and to prove the amount of his damages. The requirement for first obtaining a judgment against the uninsured motorist was eliminated, and arbitration was provided as a way of resolving disputes over fault or the amount of damages. *Id.* § 1.9. The language devised to translate this concept into insurance policies—language which has become both an industry and statutory standard since—required the insured to show that he was "legally entitled to recover damages" from the uninsured motorist.

Uninsured motorist coverage was first offered by the industry in 1955. *Id.* § 1.10. In 1957 New Hampshire became the first state to mandate the coverage for policies issued or delivered in the state, and other states rapidly followed suit. *Id.* § 1.11. Florida first required the coverage in 1961. Ch. 61-175, § 1, 1961 Fla. Laws 291, 292-93. By 1968, 46 states had such legislation. See A. WIDISS, *supra*, § 1.11. The amount of coverage offered or required was, in the beginning, typically the minimum coverage required by any particular state's financial responsibility laws. But the limits have steadily increased. See *id.* § 1.13 (Supp. 1981). Florida first required in 1971 that uninsured motorist coverage be offered in amounts up to the limits of bodily injury liability purchased by the insured, ch. 71-88, § 1, 1971 Fla. Laws 222, 222-23, then in 1973 that such coverage be offered in amounts no less than the insured's liability limits. Ch. 73-180, §§ 3, 4, 1973 Fla. Laws 366, 366-67. This is still the basic requirement, although current law provides that at the written request of the insured, limits up to \$100,000 per person and \$300,000 per occurrence, irrespective of bodily injury limits, must be made available. FLA. STAT. § 627.727(2)(a) (1983). The increasing potential for large recoveries under this coverage has undoubtedly had much to do with the considerable amount of dispute and litigation which its existence has engendered. In particular, the words "legally entitled to recover" have proven a rich source of controversy. See, e.g., Widiss, *Uninsured Motorist Coverage: Observations on Litigating Over When a Claimant Is "Legally Entitled To Recover,"* 68 IOWA L. REV. 397 (1983) [hereinafter cited as Widiss, *Uninsured Motorist Coverage*].

250. Ch. 61-175, § 1, 1961 Fla. Laws 291, 292-93.

issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom.²⁵¹

In *Olsen* a great deal turned on the court's conception of the legislative purpose embodied in this statute. It was this conception that determined the construction of the critical phrase, "legally entitled to recover damages." But there is no mention of any of this in the opinion itself, and some discussion is required to make clear what the court evidently thought the case involved.

The *Olsen* court was not writing on a clean slate with respect to the language "legally entitled to recover damages." If it had been, the case might have been conceptualized entirely differently—as one having more to do with the interpretation of an insurance contract than with tort liability. The chief justice had a point when he referred to "the relationship between the insurer and the insured" in his dissent.²⁵² Here, after all, was a dispute between an insured, a Florida resident, and her insurance company, present and doing business in Florida, involving an insurance contract negotiated, paid for, and delivered in Florida, and insuring a risk principally centered in this state. On its face, the language "legally entitled to recover damages" contemplates some form of tort liability on the part of the uninsured motorist for the injuries he has caused; but by what standard is such tort liability to be measured? If the accident had occurred in Florida between Mr. Olsen and a Florida uninsured motorist, Florida's comparative negligence standard would have determined whether and how much Mrs. Olsen was "legally entitled to recover." If all aspects of the case had been localized in Illinois, an Illinois court would have used its own contributory negligence standard. This means that whether and how much an insured is "legally entitled to recover" can vary dramatically depending on which of several possible tort liability standards is used to measure "legal entitlement." The policy language itself makes no mention of this possibility, and in this sense is inherently ambiguous.

From this point of view, *Olsen* would seem to present a conflicts

251. FLA. STAT. § 627.727(1) (1983).

252. *Olsen*, 406 So. 2d at 1111 (Sundberg, C.J., dissenting).

problem in contract, not in tort. Did the parties intend, with respect to an out-of-state accident involving an uninsured motorist, that Florida law would determine Mrs. Olsen's legal entitlement to recover or that the law of the state of injury would? This conflict is patently false, as Illinois has no interest in how Florida courts resolve this issue in litigation between a Florida insured and her insurance company, present and doing business in Florida. Under almost any method for resolving conflicts issues in contract, it can be demonstrated that Florida law would govern the interpretation of this agreement and that therefore Florida law should supply content to the phrase "legally entitled to recover damages."²⁵³ This conclusion does not mean, however, that "legal entitlement" is measured by Florida's comparative negligence standard, only that it is measured by Florida law. This forces us, in turn, to an examination of how Florida's uninsured motorist statute has been interpreted by the supreme court in other cases, nowhere referred to in *Olsen* itself.

Florida's interpretation of the "legally entitled to recover" language derives from a long-continued and consistently maintained conception of the purpose of uninsured motorist coverage. That purpose was first articulated in 1965, shortly after the coverage was mandated by the legislature. In *Davis v. United States Fidelity & Guaranty Co.*,²⁵⁴ a First District Court of Appeal opinion by Judge Rawls, the court stated: "[T]he public policy of this state . . . [is] that every insured . . . is entitled to recover under the policy for the damages he or she would have been able to recover against the offending motorist if that motorist had maintained a policy of liability insurance."²⁵⁵ This statement of purpose was quoted and adopted by the Florida Supreme Court in 1967, in *Standard Accident Insurance Co. v. Gavin*,²⁵⁶ and has been steadily adhered to since.²⁵⁷

253. See *supra* note 158; cf. *Allstate Ins. Co. v. Clendening*, 289 So. 2d 704, 709 (Fla. 1974) (validity of excess insurance clause contained in policy issued in Tennessee to Tennessee resident determined under Tennessee law regardless of fact that injury occurred in Florida) ("The expressions of the legislature in the [Florida uninsured motorist] statute clearly apply only to contracts issued in the State of Florida.").

254. 172 So. 2d 485 (Fla. 1st DCA 1965).

255. *Id.* at 486.

256. 196 So. 2d 440, 442 (Fla. 1967).

257. See *State Farm Mut. Auto. Ins. Co. v. Kilbreath*, 419 So. 2d 632 (Fla. 1982); *Allstate Ins. Co. v. Neduchal*, 418 So. 2d 248 (Fla. 1982); *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077 (Fla. 1978); *Salas v. Liberty Mut. Fire Ins. Co.*, 272 So. 2d 1 (Fla. 1972); *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229 (Fla. 1971); *Hedges v. National Union Indem. Co.*, 249 So. 2d 679 (Fla. 1971); *Brown v. Progressive Mut. Ins. Co.*, 249 So. 2d

In 1978, in *Dewberry v. Auto-Owners Insurance Co.*,²⁵⁸ the court rephrased slightly and somewhat expanded its conception of purpose in this language:

[U]ninsured motorist coverage is meant to compensate the plaintiff for a deficiency in the tort-feasor's personal liability insurance coverage. . . . The statute was only intended to allow the insured the same recovery which would have been available to him had the tort-feasor been insured to the same extent as the insured himself. . . . It could not have been intended to place the insured who is injured by an underinsured motorist in a better position than one who is harmed by a motorist having the same insurance as the insured.²⁵⁹

More recently, in *State Farm Mutual Automobile Insurance Co. v. Kilbreath*,²⁶⁰ a case holding that the statute of limitations in an action under an uninsured motorist insurance policy begins to run as of the date of the accident, the court stated that "[t]he uninsured motorist statute gives the insured the same cause of action against the insurer that he has against the uninsured/underinsured third party tortfeasor for damages for bodily injury. . . . It provides a new *procedure* whereby the insured may recover his loss against his own insurer."²⁶¹ Judge Sharp, dissenting in the court below, was approvingly cited for her point that an insured's right of action against his own insurance company for uninsured motorist benefits "'stems from . . . [his] right of action against the tortfeasor.'"²⁶²

In the court's view, an insured's rights against his insurance company rise no higher than his rights against the uninsured tortfeasor. It follows that if he cannot successfully maintain a suit against that tortfeasor for any reason, he cannot recover uninsured motorist benefits from his insurance company.²⁶³ This interpreta-

429 (Fla. 1971); *Morrison Assur. Co. v. Polak*, 230 So. 2d 6 (Fla. 1969); *Tuggle v. Government Employees Ins. Co.*, 207 So. 2d 674 (Fla. 1968); *Southeast Title & Ins. Co. v. Austin*, 202 So. 2d 179 (Fla. 1967); *State Farm Mut. Auto. Ins. Co. v. Rutkin*, 199 So. 2d 705 (Fla. 1967).

258. 363 So. 2d 1077 (Fla. 1978).

259. *Id.* at 1081 (citations omitted) (underinsured motorist claim).

260. 419 So. 2d 632 (Fla. 1982).

261. *Id.* at 634 (citations omitted) (emphasis in original).

262. *Id.* (quoting *Kilbreath v. State Farm Mut. Auto. Ins. Co.*, 401 So. 2d 846, 847 (Fla. 5th DCA 1981) (Sharp, J., dissenting)).

263. In Florida, then, the insured is not required actually to reduce his claim against the tortfeasor to judgment, but it must appear that he could. This approach is not uncommon. *See, e.g., Hall v. Allied Mut. Ins. Co.*, 158 N.W.2d 107 (Iowa 1968); *Widiss, Uninsured Mo-*

tion has been impliedly ratified by the Florida legislature. It has on numerous occasions since 1961 revised and amended the provisions relating to uninsured motorist coverage and could hardly be unaware of how the supreme court has interpreted them. No change relevant to the "legally entitled to recover" language has ever been made nor has the legislature, in any of the extant history, ever expressed dissatisfaction with the court's approach to this statutory language.²⁶⁴

torist Coverage, supra note 249, at 426-29.

All courts that have considered this language treat uninsured motorist coverage as fault based. In other words, no decisions interpret the coverage as a form of strict liability under which the insured may collect from his company simply by showing that he suffered injuries in an accident with an uninsured motorist. *See id.* at 399. But there agreement ends. In apparent disregard of the history of this coverage, a few jurisdictions—South Carolina, Georgia, Tennessee, and Virginia—interpret "legally entitled to recover" as requiring the insured actually to bring suit against the uninsured motorist and reduce his claim to judgment in order to demonstrate his legal entitlement, thus treating uninsured motorist coverage as the functional equivalent of the old unsatisfied judgment insurance. *Id.* at 413.

Most jurisdictions stop short of actually requiring suit to be brought. Instead they interpret the language to require only a hypothetical showing of tort liability on the part of the uninsured motorist. But even here there is considerable variation in defining the exact nature of the tort liability necessary to trigger the insurance company's obligation to pay. The divergence seems to stem from the fact that disputes over the meaning of "legally entitled to recover" usually arise in suits between the insured and his own insurance company, are based on the contract of insurance, and thus implicate contract as well as tort law.

Hence as against his own insurance company, some jurisdictions do not require the insured to demonstrate in every particular his ability to maintain a successful tort action against the uninsured motorist in order to compel the insurance company to pay; he is required only to show that he was injured by the negligence of the uninsured motorist. In these jurisdictions, the insurance company is not permitted to assert every defense or immunity that the uninsured tortfeasor himself would have if he were actually sued. *See, e.g., Allstate Ins. Co. v. Elkins*, 396 N.E.2d 528 (Ill. 1979); *Widiss, Uninsured Motorist Coverage, supra* note 249, at 425-29. Common examples are interspousal and intrafamilial tort immunity and defenses based on host-guest statutes, statutes of limitations, and contributory negligence. As these courts frequently say, the insurance company, when sued by its insured, does not step into the shoes of the actual tortfeasor. *See, e.g., Sahloff v. Western Cas. & Sur. Co.*, 171 N.W.2d 914, 918 (Wis. 1969). Thus in one of these states, if it were also one retaining interspousal tort immunity, a husband injured in a car accident by the negligence of his uninsured wife would not be "legally entitled to recover" from her for his injuries. But he would be able to recover from his insurance company under his uninsured motorist coverage because the company would not be permitted to assert the bar of interspousal tort immunity. *See, e.g., Elkins*, 396 N.E.2d at 531. States taking this view, in short, construe the words "legally entitled to recover" very liberally in order to permit recovery wherever possible.

264. Uninsured motorist coverage was first mandated in ch. 61-175, § 1, 1961 Fla. Laws 291, 292-93 (codified at FLA. STAT. § 627.0851 (1961)) (current version at FLA. STAT. § 627.727 (1983)). The original bill passed the Florida Senate without opposition and the House with only six nay votes. Fla. SB 907, FLA. S. JOUR. 1353, FLA. H.R. JOUR. 2200 (Reg. Sess. 1961). The bill became law on July 1, 1961, without the approval of then Governor Farris Bryant. To date, the legislature has considered 29 substantive changes in the statute, of which 15 have been enacted. For the enacted changes, see ch. 63-148, § 1, 1963 Fla. Laws

It seems settled, then, that in Florida the purpose of uninsured

307, 307-08 (amending subsection (1) of the existing statute to provide that the initial rejection of uninsured motorist coverage applied to a renewal policy unless otherwise requested in writing by the insured); ch. 70-20, § 19, 1970 Fla. Laws 91, 102 (substantially rewriting subsection (4) to provide a method of payment for uninsured motorist claims against an insolvent insurer under the Florida Insurance Guaranty Association Act); ch. 71-88, § 1, 1971 Fla. Laws 222, 222-23 (amending subsection (1) to allow coverage up to 100% of the insured's liability coverage, to allow the insured to select the amount of coverage, to give a long-term lessee the sole right to reject coverage, and to provide that coverage is excess over but not duplicative of other benefits); ch. 71-355, § 182, 1971 Fla. Laws 1593, 1692 (correcting typographical errors only); ch. 71-970, § 20, 1972 Fla. Laws 12, 24 (substantially rewriting subsection (4) (original enactment at ch. 70-20, § 19, 1970 Fla. Laws 91, 102; statute reenacted as part of extraordinary session revision to Florida Insurance Guaranty Association Act to correct constitutional deficiencies); ch. 73-180, §§ 3-4, 1973 Fla. Laws 366, 366-67 (amending subsection (1) to provide that uninsured vehicle coverage shall not be less than liability coverage unless insured selects a lower limit; amending subsection (2) to provide that uninsured vehicle coverage includes underinsured coverage); ch. 76-266, § 3, 1976 Fla. Laws 716, 719-20 (amending subsection (1) to remove provisions concerning the limits of coverage; creating new subsection (2) to provide that limits shall not be less than the insured's bodily injury liability and allowing insured to select limits up to a named amount; renumbering subsequent subsections); ch. 77-468, § 30, 1977 Fla. Laws 2057, 2074-75 (amending subsection (3) to include an underinsured vehicle owned by the insured within the definition of an uninsured vehicle; creating subsection (6), providing for arbitration of claims against insurer, providing for suits at law, and providing that any award against insurer is excess over the insured's liability coverage; creating subsection (7), providing that legal liability of an uninsured motorist insurer shall not include tort damages for pain, suffering, mental anguish, and inconvenience under certain conditions); ch. 78-374, § 1, 1978 Fla. Laws 1041, 1041-42 (amending subsection (7) to limit circumstances in which tort damages may be claimed); ch. 79-241, §§ 2-3, 1979 Fla. Laws 1364, 1364-65 (amending subsection (1), providing that uninsured motorist coverage is over and above rather than excess over other benefits and that only underinsured motorist liability insurance shall be set off against underinsured motorist coverage); ch. 80-396, §§ 1-2, 1980 Fla. Laws 1587, 1587-88 (amending subsection (1) to provide that uninsured coverage information need not be provided where there is a change in the policy and to require the insurer to offer coverage yearly with the premium notice); ch. 82-243, § 544, 1982 Fla. Laws 1289, 1554-56 (amending subsection (1) to eliminate the provision that uninsured motorist coverage is for the protection of those "legally entitled to recover" and to require that rejection of coverage be in writing; amending subsection (2) to require that underinsured coverage be offered; amending subsection (6) to clarify its applicability to underinsured claims only; and creating subsection (8) to allow attorney's fees in cases of disputed claims); ch. 82-386, § 66, 1982 Fla. Laws 2089, 2110-12 (amending subsection (1) to correct technical errors in ch. 82-243, § 544, 1982 Fla. Laws 1289, 1554-56 (reinserting "legally entitled to recover" language; amending subsection (2) to clarify underinsured coverage limits)). These last two amendments were enacted by the 1982 legislature in Special Sessions F and G, during which the entire insurance code was reviewed under the Sunset Law. While ch. 82-243, 1982 Fla. Laws 1289, contains many technical errors, the deletion of the "legally entitled to recover" language was not a technical error in the inadvertent sense. The language was struck in the original House version of the bill. Fla. HB 4F, FLA. H.R. JOUR. 4, FLA. S. JOUR. 3, 4 (Spec. Sess. Apr. 7, 1982). As neither the Senate Commerce Committee nor the House Insurance Committee reports even mention the removal or reinstatement of this language, it may be that it was considered surplusage by the drafters. See Fla. S., Committee on Commerce, Insurance Sunset, 1982 Staff Report at 9; Fla. H.R., Committee on Insurance Code and Related Laws, 1982 Staff Report at 92-93. Whatever the reason, the "legally entitled to recover" language

motorist coverage is to put the insured in the same position he would have been in had the offending motorist had liability insurance, but no better. Mrs. Olsen's right to recover from State Farm was therefore measured by her underlying right to recover in tort from the Illinois uninsured motorist. It is for this reason that the court viewed *Olsen* as essentially posing a conflicts question in tort, even though the actual tortfeasor was not a party and the suit itself appeared to involve a contractual dispute between those who were parties over the interpretation of language in an insurance policy.²⁶⁵

was immediately reinserted in the statute. Fla. HB 10G, FLA. H.R. JOUR. 18, FLA. S. JOUR. 10-11 (Spec. Sess. May 21, 1982). Further changes, not affecting the "legally entitled to recover" language, were enacted in the 1984 legislative session. See Fla. CS for HB 319, § 1 (effective Oct. 1, 1984), FLA. S. JOUR. 214, FLA. H.R. JOUR. 146 (Reg. Sess. 1984).

Of the fourteen amendments to the statute that have been proposed but not enacted since 1961, none would have affected the "legally entitled to recover language." Reading chronologically, for the proposed legislative amendments see Fla. SB 579, FLA. S. JOUR. 759-60, FLA. H.R. JOUR. 1898 (Reg. Sess. 1963); Fla. HB 2104, FLA. H.R. JOUR. 894 (Reg. Sess. 1965); Fla. HB 1093, FLA. H.R. JOUR. 895 (Reg. Sess. 1965); Fla. SB 574, FLA. S. JOUR. 172-73, 236 (Reg. Sess. 1967); Fla. HB 735 (companion bill to Fla. SB 574), FLA. H.R. JOUR. 193, 508 (Reg. Sess. 1967); FLA. SB 663, FLA. S. JOUR. 130, 192, 210 (Reg. Sess. 1969); Fla. HB 1050, FLA. H.R. JOUR. 154 (Reg. Sess. 1971); Fla. HB 2746, FLA. H.R. JOUR. 437 (Reg. Sess. 1972); Fla. HB 1094, FLA. H.R. JOUR. 134 (Reg. Sess. 1977); Fla. SB 182, FLA. S. JOUR. 25, 120 (Reg. Sess. 1978); Fla. HB 1477, FLA. H.R. JOUR. 225 (Reg. Sess. 1978); Fla. SB 1251, FLA. S. JOUR. 249 (Reg. Sess. 1979); Fla. SB 807, FLA. S. JOUR. 121 (Reg. Sess. 1979); Fla. SB 740, FLA. S. JOUR. 103 (Reg. Sess. 1983); Fla. HB 1104, FLA. H.R. JOUR. 219, 292 (Reg. Sess. 1983). That the legislature is not only aware of judicial decisions affecting the insurance code but can also draft language when necessary to make clear its intent, is illustrated by two introduced but not enacted bills dealing with related matters. The first bill was introduced in 1976 and contained an amendment citing *Lasky v. State Farm Mut. Auto. Ins. Co.*, 296 So. 2d 9 (Fla. 1974); *Tucker v. Government Employees Ins. Co.*, 288 So. 2d 238 (Fla. 1973); *Kluger v. White*, 281 So. 2d 1 (Fla. 1973); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); and *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969). See Fla. C.S. for HB's 2825, 3042, 3043, 3044, and 3155, amend. 2, FLA. S. JOUR. 535-38, FLA. H.R. JOUR. 1076-79 (Reg. Sess. 1976) (amendment struck in conference committee). The second, relating to automobile liability insurance, provided that in a direct action against an insurance company, the insurer could employ any defenses available to the insured and any defenses arising under the policy, including any which would arise in a suit by the insured, if such defenses were not inconsistent with Florida Law. See Fla. SB 255, FLA. S. JOUR. 20 (Reg. Sess. 1971); Fla. H.R., Insurance Committee Related Files (1971), Series 19, Box 171 (on file with Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

Finally, a comprehensive review of the tapes and documents available in the Florida Archives failed to reveal any expression of legislative intent regarding the circumstances under which an insured would be "legally entitled to recover," but did reveal that the language had been specifically considered in committee. See Fla. S., Commerce Committee Misc. File (1973), Series 18, Box 38; and Materials Pertaining to Fla. HB 1821 (Reg. Sess. 1971), Series 19, Box 168 (both on file with Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

265. Conceptualizing the issue in *Olsen* involves something very like *renvoi*. See *supra* notes 41-51 and accompanying text. Assuming that Florida "law" determines whether an

C. *The Constitutional and Methodological Implications of the Court's Choice-of-Law Decision in Olsen: Could Florida Law Have Been Applied?*

Determining the position an insured would be in if the uninsured tortfeasor had been insured is obviously a matter of imagining a lawsuit. Thus the underlying question in *Olsen*, to which resolution of the conflicts question was sharply relevant until Illinois changed its law, was whether Mrs. Olsen could maintain a wrongful death action in tort directly against the Illinois uninsured motorist whose negligence in some unspecified degree contributed to her husband's death in an Illinois automobile accident. If she could, then she would be "legally entitled to recover," and State Farm would have to pay. Phrased another way, would it have done her any good if the offending Illinois motorist had carried liability insurance?

All the court had to do to answer this question was to imagine the probable outcome of a direct action by Mrs. Olsen against the Illinois tortfeasor. Everyone seemed to assume that any attempt to sue in Illinois would result in dismissal because of her husband's contributory negligence. That assumption seems warranted. At the time, Illinois was not only a contributory negligence state, but one that required the plaintiff in a tort action to affirmatively plead his own freedom from negligence,²⁶⁶ an impossibility for Mrs. Olsen. From a jurisdictional standpoint, Illinois, as both the place of the

insured is "legally entitled to recover," the real question is whether that law is Florida's local law—i.e., comparative negligence—or its whole law, including its conflicts rules. The answer to that question in *Olsen* was supplied by the court's steadily adhered to conception of the purpose of uninsured motorist coverage—to put the insured motorist in the same position he would have been in had the uninsured motorist been insured—which necessarily required a determination of what the insured could have recovered in a direct action against the uninsured tortfeasor. In a case involving an out-of-state accident, this determination brings into play Florida's conflicts rules. Hence the reference to Florida law is to its whole law. Under *lex loci delicti*, Florida's conflicts rule when the policy was issued and when the accident occurred, "legal entitlement" would undoubtedly have been measured by the law of the place of injury, Illinois. After *Bishop*, presumably retroactive since the court made no provision otherwise, the question of whose law would govern in such a case was no longer clear. This was the issue the court addressed in *Olsen*.

266. *Hanson v. Trust Co.*, 43 N.E.2d 931, 933 (Ill. 1942) (incumbent upon plaintiff to allege and prove that he was in the exercise of due care for his own safety at the time of the accident); *Angelive v. Snow*, 374 N.E.2d 215, 216 (Ill. App. Ct. 1978) (law of Illinois "requires that a plaintiff in a negligence action must plead freedom from contributory negligence") (citing *Schmidt v. Blackwell*, 304 N.E.2d 113 (Ill. App. Ct. 1973)); *Williams v. Rock River Sav. & Loan Ass'n*, 200 N.E.2d 848 (Ill. App. Ct. 1964) (complaint not alleging freedom from contributory negligence fails to state cause of action); see also 28 ILLINOIS LAW & PRACTICE *Negligence* § 184 (1957); 4 ILLINOIS LAW § 34-64, at 132-33 (L. Davis ed. 1971).

wrong and the residence of the defendant, would certainly be a proper forum.²⁶⁷ But it seems unthinkable that an Illinois court would fail to apply its own law in a tort action against its own resident arising out of an Illinois accident. That left Florida as the only possible forum. And the answer there, so far as Mrs. Olsen's "legal entitlement" to damages was concerned, seemed to depend on the choice of Florida's comparative negligence standard as the governing substantive law.

In itself, the fact that this imaginary lawsuit presents a paradigm true conflict needs little elaboration. Application of Florida law would certainly further Florida's policy of compensating its negligently injured residents by comparative negligence standards; that policy, moreover, is strongly held, if one may judge from *Hoffman v. Jones*.²⁶⁸ On the other hand, Illinois' interest in applying its contributory negligence standard to protect an Illinois resident whose conduct would not have subjected him to liability in Illinois, where it occurred, is equally apparent. In fact, it would be hard to put a case where Illinois' interest in the application of its contributory negligence standard would be stronger. There is something powerfully offensive about the notion that a resident of a state who acts there in conformity with its laws can be subjected to liability for those acts in a distant state with which he has no connection. Certainly in *Olsen*, in its application of the second *Restatement* test, the court took this fact into account: "Illinois has an interest in the rights of its citizens who are subject to subrogation by the insurer on any uninsured motorist coverage it pays, which interest, in this case, is paramount to the relevant policies of Florida as the forum state."²⁶⁹ In this way the court was guided toward the right result, but quite possibly for the wrong reasons. In analyzing the case under the second *Restatement* as it did, the court appeared to overlook the point that Illinois' interest was so strong that it may have had not just the most significant relationship to the occurrence and the parties, but, in a constitutional sense, the only significant relationship. In other words, the court may not have had the constitutional power to make a choice-of-law determination.

1. *The Absence of Choice-of-Law Jurisdiction*

This point can be focused initially in the context of Mrs. Olsen's

267. See, e.g., *Nevada v. Hall*, 440 U.S. 410 (1979).

268. 280 So. 2d 431 (Fla. 1973).

269. *Olsen*, 406 So. 2d at 1111.

imaginary lawsuit by asking how she could have subjected the Illinois uninsured motorist to personal jurisdiction in a Florida court. Granted in the actual case there was no problem with personal jurisdiction, Mrs. Olsen being a Florida resident and State Farm being present in Florida and conducting substantial business activities here (indeed having itself initiated this suit and of course being the party who would ultimately have to satisfy Mrs. Olsen's claim if she prevailed). But Florida appears committed to testing an insured's right to recover from his company by his right to recover from the uninsured motorist. Nothing in the published opinions suggests that this particular Illinois uninsured motorist had any connection with Florida, owned any property here, or had ever so much as set foot in the state. How, then, could Mrs. Olsen be "legally entitled" to recover from such a person, even assuming a Florida court willing to apply Florida's comparative negligence standard to her suit? And if she could not, then the case should logically have been disposed of on that ground without reaching an unnecessary choice between Illinois and Florida law.

That this objection is hardly factitious is illustrated by the Iowa Supreme Court's decision in *Hall v. Allied Mutual Insurance Co.*²⁷⁰ In that case, two Iowa residents were killed in an accident caused by the negligence of a Texas uninsured motorist. The fatal collision occurred in Oklahoma. The decedents' insurance policy, containing the standard uninsured motorist language, had been issued in Iowa by Allied, itself an Iowa-based insurance company. Plaintiff, decedents' personal representative, sued Allied in Iowa, seeking a determination that the damages he was "legally entitled to recover" under the policy should be measured by Iowa's wrongful death statute rather than Oklahoma's, Iowa's statute being much more liberal in the kind and amount of damages recoverable than Oklahoma's.²⁷¹ He argued that under Iowa's "grouping of contacts" or "center of gravity" interest analysis approach to conflicts resolution, Iowa was the state "most intimately concerned" with the litigation, since the insurance contract had been entered into in Iowa between an Iowa insurer and Iowa residents.²⁷² Allied contended that the plaintiff was entitled to no more from it than he could have recovered in an action against the Texas uninsured tortfeasor and that its "obligation to pay must be measured by the

270. 158 N.W.2d 107 (Iowa 1968).

271. *Id.* at 109.

272. *Id.*

damages for which the uninsured motorist is legally liable since it is his liability that sets the amount and extent of . . . [the company's] liability."²⁷³

The court agreed with Allied's contention; it then held that Oklahoma law supplied the measure of damages. It noted that the Texas uninsured motorist had never set foot in Iowa and that "under the pleadings and stipulated facts there . . . [was] no reasonable basis for finding an action could have been maintained in Iowa" against that person.²⁷⁴ That left only Texas, the tortfeasor's residence, and Oklahoma, the place of injury, as possible forums in which the tortfeasor could be sued. The court found that both Texas and Oklahoma were place-of-the-wrong rule jurisdictions and that each would thus apply Oklahoma law.²⁷⁵ The plaintiff's contention, the court said, "presents a conflicts problem which we do not believe belongs in the present case. . . . Determination of . . . [the measure of damages] does not involve a conflicts problem."²⁷⁶ Note that the court did not "choose" between Oklahoma and Iowa law; it applied Oklahoma law because, like Florida, Iowa measures an insured's right to recover against his insurance company by his right to recover in a direct action against the uninsured tortfeasor. That right could never have been actually exercised in Iowa because there was no basis for subjecting the Texas uninsured motorist to personal jurisdiction there.

In *Olsen*, this point was equally important: though any jurisdictional defect was rendered harmless by the ultimate choice of Illinois law as controlling, the fact that the court presumed to choose at all implies that it might have chosen differently, indeed almost certainly could have, given the inherent flexibility of the second *Restatement*. Yet it seems almost too obvious to state that no constitutionally valid judgment could have been rendered by a Florida court under Florida law against an out-of-state defendant over whom there was no personal jurisdiction. It is not possible to say that the absence of judicial jurisdiction means that a court cannot constitutionally choose to apply its own law, simply because the Supreme Court, in its sporadic and unsatisfactory treatment of the question and its failure to articulate the relationship between judicial and choice-of-law jurisdiction, has never said so.²⁷⁷ But the

273. *Id.*

274. *Id.* at 110.

275. *Id.*

276. *Id.* at 111.

277. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Clay v. Sun Ins. Office, Ltd.*, 377

Court's more frequent and coherent pronouncements in its judicial jurisdiction decisions suggest that this will be the practical effect in all cases where such jurisdiction is lacking.

Several cases illustrate this point. In *Hanson v. Denckla*,²⁷⁸ which denied Florida's exercise of personal jurisdiction over a Delaware defendant in a case that otherwise had substantial connections with Florida, the Court emphasized in language that has become increasingly important that the defendant must "purposefully [avail] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."²⁷⁹ Because the Court found no such purposeful availment by the Delaware trustee in Florida, it found it unnecessary to consider the question whether Florida also lacked the necessary contacts with the trust agreement to determine its validity under Florida law. Florida, the Court said, does not acquire personal jurisdiction "by being the 'center of gravity' of the controversy The issue is personal jurisdiction, not choice of law."²⁸⁰

Rush v. Savchuk,²⁸¹ much closer on its facts to *Olsen*, is particularly instructive. Rush, as driver, and Savchuk, as passenger, both Indiana residents, were involved in a single-car accident in Indiana. Indiana had a guest statute that would have barred any claim by Savchuk against Rush; it was also a contributory negligence state. Savchuk subsequently moved with his parents to Minnesota and about a year after the move commenced an action there against Rush. Minnesota had no guest statute and was a comparative negligence state. To obtain personal jurisdiction over Rush, who had no contacts whatever with Minnesota, Savchuk employed the technique used in *Seider v. Roth*²⁸² and attached Rush's liabil-

U.S. 179 (1964); *Carroll v. Lanza*, 349 U.S. 408 (1955); *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66 (1954); *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947); *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939); *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). These cases are all discussed in *Hague*. See also E. SCOLAS & P. HAY, *supra* note 4, §§ 3.20-.28; Korn, *supra* note 40, at 785-87, 786 n.31; Reese, *supra* note 248.

278. 357 U.S. 235 (1958).

279. *Id.* at 253.

280. *Id.* at 254.

281. 444 U.S. 320 (1980).

282. 216 N.E.2d 312 (N.Y. 1966) (overruled in *Rush*). This was a form of quasi in rem jurisdiction in which the plaintiff in an automobile accident case could attach as a form of property the obligation of defendant's liability insurer to defend and indemnify in any state in which the insurer was present and doing business. Liability in such a suit was restricted to the policy limits. See *Rush v. Savchuk*, 444 U.S. 320, 326-27 & nn.10-13 (1980) (only New York and Minnesota fully adhere to *Seider*-type jurisdiction).

ity insurance policy, which had been issued in Indiana by State Farm Mutual Automobile Insurance Company, present and doing business in Minnesota as well as in every other state. Not only did the Minnesota courts sustain *Seider*-based personal jurisdiction over Rush, but plainly indicated as well that when and if the merits were reached, Minnesota law would be applied, using one of the new conflicts methodologies, Professor Leflar's "better law" approach.²⁸³

Repeating the injunction of *Shaffer v. Heitner* that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe*"²⁸⁴ and noting that the defendant Rush had "engaged in . . . [no] purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable,"²⁸⁵ the Supreme Court found that Minnesota's version of *Seider* jurisdiction violated the due process clause.²⁸⁶ So far as Minnesota's legislative jurisdiction to apply its own law was concerned, the Court said only in a footnote that "[t]he constitutionality of a choice-of-law rule that would apply forum law in these circumstances is not before us."²⁸⁷ But as in *Hanson*, the effect of the Court's decision denying Minnesota judicial jurisdiction was also to deny Minnesota an opportunity ever to apply its own law unless Rush either voluntarily appeared or was found and served while physically present in Minnesota.

283. See *Savchuk v. Rush*, 272 N.W.2d 888, 891-92 (Minn. 1978), *rev'd*, 444 U.S. 320 (1980). Minnesota adopted Professor Robert Leflar's "better law" approach in *Kopp v. Rechtzigel*, 141 N.W.2d 526 (Minn. 1966). It is an approach reminiscent of the second *Restatement*, though scaled down considerably, and employs five choice-influencing considerations: (a) predictability of results; (b) maintenance of interstate and international order; (c) simplification of the judicial task; (d) advancement of the forum's governmental interests; and (e) application of the better rule of law. See Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1585-88 (1966). The most controversial of these considerations has been the "better law" factor. See, e.g., von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 952 (1975). *But cf.* Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 298-300 (1966). Three states—Minnesota, New Hampshire, and Wisconsin—have adopted this approach. See *Kay*, *supra* note 145, at 591-92.

284. *Rush*, 444 U.S. at 327 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977)). *Shaffer* had of course quoted Chief Justice Stone's classic formulation in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), to the effect that constitutionally sufficient in personam jurisdiction under the fourteenth amendment due process clause required "certain minimum contacts with . . . [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Shaffer*, 433 U.S. at 203.

285. *Rush*, 444 U.S. at 329 (citing *Kulko v. California Super. Ct.*, 436 U.S. 84 (1978), and *Hanson v. Denckla*, 357 U.S. 235 (1958)).

286. *Rush*, 444 U.S. at 332.

287. *Id.* at 325 n.8.

*Shaffer v. Heitner*²⁸⁸ and *Kulko v. Superior Court*²⁸⁹ make the same point. In each case the Court acknowledged the forum state's interest in applying its law, but by denying judicial jurisdiction deprived it of the opportunity to effectuate that interest. These cases—*Hanson, Rush, Shaffer, and Kulko*—all suggest that judicial jurisdiction is a prerequisite to the making of a choice-of-law decision. What they suggest with respect to *Olsen* is that the Florida Supreme Court made an unnecessary and ineffectual choice-of-law determination. Without a showing of ability on Mrs. Olsen's part to assert personal jurisdiction over the Illinois uninsured motorist, the court had no effective power to choose between Illinois and Florida law to govern the case. Illinois law should have been applied, not because the second *Restatement* said so, but because Illinois was the only state with power to hear and determine the merits of Mrs. Olsen's claim against the Illinois tortfeasor and would have applied its own law in doing so.

What relationship a state must have with a lawsuit before it can constitutionally choose to apply its own law was directly considered by the Supreme Court in 1981 in *Allstate Insurance Co. v. Hague*.²⁹⁰ As the Court's first major decision in choice of law since 1964,²⁹¹ it is obviously a case of considerable importance. But it left much unclear. It appears to say that as long as there is jurisdiction to adjudicate, very little else in the way of contacts or connection with a dispute is required. Ralph Hague, a Wisconsin resident, was injured when the motorcycle on which he was riding as a passenger was negligently struck by a car. He subsequently died of his injuries. The accident occurred in Wisconsin, and both the op-

288. *Shaffer*, 433 U.S. at 216 (Heitner's arguments establish "only that it is appropriate for Delaware law to govern the obligations of appellants to Greyhound and its stockholders").

289. *Kulko*, 436 U.S. at 98 ("fact that California may be the 'center of gravity' for choice-of-law purposes does not mean that California has personal jurisdiction over the defendant").

290. 449 U.S. 302 (1981).

291. The last legislative jurisdiction case was *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964). Scholarly reaction to *Hague* was immediate and fecund. See, e.g., *Symposium: Choice-of-Law Theory After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 1 (1981) (articles by Professors Cavers, Weintraub, von Mehren and Trautman, Sedler, Silberman, Martin, Twerski, Davies, Reese, and Leflar); *Choice of Law: A Symposium*, 14 U.C.D. L. REV. 837 (1981) (articles by Professors Juenger, Lowenfeld and Silberman, Peterson, and Kozyris); Allo, *Allstate Insurance Co. v. Hague: An Unprovided-for-Case in the Supreme Court*, 32 CASE W. RES. L. REV. 1 (1981); Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960 (1981); Korn, *supra* note 40, at 795-99; Shreve, *In Search of a Choice-of-Law Reviewing Standard—Reflections on Allstate Insurance Co. v. Hague*, 66 MINN. L. REV. 327 (1982).

erator of the motorcycle (Hague's son) and the driver of the car were Wisconsin residents. Neither the motorcycle nor the car was insured. Hague, however, owned three cars and carried a single insurance policy covering all three with Allstate Insurance Company. The policy was written and delivered in Wisconsin and contained uninsured motorist coverage in the amount of \$15,000 per vehicle.²⁹²

Although Hague was a Wisconsin resident, he had been employed in the nearby town of Red Wing, Minnesota, for fifteen years prior to the accident, commuting a mile and a half daily across the Mississippi River between Red Wing and Hager City, Wisconsin, where he resided. After his death, Hague's widow moved to Minnesota, where a Minnesota probate court appointed her personal representative of her deceased husband's estate. She then instituted a declaratory judgment action in that court against Allstate in which she sought to aggregate (or "stack") her husband's separate uninsured motorist coverages of \$15,000 each for a total recovery of \$45,000. Stacking was permitted under Minnesota law, but prohibited by Wisconsin's. Allstate argued that Wisconsin's antistacking rule governed because the policy had been issued in Wisconsin, the accident occurred there, and all persons involved were residents of Wisconsin at the time of the accident.²⁹³ But the trial court found for Mrs. Hague, and its judgment was affirmed on appeal by the Minnesota Supreme Court, which employed its "better law" approach to conflicts problems and found Minnesota law preferable because it spread losses caused by uninsured motorists more broadly than did Wisconsin's.²⁹⁴

The Supreme Court affirmed. Eight members of the Court participated in the decision. Justice Brennan wrote a plurality opinion for himself and Justices White, Marshall, and Blackmun. Justice Stevens concurred in a separate opinion. Justice Powell dissented in an opinion joined by the Chief Justice and Justice Rehnquist. In light of this serious division, there was surprisingly little disagreement with two basic propositions: that the fourteenth amendment due process clause governed, subsuming whatever requirements the full faith and credit clause might impose;²⁹⁵ and that, in the plural-

292. *Hague*, 449 U.S. at 305.

293. *Id.* at 305-06.

294. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1978), *aff'd*, 449 U.S. 302 (1981).

295. *Hague*, 449 U.S. at 308 & n.10 (opinion of Brennan, J.); *id.* at 332 (Powell, J., dissenting). Justice Stevens concurred in the judgment of the Court only, expressing his view

ity's words, "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."²⁹⁶

The split occurred over the sufficiency of Minnesota's contacts. The plurality identified three which, in the aggregate, sufficed for application of Minnesota law. The first was Ralph Hague's membership in Minnesota's work force for the fifteen years preceding his death.²⁹⁷ The second was Allstate's jurisdictional presence in Minnesota.²⁹⁸ And the third was Mrs. Hague's status as a resident of Minnesota.²⁹⁹ Justice Powell, for the dissenters, simply found the contacts with Minnesota either constitutionally irrelevant or too trivial to justify application of that state's law. He termed Mrs. Hague's post-occurrence move to Minnesota constitutionally irrelevant and without significance.³⁰⁰ The argument based on Allstate's presence proved too much, for the insurer was present in all fifty states.³⁰¹ And while employment status might be important in some cases, "[n]either the nature of the insurance policy, the events related to the accident, nor the immediate question of stacking coverage is in any way affected or implicated by the insured's employment status."³⁰²

Hague was conceptualized throughout, in the Supreme Court and in the courts of Minnesota, as a choice-of-law problem in contract interpretation, not in tort. Because Mrs. Hague was suing Allstate directly, and because Allstate was present in Minnesota, the problem with judicial jurisdiction that *Olsen* presents did not arise. But dicta in the opinions confirm the view that a court must first have the jurisdiction to adjudicate a controversy before it can make a choice-of-law decision to apply its own law. In discussing Allstate's jurisdictional presence in Minnesota, the plurality added in a footnote that "examination of a State's contacts may result in divergent conclusions for jurisdiction and choice-of-law pur-

that "the two constitutional provisions protect different interests and that proper analysis requires separate consideration of each." *Id.* at 322 (Stevens, J., concurring).

296. *Id.* at 312-13 (opinion of Brennan, J.); *id.* at 332, 335-36 & n.10 (Powell, J., dissenting).

297. *Id.* at 313.

298. *Id.* at 317-18.

299. *Id.* at 318-19.

300. *Id.* at 337 (Powell, J., dissenting).

301. *Id.* at 337-38.

302. *Id.* at 338-39.

poses. . . Here, of course, jurisdiction in the Minnesota courts is unquestioned, a factor not without significance in assessing the constitutionality of Minnesota's choice of its own substantive law."³⁰³

In his concurrence, Justice Stevens observed that the "choice-of-law issue arise[s] only after it is assumed or established that the defendant's contacts with the forum State are sufficient to support personal jurisdiction."³⁰⁴ At another point he stated that a "forum State's interest in the fair and efficient administration of justice is . . . sufficient . . . to attach a presumption of validity to . . . [its] decision to apply its own law to a dispute over which it has jurisdiction."³⁰⁵ In his dissenting opinion, Justice Powell argued by analogy to *John Hancock Mutual Life Insurance Co. v. Yates* that Mrs. Hague's post-occurrence move was constitutionally irrelevant for choice-of-law purposes though "crucial for the exercise of in personam jurisdiction."³⁰⁶ At another point, in contending that no legitimate interest of Minnesota's was served by application of its law, he stated that the "forum State's application of its own law to this case cannot be justified by the existence of relevant minimum contacts."³⁰⁷

All of these statements support the conclusion that the presence of judicial jurisdiction is crucial to the constitutionality of a choice-of-law decision. Four members of the Court—the plurality in *Hague*—appear to believe that the presence of judicial jurisdiction is almost, if not quite, sufficient to validate a forum's choice-of-law decision. Justice Stevens, echoing Brainerd Currie's view, would attach a "presumption of validity" to a forum's decision to apply its own law to a dispute over which it had judicial jurisdiction. And the minority in *Hague*, though unwilling to equate the presence of judicial jurisdiction with the power to make a choice-of-law determination, nevertheless said nothing to deny its importance. What was not actually said, but is clearly inferable, is that the absence of judicial jurisdiction is fatal in a constitutional sense to a forum's choice of its own law.³⁰⁸

303. *Id.* at 317 n.23 (citations omitted).

304. *Id.* at 320 n.3 (Stevens, J., concurring).

305. *Id.* at 326.

306. *Id.* at 338 n.4 (Powell, J., dissenting) (citing *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936)).

307. *Hague*, 449 U.S. at 339 n.6 (Powell, J., dissenting).

308. In concluding that there was a sufficient aggregation of contacts to support application of Minnesota law, the plurality expressly preserved this point: "We express no view whether the first two contacts, either together or separately, would have sufficed to sustain

This analysis suggests several conclusions in regard to the court's treatment of *Olsen* as presenting an issue in choice of law. Given the absence of any basis for supposing that personal jurisdiction could have been asserted over the Illinois tortfeasor, coupled with the court's consistent interpretation of "legally entitled to recover" as measuring recovery from the insurer by the insured's apparent actual ability to recover in tort from the uninsured motorist, the court could not have constitutionally applied Florida's substantive law even if it had wished to do so. There was lacking the necessary judicial jurisdiction over the Illinois tortfeasor to validate that determination. Moreover, in "choosing" Illinois law to govern through the mechanism of the second *Restatement*, the court misleadingly suggested that it had the power to choose, when in fact Illinois was the only state whose law could constitutionally have been applied.

2. *An Arguendo Assumption of Personal Jurisdiction*

The most likely answer to these objections is that the court was willing to assume, *arguendo*, the existence of personal jurisdiction over the Illinois tortfeasor in order to decide the choice-of-law question that such a case would present.³⁰⁹ This is an assumption

the choice of Minnesota law" *Id.* at 320 n.29. The two contacts referred to were Ralph Hague's employment in Minnesota and Allstate's presence in that state.

309. There is another, less likely possibility, stemming from the fact that the court did have jurisdiction over State Farm, the party who would actually satisfy Mrs. Olsen's claim if she could be said to be "legally entitled to recover" against the Illinois tortfeasor. The court may have attributed State Farm's jurisdictional presence to the Illinois "defendant" for purposes of making a choice-of-law decision. There is some suggestion of this in the court's § 6 analysis, in which it was said that Illinois had an interest, not in the rights of its citizens being sued elsewhere for acts that would not subject them to liability in Illinois, where committed, but rather in the rights of such citizens "who are subject to subrogation by the insurer on any uninsured motorist coverage it pays." *Olsen*, 406 So. 2d at 1111.

An attribution theory of this sort would resemble the *Seider*-based jurisdiction which the Minnesota courts unsuccessfully attempted to employ in *Rush v. Savchuk*, 444 U.S. 320 (1980), *rev'g* 272 N.W.2d 888 (Minn. 1978). This now-defunct quasi in rem theory uses the unrelated presence in a state of an out-of-state defendant's insurance company as a way of reaching the defendant himself, by attaching the company's obligation to indemnify under the insurance policy. But in *Rush*, the Supreme Court made clear that "considering the 'defending parties' together and aggregating their forum contacts" was "plainly unconstitutional. . . . The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction." *Rush*, 444 U.S. at 331-32. Nor would the Court permit this kind of attribution on the theory that attaching the insurance company's obligation was the functional equivalent of a direct action against the insurer in which the actual tortfeasor was no more than a "nominal defendant" who would incur no personal liability. *Id.* at 330. Jurisdiction over the "nominal defendant," the Court said, was analytically prerequisite to reaching the insurer, and, "[i]f the Constitution forbids the assertion of

that the form of the certified question itself invited,³¹⁰ and it makes sense of the actual decision. It enabled the court to supply considerable content to the newly adopted "most significant relationship" test of the second *Restatement*. *Bishop*, after all, decided nothing, although it did pretty well indicate what the result should be in false conflict cases. *Olsen*, on the other hand, presented an opportunity not only to apply the new methodology, but to do so in a case of true conflict.

Assuming away the jurisdictional defect casts *Olsen* in its most interesting and instructive light. It enables us to ask whether, in such a suit, Florida law could constitutionally have been applied and, if so, what the court's refusal to do so tells us about its approach to conflicts resolution under the second *Restatement*. To explore these questions, we assume that Mrs. Olsen could have obtained personal jurisdiction over the Illinois tortfeasor in one of the usual ways—because he voluntarily appeared, owned property in Florida,³¹¹ moved there after the accident, or was found and

jurisdiction over the insured based on the policy, then there is no conceptual basis for bringing . . . [the insurance company] into the action." *Id.* at 330-31. Analogized to *Olsen*, this would mean that actual personal jurisdiction over the Illinois tortfeasor would still be necessary before a constitutionally valid choice of Florida law could be made and State Farm required to pay.

There is this difference, however. Unlike a typical *Seider* situation, and unlike the situation in *Rush*, State Farm's presence in Florida was not unrelated to the underlying cause of action against the Illinois uninsured motorist; its obligation to indemnify, the basis of *Seider* quasi in rem jurisdiction, did not run to the Illinois defendant but to Mrs. Olsen, based on its insurance contract issued in Florida to her husband. There is still another difference—one that distinctly cuts the other way. In *Rush*, the "nominal defendant" would have incurred no personal liability. Here, by contract, State Farm would have been subrogated to whatever claim Mrs. Olsen had against the Illinois tortfeasor, either exposing that individual to the potential hazards of a subrogation suit based on a claim that could never have been enforced directly against him, or, more likely, depriving State Farm of its contractual right to subrogation, a result that might itself present due process problems. The real constitutional vice in *Rush*—and the vice of the now-defunct *Seider*-based jurisdiction—lay in subjecting an individual to the adjudicatory power of a state with which he had nothing to do. That same vice would be present in *Olsen* on this theory, since it nowhere appears that the Illinois uninsured motorist had any connection whatever with the state of Florida.

310. The question certified was, "In a personal injury suit filed in Florida for a tort alleged to have occurred outside of Florida, can the contributory negligence defense bar recovery?" *Olsen*, 406 So. 2d at 1110. The meaning of the phrase, "personal injury suit filed in Florida," is not clear. It could be taken to imply a suit in which constitutionally sufficient personal jurisdiction over the tortfeasor had been obtained. If Mrs. Olsen could not recover in that situation under Florida's conflicts rules, a fortiori she could not recover in the case as it actually stood.

311. After *Shaffer v. Heitner*, 433 U.S. 186 (1977), ownership of property in Florida, standing alone, would be insufficient to support personal jurisdiction in this state. Such ownership would have to be coupled with "minimum contacts" sufficient to satisfy the stan-

served while casually present in or over the state. What is the situation then in Mrs. Olsen's tort suit in a Florida court against the Illinois defendant over whom constitutionally sufficient in personam jurisdiction has been obtained?

A comparison with the Supreme Court's decision in *Allstate Insurance Co. v. Hague*³¹² suggests that in this situation Florida would have the constitutionally requisite aggregation of contacts, creating state interests, necessary for application of its law. First, Mrs. Olsen was at all relevant times a resident of Florida, a fact that avoids altogether the problem of post-occurrence changes in residence so clearly troublesome to the dissenters in *Hague*. Second, Mr. Olsen was likewise a Florida resident as well as a member, presumably, of its workforce, a stronger contact than Ralph Hague's relationship to Minnesota³¹³ and significant also in light of the plurality's footnote observation that the death of a resident, even though occurring in another state, is a contact with the state of residency.³¹⁴ Finally there is the assumed fact of personal jurisdiction in Florida over the Illinois tortfeasor, analogous to Allstate's presence for jurisdictional purposes in Minnesota.

In *Hague*, the state interests created by the aggregation of contacts there involved were of two kinds: one was Minnesota's police power or "welfare" interest in a resident, Mrs. Hague, and in an employee, Mr. Hague. Hague's employment status, though not as profound as residency, implicated Minnesota's provision of services, amenities, and facilities;³¹⁵ his presence on the highways of the state invoked Minnesota's concern "for the safety and well-being of its work force and the concomitant effect on Minnesota employers."³¹⁶ The death or injury of an employee was said to have an obvious effect on the state's workforce and employers and to invoke its interest in seeing employees made whole or in vindicating rights incident to the administration of their estates.³¹⁷ As to Mrs. Hague, her good faith change of residence and appointment as her husband's personal representative gave Minnesota an interest in her recovery, "an interest which . . . [the Minnesota Supreme

dards of *International Shoe, Inc. v. International Shoe Co.* *Id.* at 212. Only if Florida were the only forum available to Mrs. Olsen—which it clearly would not be, since she could bring suit, however otiose, in Illinois—might the general principle of *Shaffer* not apply. *See id.* at 211 n.37.

312. 449 U.S. 302 (1981).

313. *Id.* at 314.

314. *Id.* at 315 n.20.

315. *Id.* at 314.

316. *Id.*

317. *Id.* at 315.

Court] identified as full compensation for 'resident accident victims' to keep them 'off welfare rolls' and able 'to meet financial obligations.'³¹⁸ All of this could be said, and more strongly, of Mr. and Mrs. Olsen because both were Florida residents, a status which had existed for some time before the accident and continued in Mrs. Olsen's case thereafter.

The second kind of interest identified by the plurality in *Hague* was a function of Allstate's jurisdictional presence in Minnesota. It followed from this that Allstate could claim neither unfamiliarity with Minnesota law nor surprise that that state's law was applied in litigation in which it was involved.³¹⁹ Allstate's presence in Minnesota gave the state an "interest in regulating the company's insurance obligations insofar as they affected both a Minnesota resident,"³²⁰ Mrs. Hague, and Mr. Hague, "a longstanding member of Minnesota's workforce."³²¹ Florida's interests, based on the here assumed jurisdictional power over the person of the Illinois uninsured motorist, would be much the same. Certainly its interest in vindicating under Florida law the rights of Mr. and Mrs. Olsen, both residents, would be. But whether it would be fundamentally unfair to apply Florida law to the Illinois resident might well turn on the way in which jurisdiction over him was acquired. Certainly if he voluntarily consented to appear in the action, had moved to Florida before the time suit was commenced, or owned property in the state, his claim to surprise and unfairness at application of Florida law would not seem particularly compelling. The case then would be very close to the false conflict situation in which two Florida residents injure each other in an accident in Illinois and return home to sue.

If jurisdiction were predicated on his being found and served while vacationing in Florida or, worse yet, while flying over the state,³²² the matter might stand differently. In those instances his purposeful avilment of the "privilege of conducting activities" in Florida would not only be slight, but wholly unrelated to Mrs. Olsen's tort action or the accident giving rise to it.³²³ Allstate's pres-

318. *Id.* at 319 (quoting the Minnesota Supreme Court's opinion in *Hague*, 289 N.W.2d at 49).

319. *Hague*, 449 U.S. at 317-18.

320. *Id.* at 318.

321. *Id.*

322. *See* *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959) (defendant properly served in Arkansas while flying over it on nonstop flight from Memphis to Dallas).

323. *Cf. Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); *Rush v. Savchuk*, 444 U.S. 320, 327 (1980) ("In determining whether a particular exercise of state-court jurisdiction is consistent

ence in Minnesota in *Hague* was unrelated to the accident in Wisconsin, but not entirely unrelated to the actual lawsuit which eventuated.³²⁴ The Illinois motorist's claim to unfairness and surprise at application of Florida law in this instance would seem far more substantial. It would certainly have serious implications for the constitutional right to travel.³²⁵ What bearing the particular manner of obtaining otherwise proper personal jurisdiction has on the constitutional sufficiency of *Hague's* aggregated contacts for choice-of-law purposes is one of the principal questions which that case leaves unanswered. But it is important to recognize that nothing actually said in *Hague* would prevent a Florida court from applying Florida law in these circumstances.

It may help to have in mind a concrete case that would surely fall at the outer limits of the constitutionally permissible. Consider the following, not implausible scenario. An Illinois resident (uninsured, as it happens) is involved in a two-car accident close to home, caused largely by the fault of Johnnie Olsen, a Florida resident driving through Illinois. Mr. Olsen dies as a result of injuries sustained in the crash. The Illinois resident consults his lawyer, who advises him that he cannot be held liable under Illinois law because of Mr. Olsen's contributory negligence. Two years pass and nothing happens. The Illinois resident flies to Orlando to visit Disney World. It is his first trip ever to Florida. While there he is somehow identified by Mrs. Olsen and properly served with process. Florida's comparative negligence law is applied in the ensuing law suit and a large judgment rendered against him. (And even if he is judgment-proof, Mrs. Olsen will most certainly now be able to recover from State Farm, at least within the policy limits.) Is this result unfair? Or should the hapless Illinois resident have consulted a better lawyer, one who would have advised him to go to Disneyland instead?

One writer who would call this result not only unfair but also unconstitutional is Professor Willis Reese, the principal architect of the second *Restatement*.³²⁶ He makes this point, however, in discussing a case where much the same thing happened. In *Rosen-*

with due process, the inquiry must focus on 'the relationship among the defendant, the forum, and the litigation.' *Shaffer v. Heitner*. . .").

324. *Hague*, 449 U.S. at 318 n.24.

325. See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 289-91, 806-16 (2d ed. 1983).

326. See Reese, *supra* note 248, at 1595-99, 1605-06.

thal v. Warren,³²⁷ a well-known decision of the United States Court of Appeals for the Second Circuit, a New York resident, Rosenthal, went to a Boston hospital for an operation which was performed by Dr. Warren, a world-renowned physician. Shortly after the operation, still in the hospital and still under Dr. Warren's care, Rosenthal died. His widow filed suit in New York against Dr. Warren and the hospital to recover for her husband's death seeking damages in excess of a million dollars. New York constitutionally prohibited any limitation on wrongful death damages. Massachusetts, however, limited such damages to fifty thousand dollars.

Jurisdiction was obtained over Dr. Warren to the extent of his malpractice insurance under the now defunct *Seider* rule, and over the hospital by serving one of its officers while he was in New York City soliciting funds for the hospital. The defendants removed the case to federal district court in New York. Applying what it supposed to be New York's conflicts rules, the trial court held that the New York unlimited damages rule governed.³²⁸ On appeal, its decision was affirmed by the Second Circuit in a two-to-one opinion: the New York courts, Judge Oakes wrote, "would view the Massachusetts limitation . . . as so 'absurd and unjust' that the New York policy of fully compensating the harm from wrongful death would outweigh any interest Massachusetts has in keeping down . . . the size of verdicts (and in some cases insurance premiums)."³²⁹

Rosenthal was a paradigm true conflict: the plaintiff and her decedent were residents of the forum state with a law favoring full recovery; the defendants were residents of the state of conduct and of injury, whose law would have limited damages. As to the hospital, the case is strikingly like the *Olsen* scenario. *Rosenthal*, Professor Reese writes,

must stand for the proposition that the state of a person's domicile has power to apply its rule on the measure of damages in any action he may bring to recover for an injury suffered anywhere in the world. This is an alarming notion. It would permit the state of

327. 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

328. The trial court was probably correct in this, but by the time *Rosenthal* was decided in the Second Circuit, the New York Court of Appeals had adopted the *Neumeier* rules in *Neumeier v. Kuhner*, 286 N.E.2d 454 (N.Y. 1972). See *infra* text accompanying notes 420-28. Under the second of these rules, applicable to paradigm true conflicts of the pattern *Rosenthal* presented, the New York court had indicated, at least in host-guest cases, that it would apply the law of the state of injury.

329. *Rosenthal*, 475 F.2d at 445.

domicile to apply its law in a situation where . . . all of the other significant contacts are massed in another state. To be sure, it is only reasonable to expect that a state will be more concerned with its own interests and policies than with those of another. Nevertheless, there must come a point where the needs of the interstate or international systems should require a state to subordinate its lesser interests to the far greater interests of a second state. *Rosenthal* involved a situation that lies well beyond this point.³³⁰

Its *Seider* aspect aside, the point here is that nothing said in *Hague* would prevent *Rosenthal* from being decided the same way today.

The outcome in *Rosenthal* must surely have been applauded in Minnesota, a state which seems determined, in another commentator's telling phrase, "to rule the world"³³¹ through its particular modern approach—the "better law" method of Professor Leflar.³³² *Rush v. Savchuk*³³³ made clear that *Seider*-based jurisdiction was unconstitutional. But the result there could well have been different if the Indiana defendant, *Rush*, had been served while casually present in Minnesota. With personal jurisdiction over him, Minnesota would quite arguably have been free to choose its own law, thus applying its simple negligence rule rather than Indiana's guest statute, and its comparative negligence standard rather than Indiana's contributory negligence doctrine. The case then would have been very close to *Hague*, to *Rosenthal* (at least as to the hospital), and to the *Olsen* scenario.

3. *The Choice of Florida Law Under the Approach of the Second Restatement*

What all of these cases and variations of cases so sharply illustrate is the remarkable latitude which modern choice-of-law approaches give courts in advancing their own states' policies and protecting their own states' residents at the expense of like interests of other states. Combining the near unfettered constitutional discretion portended by *Hague* with almost any of the modern interest analysis approaches can produce virtually any result a court may wish to reach. In time, *Hague* may be seen as important chiefly for its broad and untroubling statement of principle—that a

330. Reese, *supra* note 248, at 1606.

331. Korn, *supra* note 40, at 792.

332. See *supra* note 283.

333. 444 U.S. 320 (1980).

state must have such significant contacts with a dispute, implicating its interests, that application of its law "is neither arbitrary nor fundamentally unfair."³³⁴ In this respect, it may come to bear the same relation to choice of law that *International Shoe Co. v. Washington*³³⁵ bears to the exercise of judicial jurisdiction.

After *International Shoe* was decided in 1945, the states experimented with the boundaries of the due process clause. Some followed a course of restraint and moderation, choosing to reach with their long arms only very specific kinds of out-of-state activity producing consequences within the state; others enacted vaguely worded long-arm statutes deliberately calculated to exhaust their power under the Constitution, leaving it, presumably, to the Supreme Court to say how much was enough.³³⁶ Predictably, the Court did, in *Hanson v. Denckla*.³³⁷ It has become increasingly clear that it is that case, far more than anything said in *International Shoe*, that now serves to define—and restrain—the new freedom in in personam jurisdiction.³³⁸ The deep division in the *Hague* Court over the nature and sufficiency of the requisite contacts, particularly those post-occurrence in nature, as well as the potential ramifications of the decision in such areas as the right to travel and the permissibility of exercising choice-of-law jurisdiction over corporate defendants jurisdictionally present in many states, but whose presence in a particular state is wholly unrelated to the cause of action being sued upon,³³⁹ are considerations that suggest that *Hague*, sooner or later, will have its *Hanson*.

In the meantime, however, it would be a simple matter, given *Hague's* constitutional license and the flexibility of the second *Restatement*, for the Florida Supreme Court to apply Florida law in the scenario case, or, for that matter, to have actually done so in

334. *Hague*, 449 U.S. at 312-13.

335. 326 U.S. 310 (1945).

336. *Compare, e.g.*, ILL. ANN. STAT. ch. 110, ¶ 2-209 (Smith-Hurd 1983) (transaction of business, commission of tortious act, ownership of property, insurance contracts) with CAL. CIV. PROC. CODE § 410.10 (West 1973) (effective 1970) (California courts "may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States"). See generally Cardozo, *The Reach of the Legislature and the Grasp of Jurisdiction*, 43 CORNELL L.Q. 210 (1957); Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533; Green, *Jurisdictional Reform in California*, 21 HAST. L.J. 1219 (1970); Leflar, *Conflict of Laws*, 34 N.Y.U. L. REV. 20 (1959).

337. 357 U.S. 235 (1958).

338. See *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

339. See Korn, *supra* note 40, at 797-99.

Olsen itself, by construing "legally entitled to recover" as not requiring the jurisdictional presence of the tortfeasor in a suit that was after all only imaginary, secure in the knowledge that State Farm, over whom there was unquestionably jurisdiction, would be the only party bound by the judgment.³⁴⁰

Consider the choice-influencing considerations of the second *Restatement's* section 6:³⁴¹ the needs of the interstate system could hardly be disserved by doing what could always be done even under the place-of-the-wrong rule—namely, refusing to apply the otherwise applicable law of another state because contrary to the strong public policy of the forum.³⁴² The Fifth District Court of Appeal saw clearly that the public policy embodied in Florida's comparative negligence rule was about as strong as any such policy can be:³⁴³ *Hoffman v. Jones*³⁴⁴ was an unusually well thought-out and considered, not to say controversial, decision. In contrast to comparative negligence, which the court adopted in *Hoffman*, the rule of contributory negligence was condemned as "unjust," "inequitable," "harsh," "wrong," "primitive," and no longer responsive to modern conditions.³⁴⁵ The decision was almost unanimous³⁴⁶ and subsequently was recognized by the legislature in its Uniform Contribution Among Tortfeasors Act.³⁴⁷ Only mention in the Florida Constitution could have made comparative negligence a policy more strongly held in Florida. To this could be added Florida's obvious interest in full compensation for resident accident victims and their families—an interest which the Florida wrongful death statute was amended to serve, extending as it now does to the death of a resident wherever occurring.³⁴⁸ Permitting Mrs. Olsen to recover under comparative negligence rather than barring her

340. As the practice in some other states indicates, Florida's settled approach to the interpretation of "legally entitled to recover"—to put the insured in the same position he would have been in had the tortfeasor had insurance—is not the only one possible. See *supra* note 263. In *Olsen*, the court might have deviated from its approach to the extent of ignoring the defect in personal jurisdiction, on the ground that all of the cases in which that approach was taken were ones in which all events occurred in Florida. *Olsen* was, in fact, the first uninsured motorist case in which the accident happened in another state.

341. RESTATEMENT (SECOND) § 6(2)(a)-(g).

342. See *supra* text accompanying notes 64-94.

343. *Olsen v. State Farm Auto. Ins. Co.*, 386 So. 2d 600, 601 (Fla. 5th DCA 1980), *rev'd*, 406 So. 2d 1109 (Fla. 1981).

344. 280 So. 2d 431 (Fla. 1973).

345. *Id.* at 436-37.

346. The court divided six to one, with only Justice Roberts dissenting.

347. FLA. STAT. § 768.31(3)(a) (Supp. 1976).

348. See *supra* note 2.

claim altogether under contributory negligence would advance all of these interests.

As to Illinois' interests, a little research would have revealed just how precarious the status of contributory negligence was in that state: it was not a strongly held policy, as its demise during the pendency of *Olsen* confirmed.³⁴⁹ Nor would the natural inclination to give a resident the benefit of local law be as strong in the case of one driving without insurance, probably in violation of financial responsibility laws and perhaps other laws as well. In the actual case, it seems unlikely that the Illinois tortfeasor could ever have been sued anywhere but in Illinois, whether by Mrs. Olsen or by State Farm on its subrogated claim, provided he never set foot in Florida. Hence his exposure was always nil and Illinois' interest in the application of its law concomitantly exiguous. If under Florida law the court had found sufficient "legal entitlement" to permit Mrs. Olsen to recover from State Farm under her coverage, the only loser would have been State Farm, not the Illinois uninsured motorist.

Given this imbalance in the interests of Florida and Illinois, it would have been easy to characterize Mrs. Olsen's expectation that she would be compensated for injuries caused by uninsured motorists as "justified"; full compensation for tortiously inflicted injuries is the basic policy underlying this field of law. The remaining choice-influencing considerations of section 6 could have been molded in like fashion to favor application of Florida law.

What makes these constitutional and methodological conclusions important is that unlike Minnesota, the *Olsen* court made clear that it would not apply Florida law, even on the assumption that adequate in personam jurisdiction existed over the Illinois uninsured motorist. It reached this decision notwithstanding the considerable latitude provided by current Supreme Court choice-of-law doctrine and the flexible approach of the second *Restatement*. We consider now what this has to say about Florida's approach to true conflicts in tort under the second *Restatement*.

D. The State (or Place) of the Wrong As the State with the "Most Significant Relationship to the Occurrence and the Parties": An Evaluation of the Olsen Approach to True Conflicts

349. See *Alvis v. Ribar*, 421 N.E.2d 886 (Ill. 1981).

1. *Florida's Approach to True Conflict Resolution: A Return to the Law of the Place of the Wrong*

The constitutional and methodological freedom which the court had in *Olsen* makes all the more startling the result it actually reached. The case is startling, too, for another reason: it runs completely counter to what has aptly been called "a set of subliminal biases."³⁵⁰ These are the more subtle choice-influencing considerations which we encountered earlier in considering false conflicts³⁵¹ and which undeniably operate beneath the surface in torts conflicts cases, frequently seeming to have more to do with the results actually reached than the reasons given in the opinions.

The first of these is a bias favoring forum law over the law of another state. Courts may understandably think their own state's law preferable to that of some other state. Currie thought that a forum court should always apply its own law unless there was good reason not to do so and in true conflict cases argued for the presumptive application of forum law because it was the "sensible and clearly constitutional thing for any court to do."³⁵² He wrote:

In this way . . . [the forum court] can be sure at least that it is consistently advancing the policy of its own state. . . . [A] court should never apply any other law except when there is a good reason for doing so. That so doing will promote the interests of a foreign state at the expense of the interests of the forum state is not a good reason. Nor is the fact that such deference may lead to a conjectural uniformity of results among the different forums a good reason, when the price for that uniformity is either the indiscriminate impairment of local policy in half of the cases or the consistent yielding of local policy to the policy of a foreign state.³⁵³

And though Justice Stevens thought Minnesota's choice of its own law in *Hague* "plainly unsound"³⁵⁴ as a matter of conflicts law, he remarked in his concurring opinion that a forum court's choice of its own law in any dispute over which it had jurisdiction could al-

350. Korn, *supra* note 40, at 780.

351. See *supra* text accompanying notes 97-98.

352. B. CURRIE, *supra* note 2, at 119.

353. *Id.* (footnote omitted).

354. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 324 (1981) (Stevens, J., concurring).

most never be thought "wholly irrational":³⁵⁵ "judges are presumably familiar with their own state law and may find it difficult and time consuming to discover and apply correctly the law of another State."³⁵⁶ But with seemingly no hesitation, the *Olsen* court chose Illinois over Florida law.

A second bias is one favoring recovery, operating usually to benefit plaintiffs at the expense of defendants and their insurance companies. No one reading the decisions in torts conflicts cases can be unaware of this tendency. Professor Weintraub, generalizing from many cases which in one way or another have in fact reached this result, has proposed that all true conflicts be resolved by presumptive application of the law that favors the plaintiff.³⁵⁷ He argues that

recovery, with loss-distribution through the tortfeasor's liability insurance, represents the most pervasive aspect of tort developments in this country over the past several decades. It makes sense to have a choice-of-law rule in accord with widely shared and clearly discernible trends in the domestic laws whose conflicts we are trying to resolve.³⁵⁸

Yet the court chose the law that left Mrs. Olsen with no basis for recovery for her husband's death.

Third, it occasionally seems that that law is chosen which favors local litigants over nonresidents. Indeed, though he would certainly disapprove of any such bias as a ground of decision, much of Currie's work was predicated on the assumption that a state's "interest" in the application of its law was a function, first, of the fact that the law was enacted for the benefit and protection of its own citizens and, second, that it would so operate if applied in a particular case.³⁵⁹ Thus the presumptive application of forum law that Currie advocated would, in the normal true conflict case, automatically incorporate a bias in favor of forum residents. This bias the *Olsen* court also resisted, favoring an Illinois uninsured motorist and an insurer operating in all fifty states over Mrs. Olsen.

All of these biases are not present in every case and even when present may cross cancel one another. What makes *Olsen* so strik-

355. *Id.* at 326.

356. *Id.* (footnote omitted).

357. R. WEINTRAUB, *supra* note 4, § 6.4, at 270-71.

358. *Id.* § 6.32, at 345 (footnote omitted).

359. B. CURRIE, *supra* note 2, at 81-84, 152-53.

ing in light of the result actually reached is that all three were present and all coalesced to favor Mrs. Olsen and the application of Florida law. Florida's choice of its own law would not only have permitted recovery but would have had the effect of favoring a resident over a nonresident as well.

The court, then, had the constitutional latitude to decide differently; it had a method at hand in the flexible, approach-oriented second *Restatement* for doing so; and all of the subliminal biases would have reinforced a decision in favor of Mrs. Olsen and the application of Florida law. In light of this, it is hard to resist the conclusion that the court intends to resolve true conflicts by applying the law of the place of the wrong. The tenor of the opinion supports this view. The attenuated interest of Illinois in an uninsured motorist unlikely ever to be subjected to personal liability was seen in a single sentence to outweigh Florida's strong interest in application of its comparative negligence standard to permit a resident to recover for her husband's wrongful death.³⁶⁰ It is as if the proposition were too obvious for discussion. "Certainly" Illinois' interest in the occurrence was the most significant because the accident happened there.³⁶¹ From *Bishop* the court isolated the statement that the place of the wrong " 'would, under most circumstances, be the decisive consideration in determining the applicable choice of law.' "³⁶² It likewise stressed the presumptive place-of-the-wrong aspects of sections 145 and 146.³⁶³ Finally, the court gave special prominence to the two choice-influencing considerations of section 6 most closely identified with the place-of-the-wrong rule: " 'certainty, predictability and uniformity of result' " and " 'ease in the determination and application of the law to be applied.' "³⁶⁴ The opinion is literally instinct with *lex loci delicti*.

2. *The Soundness of the Court's Approach in Terms of Conflicts Justice*

If the place of the wrong proves through later decisions to be the decisive consideration in cases of true conflict, the court in our view will have chosen a sound basis for the resolution of such cases. We make this assertion primarily for reasons having to do

360. *Olsen*, 406 So. 2d at 1111.

361. *Id.*

362. *Id.* (quoting *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980)).

363. *Olsen*, 406 So. 2d at 1110-11.

364. *Id.* at 1111 (quoting RESTATEMENT (SECOND) § 6, as explained in *Bishop*, 389 So. 2d at 1001).

with conflicts justice. By this term, we mean a principled way of selecting the applicable law in a case of true conflict; one that is independent not only of notions of how we want the case to come out on the merits, but independent also of how it would be decided if it were a wholly domestic dispute. If, for example, Mr. Olsen had been killed in an accident in Jacksonville with a partially at fault, uninsured Florida resident, Florida's comparative negligence standard would have determined that Mrs. Olsen was "legally entitled to recover" something from him and hence from State Farm under her policy. But to say the same result should follow in the actual case is to ignore the fact that the accident happened in Illinois and involved an Illinois resident; to ignore, in short, the reasons for having conflicts law in the first place.

If something less than a method independent of sympathy, favoritism, parochial preference for local law, or preference for recovery rather than nonrecovery is desired, there are plenty of alternatives at hand. Currie's approach is biased in favor of forum law and often of forum residents; Weintraub's in favor of plaintiffs and their recovery; Leflar's in favor of the "better law," which even he concedes will often lead a forum court straight to its own law books.³⁶⁵ As for interest analysis, any method for true conflict resolution that employs it—and most modern approaches do—can easily be manipulated to incorporate any bias a court desires, thus imparting a seeming rationality to the result reached, simply by giving more weight to some interests than others or by emphasizing this contact and deemphasizing that one. We have seen how easily the second *Restatement* could be so employed. But our own bias is for a neutral, even-handed way of first choosing the applicable law, and by this standard the place-of-the-wrong rule fares better than most.

Fundamental fairness is an essential element of any approach that aspires to conflicts justice. In his recent exhaustive study of New York's tortured experience with modern interest analysis in tort cases, Professor Harold Korn makes a compelling case in a fairness sense for a return to the place of the wrong as the decisive factor in split-domicile, true conflict cases.³⁶⁶ His argument rests in

365. Leflar, *supra* note 283, at 298.

366. See Korn, *supra* note 40, at 966-67. Professor Korn does not necessarily advocate an across-the-board place-of-injury solution for all true conflicts, though he thinks a "respectable argument" can be made for it, *id.* at 967, particularly in cases—like *Olsen*—involving individual defendants and without reference to insurance. *Id.* at 966. His own solution is more complicated. See *id.* at 967-73.

large part on the same constitutional considerations of fairness which operate in the area of personal jurisdiction and which find expression in the language of *Hanson v. Denckla*—"that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."³⁶⁷ Ordinarily, in cases like *Olsen* the only state with which the adverse parties will have voluntarily associated themselves is the state of injury. Ascribing controlling significance to the place of the wrong in such a case, Korn argues,

needs no fine legal reasoning to commend it. An innate sense of justice would, I think, produce a consensus that, all other things being equal, the traveler in a foreign land must accept the law of the stay-at-home citizen of that land, and in a case like *Rush v. Savchuk* . . . the fairness of the solution cries out so strongly that it assumes constitutional due process stature.³⁶⁸

So far as Johnnie Olsen and the Illinois uninsured motorist were concerned, Illinois was the only common state with which both had some degree of voluntary association at the time of the accident, the Illinois resident by living there and Mr. Olsen by choosing of his own volition to drive there. Suppose the Illinois resident had been vacationing in Florida and that the same accident had occurred in Orlando. If Mrs. Olsen then brought suit in a Florida court, we would expect Florida law to be applied. The result should be no different if she chose instead to sue him in Illinois. Would anyone think it fair for an Illinois court to invoke contributory negligence to shield its resident from liability for an accident happening in Florida and involving a Florida resident?

Note that in these two variations, personal jurisdiction would present no problem. If the accident occurred in Florida, the Illinois uninsured motorist could be sued either in Florida, with jurisdiction obtained under its long-arm statute,³⁶⁹ or in Illinois, where he resides. In the actual case, however, he could be sued only in Illinois. If, *arguendo*, personal jurisdiction had been obtained in Florida, it would in all probability have been based on some post-occurrence "purposeful availment" by the Illinois motorist having nothing to do with the accident itself.

367. 357 U.S. 235, 253 (1958).

368. Korn, *supra* note 40, at 967.

369. FLA. STAT. § 48.193(1)(b) (1983).

Hague leaves uncertain to what extent an out-of-state defendant's connection with a state, minimally sufficient for purposes of personal jurisdiction, also suffices to validate that state's choice of its own law to govern in the case.³⁷⁰ Deciding a case like *Olsen* by applying the law of the place of the wrong avoids this issue altogether; a court choosing this course will never be "wrong" in a constitutional sense.³⁷¹

The place-of-the-wrong rule underscores fairness in yet another sense. We began this analysis of the *Olsen* decision by observing that for true conflicts, no method of resolution thus far devised has worked to everyone's satisfaction. In every case of true conflict, two different and potentially outcome-determinative laws will compete for dominance. At least in a sovereign sense, both are equally correct. It is in the nature of a lawsuit that only one law can govern. A logician might say that there is no rational way of choosing one "correct" rule from two equally correct rules. Yet we require conflicts law to do just this, and it is from this fundamental paradox that much of the difficulty stems. Territorial theory and with it the place-of-the-wrong rule evolved as a way of resolving conflicts among sovereign nations. There, as Justice Story perceived, differences in culture and legal systems might be so great that one nation could rightly decline to enforce the laws of another.³⁷² The situation is clearly different among the states of the United States. In some important ways each state is sovereign; in others, each is but a political subdivision under a single sovereign. The balance between the two, over time, has been delicate, uneasy, and occasionally precarious, but the way in which it has been struck suggests that the similarities among the states greatly outweigh the differences, else we would be no union but a mere confederation or something worse.³⁷³ In this sense no state of the United States is ever wholly free to ignore the laws of another. Not only does the Constitution—chiefly in its due process and full faith and credit clauses—reflect this limitation,³⁷⁴ but it is mirrored also in the pol-

370. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 n.29 (1981).

371. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Nevada v. Hall*, 440 U.S. 410 (1979).

372. See J. STORY, *supra* note 29, §§ 24-25, 32-38.

373. See generally 1 THE COMPLETE ANTI-FEDERALIST (H. Storing ed. 1981); L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973); J. HURST, THE GROWTH OF AMERICAN LAW (1950).

374. Professor Korn makes this point in this way:

The interplay of the expansionist trend of recent developments in judicial jurisdiction and choice of law had thus produced a hybrid body of doctrine that served no legitimate purpose of either field and that seemed, to say the least, ill-suited to

icies and judgments expressed in the laws of the various states: the differences that do exist are in almost every instance differences of degree, not of kind.³⁷⁵ The sorts of conflict which might lead a court to refuse to entertain a cause of action created by a sister state—those which, in Cardozo's words, implicate "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal"³⁷⁶—have been conspicuous by their absence in the domestic conflicts law of the United States.³⁷⁷

True conflict resolution, already logically difficult, has thus proven even more troublesome in the unique sovereign context of the United States. The effect has been to make arbitrary solutions particularly appealing as the only fair way of accommodating an impasse of sovereign interests. Beale's method, embodying his own juridical conceptions of vested rights and obligatory enforcement, had the happy side effect of making chance the arbiter: let the governing law be supplied by the very fortuity of where injury occurred. What Currie once suggested in jest—"that it would be better to flip a coin"³⁷⁸—thus lay at the very core of Beale's approach. The eminent fairness of this solution combined with the strong hold that territorial theory has always had on judicial conflicts thinking in America. There is something powerfully hypnotic in the notion that Florida has supreme power to make laws for its territory;³⁷⁹ that no other state has power to do so; and that therefore the legal consequences of events that occur within Florida should be fixed in reference to whatever the law of Florida happens to be.

To Beale, this syllogism had the ineluctable quality of a first principle. He was reinforced in this by the analogy between torts and crimes. One attribute of sovereignty that has remained nearly constant throughout American legal history is the power of each

a community of states bound together in federal union under a Constitution that includes a due process, an equal protection, and a full faith and credit clause as well as a provision entitling "[t]he Citizens of each State . . . to all Privileges and Immunities of Citizens in the several States."

Korn, *supra* note 40, at 794 (footnotes omitted).

375. See, e.g., RESTATEMENT (SECOND) § 90 comment c; RESTATEMENT OF CONFLICT OF LAWS § 612 comment c (1934); 3 J. BEALE, *supra* note 33, § 612.1.

376. Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918).

377. See, e.g., R. LEFLAR, AMERICAN CONFLICTS LAW § 48 (3d ed. 1977); E. SCOLES & P. HAY, *supra* note 4, § 3.15.

378. B. CURRIE, *supra* note 2, at 120-21.

379. *Cf. id.* at 50.

state to define and punish as crimes acts committed within its borders, but not those committed without.³⁸⁰ Tracing to Chief Justice Marshall's comment in *The Antelope* that "[t]he courts of no country execute the penal laws of another,"³⁸¹ there is general agreement that "if a court takes jurisdiction in a criminal case it will apply only its own penal law. Hence criminal law cases do not involve choice-of-law questions in the ordinary sense."³⁸² The same acts can be both tortious and criminal at the same time. Beale plainly saw the analogy: "the injury of . . . [certain protected rights] is a wrong. If the right is that of a private person the wrong is a tort. If it is in favor of the state the wrong is a crime."³⁸³ In logic, if a person cannot be punished in one state for acts that would be criminal if committed there but which in fact are committed in another state where they are not, why should it be otherwise when the acts are called torts instead of crimes?

The real problem with Beale's method was overkill: in the interests of consistency and the attainment of perfect conflicts justice, he insisted on resolving all conflicts in the same way. As commendably even-handed as his approach was in cases of true conflict, it broke down completely in false conflict situations. Here judges refused to exalt Beale's version of conflicts justice as a preeminent value over their own conceptions of what would make for fair and just results in individual cases. It is probably not too much to say that Beale's approach would have retained the almost universal acceptance it once enjoyed if it had made provision for this kind of case. At this juncture Brainerd Currie's insights became critical. He told the judges what they had instinctively known all along; that there was a rational way of resolving false conflicts.³⁸⁴ Interest analysis provided an intellectually satisfying way of saying that the law of the place of the wrong should not be applied where no purpose other than obeisance to Beale would be served by doing so.

380. See, e.g., *Huntington v. Attrill*, 146 U.S. 657, 669 (1982) ("crimes and offenses against the laws of any State can only be defined, prosecuted and pardoned by the sovereign authority of that State"); *State v. Knight*, 1 N.C. (Tay.) 44, 45 (1799) (legislature cannot "define and punish crimes committed in another state"); 2 J. BEALE, *supra* note 33, § 425.2 ("a state can make no act or event a crime unless the act or event occurs within the state"); Murphy, *Revising Domestic Extradition Law*, 131 U. PA. L. REV. 1063, 1064-66 (1983); Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 TEX. L. REV. 763 (1960).

381. *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825).

382. W. REESE & M. ROSENBERG, *CASES AND MATERIALS ON CONFLICT OF LAWS* 456 n.4 (7th ed. 1978).

383. 2 J. BEALE, *supra* note 33, § 377.1, at 1287.

384. See *supra* text accompanying notes 119-28.

But Currie found his own attempts to extend interest analysis to cases of true conflict unsatisfactory and stultifying; he, too, came to an arbitrary method of resolution—the automatic application of forum law.³⁸⁵ Once interest analysis revealed that each of two states was interested in the application of its law in a dispute—a case of true conflict—he could see no rational way consistent with his conception of the role of the judiciary in our system for courts to weigh and balance the interests involved and then to make the relative assessment that one state's interests were greater or more significant than another's.³⁸⁶

Both Beale's and Currie's true conflict solutions are fair in the sense that they are arbitrary. The place-of-the-wrong rule seems preferable to Currie's approach or to any of the other arbitrary approaches precisely because it is less biased. It does not weight the rule-selecting process itself with any preference for forum law, for local residents, for plaintiffs and their recovery, or for whatever law a particular judge may happen to think is "better." It will always provide a clearly constitutional solution, while *Hague* suggests, in contrast, that systematic application of forum law can approach constitutional limitations and perhaps exceed them.³⁸⁷ Currie's approach, and most of the others, demonstrably promote forum shopping. Given a choice, plaintiffs obviously will choose a forum law state if its law is favorable, or any available forum likely to apply the law favoring recovery. The place-of-the-wrong rule, on the other hand, gives the same governing law regardless of where suit is brought and if everywhere followed would eliminate forum shopping altogether.³⁸⁸ Finally it acknowledges, as no other of the approaches, the sovereign rule-making power of other states of the United States; it defers to that power and in so doing draws on ways of conflicts thinking deeply rooted in American legal history.

3. *Alternatives in Interest Analysis: The Experience of the New York Court of Appeals*

As to interest analysis, used to weigh interests and determine which state's is "greatest" or "most significant," the bitter experi-

385. See *supra* text accompanying notes 211-14.

386. See B. CURRIE, *supra* note 2, at 601-06. Commentators and courts, however, have not agreed. See *supra* notes 209-10.

387. Cf. *Rush v. Savchuk*, 444 U.S. 320 (1980).

388. See, e.g., D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 22-23 (1965) (no true justice without uniformity); cf. Korn, *supra* note 40, at 969-71. But see B. CURRIE, *supra* note 2, at 100-01.

ence of a conscientious and fair-minded court gives some measure of that method's defects and, by contrast, of the superiority of the place-of-the-wrong rule. Currie died in 1965 and did not live to see in full fruition his fear that courts would prove ill-equipped to discover, weigh, balance, and assess the respective interests of states in the application of their laws in cases of true conflict. In the event, he was proved right; and this nowhere appears more clearly than in New York's painful and extensive history of experimentation with interest analysis.

Beginning in 1963 with *Babcock v. Jackson*³⁸⁹ and its outright abandonment of *lex loci delicti* for modern interest analysis, the New York Court of Appeals decided a remarkable series of cases, ending in 1972 with *Neumeier v. Kuehner*.³⁹⁰ All involved conflicts between New York's ordinary negligence rule for host-guest cases and the more restrictive guest statutes of other states. In deciding these cases, the court grappled with a fair range of issues which torts conflicts cases, true and false, can present. Its final solution—announced in *Neumeier v. Kuehner* with the adoption of the so-called “*Neumeier* rules”—strikingly presages the place-of-the-wrong approach which Florida appears to be taking to true conflicts under the second *Restatement*. These cases are worth looking at in some detail for what they have to say, first, about the workability of interest analysis and second, about the values that are likely to prove important to a just and satisfying technique for the resolution of true conflict cases.

Babcock was, like *Bishop*, a paradigm false conflict: interest analysis quickly showed that Ontario had no interest in the application of its law to a New York lawsuit between two New York residents arising out of a single-car accident which fortuitously occurred in Ontario during the course of an intended weekend trip there. In a five-to-two opinion, the court applied New York law as the law of the only interested jurisdiction, rejecting *lex loci delicti* outright and replacing it with a test whose language prefigures the second *Restatement*'s “most significant relationship” formulation: “controlling effect,” the court said, should be given “to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.”³⁹¹ The author of the second

389. 191 N.E.2d 279 (N.Y. 1963); see *supra* text accompanying notes 129-42.

390. 286 N.E.2d 454 (N.Y. 1972).

391. *Babcock*, 191 N.E.2d at 283.

Restatement, Professor Reese, has called Judge Fuld's opinion in *Babcock* "almost certainly the most significant contribution to choice of law that has been made in this century."³⁹² The case seems uncomplicated in retrospect,³⁹³ but at the time the court's use of terms such as "center of gravity" and "grouping of contacts" and its enumeration of virtually every contact of the parties either with New York or Ontario left unclear what was important and what was not in deciding whose concern was "greatest." *Babcock* was quickly followed by three other cases which, though usually considered false conflicts, were nowhere near so easy.

*Dym v. Gordon*³⁹⁴ involved a suit in New York between two New York residents who had traveled separately to Colorado for a six-week summer session at the state university. While in Colorado the plaintiff-guest was injured during a short trip to a place of instruction when the defendant-host's car, registered and insured in New York, collided with another vehicle, owned and driven by a Kansas resident. Colorado's guest statute required a showing of gross negligence for recovery. In a four-to-three opinion, the court held Colorado law applicable. The case was different from *Babcock* in that the parties were in Colorado for an extended period, the host-guest relationship was formed there, and the short trip began and was to have ended there. What made *Dym* really different, though, was the court's unattributed finding that Colorado's guest statute served an additional purpose beyond the usual ones of preventing suits by ungrateful guests against their hosts and of protecting resident drivers and their insurance carriers from fraudulent claims. Colorado, the court said, "has an interest in seeing that the negligent defendant's assets are not dissipated in order that the persons in the car of the blameless driver will not have their right to recovery diminished by the present suit."³⁹⁵

To the extent that Colorado could be said to have an interest in protecting a Kansas resident (as opposed to Colorado residents) driving on its highways, this additional purpose gave Colorado an obvious interest in the application of its guest statute, making *Dym* in effect a true conflict. Difficulties in cases soon to follow were to lead the court to reevaluate this construction of the Colorado guest statute and to conclude that it "was mistaken,"³⁹⁶ thus

392. Reese, *supra* note 171, at 552.

393. *But see* Korn, *supra* note 40, at 837.

394. 209 N.E.2d 792 (N.Y. 1965).

395. *Id.* at 794.

396. *Tooker v. Lopez*, 249 N.E.2d 394, 397 (N.Y. 1969).

making *Dym* a false conflict and in effect overruling it.³⁹⁷ But in the meantime, the court found that unlike *Babcock*, the fact “that the accident occurred in Colorado could in no sense be termed fortuitous.”³⁹⁸ Of “compelling importance” was

the fact that here the parties had come to rest in the State of Colorado and had thus chosen to live their daily lives under the protective arm of Colorado law. Having accepted the benefits of that law for such a prolonged period, it is spurious to maintain that Colorado has no interest in a relationship which was formed there.³⁹⁹

With this decision, it became less clear than ever what elements were critical in determining which state’s “relationship or contact with the occurrence or the parties” gave it the “greatest concern” with the issue involved—whether it was the parties’ common domicile; the place where the car was registered and insured; the place where suit was brought; the place and time of the formation of the host-guest relationship; where the trip began and was to have ended; the duration of the parties’ stay in the state where injury occurred; the fact that other parties in other cars were involved; or a combination of some or all of these. It was also unclear whether these elements or contacts, almost all referred to in *Babcock* and *Dym* at some point or other, were simply to be aggregated quantitatively, or whether some were more important than others. As Professor Korn has noted, “What *was* becoming more evident was that the *Babcock* formula could be made to yield divergent results in similar circumstances by altering the significance accorded to a particular contact or the policies attributed to a particular type of law.”⁴⁰⁰

*Macey v. Rozbicki*⁴⁰¹ followed a year later, falling factually somewhere between *Babcock* and *Dym*. This case involved two sisters as host and guest, both residents of Buffalo, New York. One, the defendant-host, was vacationing for the entire summer at her Ontario summer home. The other, the plaintiff-guest, had come to Ontario for a ten-day visit with her sister and while there was injured in a two-car collision during a brief trip that began and was to have

397. See *id.* at 407-08 (Burke, J., concurring); *Macey v. Rozbicki*, 221 N.E.2d 380, 385 (N.Y. 1966) (Keating, J., concurring).

398. *Dym*, 209 N.E.2d at 794.

399. *Id.* at 795.

400. Korn, *supra* note 40, at 850 (emphasis in original).

401. 221 N.E.2d 380 (N.Y. 1966).

ended in Ontario. In the ensuing lawsuit, brought in New York, New York law was applied in a five-one-one opinion. *Dym* was distinguished on the ground that there the "principal situs of the relationship was in Colorado,"⁴⁰² whereas here "the relationship of two sisters living permanently in New York was not affected or changed by their temporary meeting together in Canada for a short visit there, especially since the arrangements for that visit had undoubtedly been made in New York State."⁴⁰³ The majority opinion was short and unhelpful.

In his concurring opinion,⁴⁰⁴ Judge Keating began to lay the foundation for the view the court would shortly come to. He thought that any attempt to distinguish *Dym* from the present case was disingenuous and that *Dym* was irreconcilable with *Babcock* and should be overruled, lest the effect be to confuse "the choice of law process even more than it already appears to be."⁴⁰⁵ More importantly, he would have swept away most of the "contacts" in those cases as irrelevant both to New York's policy "of affording recovery to injured residents of this State or for that matter to the policies of other jurisdictions in denying a remedy."⁴⁰⁶ "The only facts having any significant bearing on the applicable choice of law in guest statute cases," he continued, "are the residence of the parties and the place in which the automobile is insured and registered. As we noted in *Babcock*, only these facts have any relation to the policies sought to be vindicated by the ostensibly conflicting laws."⁴⁰⁷ This was interest analysis in a very pure form.

This brought the court to *Tooker v. Lopez*,⁴⁰⁸ in which Judge Keating wrote for a bare majority of four. The case involved a single-car accident which occurred in Michigan and in which Marcia Lopez and Catharina Tooker, both New York residents and fourth-year students at Michigan State University, were killed. Susan Silk, a Michigan resident and a fellow student at the university, was also a passenger in the car and was seriously injured. Marcia Lopez was the host-driver of the car, which was owned by her father and registered and insured in New York. The three women

402. *Id.* at 382.

403. *Id.* at 381.

404. *Id.* at 382 (Keating, J., concurring).

405. *Id.* at 385.

406. *Id.* at 383.

407. *Id.* (emphasis in original).

408. 249 N.E.2d 394 (N.Y. 1969).

were en route from East Lansing to Detroit for a weekend visit when the accident occurred. In the wrongful death action that followed, the court held that New York law applied. Michigan's guest statute was found to embody the policies of preventing "fraudulent claims against local insurers . . . [and] the protection of local automobile owners,"⁴⁰⁹ neither of which would be furthered where no Michigan automobile owner was involved and "the insurer is a New York carrier and the defendant is sued in the courts of this State."⁴¹⁰ Michigan's interest in the application of its law was therefore nil; New York's interest in the application of its ordinary negligence standard to permit recovery in this wrongful death suit was, on the other hand, quite strong.⁴¹¹

It was now obvious that *Babcock's* "greatest concern" formulation, never itself questioned or repudiated since the case was decided, was to be given content by a relative assessment of each state's interest in the application of its law as advancing the purposes and policies embodied in it.⁴¹² The concepts of "center of gravity" and "grouping of contacts" were gone.⁴¹³ There remained, at least for host-guest cases, only those factors relevant to the policies of guest statutes and the standard of care which they embodied;⁴¹⁴ these were the domicile of the parties and the place where the automobile was registered and insured.

Chief Judge Fuld concurred in the majority opinion but wrote a separate concurrence⁴¹⁵ in which he first took note of the fact that the court's decisions since *Babcock* had not "featured consistency."⁴¹⁶ He thought the time had come for the court "to endeavor to minimize what some have characterized as an *ad hoc* case-by-case approach by laying down guidelines . . . for the solution of guest-host conflicts problems."⁴¹⁷ Sufficient experience had accumulated in his view to permit "the formulation of a few rules of general applicability, promising a fair level of predictability."⁴¹⁸ He then proceeded to set out three rules for this purpose.⁴¹⁹ Their

409. *Id.* at 397.

410. *Id.*

411. *Id.* at 398-99.

412. *Id.*

413. *Id.* at 400 n.2.

414. *Id.* at 400.

415. *Id.* at 403 (Fuld, C.J., concurring).

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.* at 404.

content is surprising, because they cannot be reconciled with the interest-analysis interpretation of *Babcock* which the majority's opinion had just taken and in which Judge Fuld, ironically, concurred.

The first of these rules—the so-called “*Neumeier* rules” because they were soon to be adopted by the court in *Neumeier v. Kuehner*⁴²⁰ as rules of decision in New York—dealt with false conflict cases like *Babcock*; it provided that “[w]hen the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.”⁴²¹ The second of the rules was intended for the normal true conflict situation like that presented by *Olsen*, in which the parties were from different states with different laws, each state's law favoring its own resident. That rule adopted the place of the wrong as the decisive consideration, providing that

[w]hen the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.⁴²²

This rule, if generalized from host-guest cases to other loss-distribution issues and applied in *Olsen*, would require the application of Illinois law.

The fact pattern of *Neumeier* itself fell within the third rule.⁴²³ The conflict again involved Ontario's guest statute, amended since *Babcock* to require the guest to show gross negligence on the part of the host as a predicate to recovery. *Neumeier*, the guest, was a resident of Ontario. *Kuehner*, the host, was a New York resident whose car was registered and insured in New York. Both were killed in a grade-crossing accident in Ontario in the course of a trip that began with *Kuehner* leaving his Buffalo, New York, home and

420. 286 N.E.2d 454 (N.Y. 1972).

421. *Tooker*, 249 N.E.2d at 404 (Fuld, C.J., concurring).

422. *Id.*

423. *Id.*

picking up his friend Neumeier at his home in Fort Erie, Ontario. The two had planned to drive to Long Beach, Ontario, to do some work on a cottage owned by Kuehner and to return to Fort Erie that evening. Neumeier's wife brought a wrongful death action in New York against Kuehner's estate and the Canadian National Railway Company.

Here was the so-called "unprovided for" case which the proponents of modern interest analysis had always found particularly troublesome: an Ontario plaintiff was suing a New York defendant in a New York court, seeking the application of New York's ordinary negligence rule; the New York defendant, of course, sought the application of Ontario's stricter gross negligence standard: in short, a split-domicile true conflict, but one in which the law of each party's state disfavored his cause. This kind of case had given Currie great conceptual difficulty because his system rested on the fundamental postulate that a state was "interested" in the application of its law only because that law was enacted for the benefit and protection of that state's own residents and would so operate in the particular case. When the law of a party's own state was unfavorable, it was hard to see how that state could properly be said to be "interested" in its application.⁴²⁴ In this situation, interest analysis seemed to break down altogether.

Ontario's law, the court said in *Neumeier*, was enacted to protect Ontario hosts from suits by ungrateful guests.⁴²⁵ But Kuehner, the host, was a New York resident. By the same token, New York's ordinary negligence standard for host-guest cases reflected that state's "deep interest in protecting its own residents, injured in a foreign state, against unfair or anachronistic statutes of that state."⁴²⁶ But here the injured guest was not a New York resident. New York, the court continued, "has no legitimate interest in ignoring the public policy of a foreign jurisdiction—such as Ontario—and in protecting the plaintiff guest domiciled and injured there from legislation obviously addressed, at the very least, to a resident riding in a vehicle traveling within its borders."⁴²⁷ The court held that Ontario law governed, applying the third of the *Neumeier* rules. Though "necessarily less categorical" in such cases than in those governed by the first and second rules,

424. See *supra* note 207; see also Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 137-42 (1973).

425. *Neumeier*, 286 N.E.2d at 455.

426. *Id.* at 456.

427. *Id.*

“[n]ormally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.”⁴²⁸

The court split six to one in favor of applying Ontario's law; but Judge Fuld's majority opinion announcing the adoption of the three rules was joined by only three other members of the court. How these rules, already much criticized,⁴²⁹ will fare in practice remains speculative; for the New York Court of Appeals has decided no major torts conflicts case since *Neumeier*.

4. *The New York Experience: A Return to the Place of the Wrong*

The three *Neumeier* rules summarize a highly respected court's decade of experience with the intricacies of interest analysis. Though confined in terms to host-guest cases, they seem susceptible of generalization to other tort loss-distribution issues as well.⁴³⁰ Within a framework of interest analysis, they state presumptive rules: in false conflicts, the law of the parties' common domicile, ordinarily the only interested state, will be applied; in true conflicts, the law of the place of the wrong governs. For our purposes at this point, the most important aspect of the New York experience is the return to the place-of-the-wrong rule for the resolution of true conflict cases. In classic true conflicts, like *Olsen*, which fall within the second rule, the locus solution operates categorically; in

428. *Id.* at 458 (quoting *Tooker*, 249 N.E.2d at 404 (Fuld, C.J., concurring)).

429. See, e.g., Hancock, *Some Choice-of-Law Problems Posed by Antiquated Statutes: Realism in Wisconsin and Rule-Fetishism in New York*, 27 STAN. L. REV. 775 (1975); Korn, *supra* note 40, at 895-903; Sedler, *supra* note 424; Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 983-94 (1977) [hereinafter cited as Sedler, *Rules of Choice of Law*]; Twerski, *supra* note 207; von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROBS. 27 (1977).

430. See, e.g., Sedler, *supra* note 424, at 135-37. But see, e.g., E. SCOLES & P. HAY, *supra* note 4, § 17.30, at 601-02. The authors state:

The effects of the rulemaking methodology displayed by *Neumeier* are only now beginning to become evident. Clearly the certainty and predictability that the rules bring to the choice-of-law problem enable courts to decide some cases more easily. It is less clear whether or not the rules can be extended to include tort situations beyond guest statute cases or, at least, can serve as useful analogies, in New York and in other jurisdictions.

Id. at 601 (footnotes omitted).

“unprovided-for” true conflicts, those governed by the third rule, the law of the place of the wrong will “normally” apply.

The reasons underlying the court’s shift in just three years from the orthodox form of state interest analysis adopted in *Tooker* to the formulated rules of *Neumeier*, reviving as they do the place of the wrong as the decisive factor in true conflicts, ought to have particular significance in Florida, where the slate is still relatively clean. Unfortunately, those reasons are nowhere neatly summarized. Judge Fuld’s reference in his *Tooker* concurrence to the accumulation of “sufficient experience”⁴³¹ to permit the formulation of rules is curious; two of the three *Neumeier* rules deal with true conflicts, but the court never had occasion to decide one until *Neumeier* itself. Only *Dym v. Gordon*⁴³² came close, and that case turned into a false conflict when the court reconsidered the policies of the Colorado guest statute.

Adumbrations in the opinions provide some insight into the thinking of the court. In *Neumeier*, the court expressed concern for a “principled basis” for deciding conflicts cases in the context of modern interest analysis:⁴³³ one that would offer “a greater degree of predictability and uniformity,”⁴³⁴ that would not impair the “‘smooth working of the multi-state system’” or produce “‘great uncertainty for litigants,’”⁴³⁵ and that would discourage the practice of forum shopping.⁴³⁶ These desiderata—even-handedness; the recognition of the sovereign interests of other states; predictability, uniformity, and certainty; and the discouragement of forum shopping—have always been considered the principal virtues of the place-of-the-wrong rule. They are values that the court’s preoccupation with interest analysis and the new learning had tended either to obscure or to relegate to make-weight status.

At least for true conflicts, perhaps only trial and error could have shown how meretricious was the promise of a “just, fair and

431. *Tooker*, 249 N.E.2d at 403 (Fuld, C.J., concurring).

432. 209 N.E.2d 792 (N.Y. 1965).

433. *Neumeier*, 286 N.E.2d at 457. Acknowledging that its decisions since *Babcock* had “lacked consistency,” the court said:

This stemmed, in part, from the circumstance that it is frequently difficult to discover the purposes or policies underlying the relevant local law rules of the respective jurisdictions involved. It is even more difficult, assuming that these purposes or policies are found to conflict, to determine on some principled basis which should be given effect at the expense of others.

434. *Id.*

435. *Id.* at 458 (quoting from the third *Neumeier* rule).

436. *Id.*

practical"⁴³⁷ solution which interest analysis seemed to hold out; that too high a price in confusion and uncertainty could be paid for what seemed at the moment the most perfectly just and rational solution for any particular case. Perhaps no other court ever more fully embraced the teachings of Brainerd Currie and his methods of interest analysis, and yet it ignored Currie's own solemn warning that interest analysis could provide no rational answer to true conflicts. Given the intractable nature of the problem and the complexity of the cases, it may well be that a simple and certain rule contributes far more to conflicts justice than one improvised for the particular case through the imponderable calculus of interest analysis. As Alexander Bickel has written in another context, "piercing through a particular substance to get to procedures suitable to many substances is in fact what the task of law most often is."⁴³⁸

It remains to ask why New York revived the place-of-injury rule for true conflicts, rather than simply adopting Currie's own solution, the application of forum law. Both approaches are essentially arbitrary and would thus make for certainty, predictability, and uniformity of result. Again, the answer is suggested rather than stated. A starting point is a passage in Judge Keating's majority opinion in *Tooker*, in which he responds with some vehemence to the dissent's suggestion that the court's choice-of-law process amounts to nothing more than "a rule which will always result in the application of New York law."⁴³⁹ The court's decisions since *Babcock*, he says,

have not always resulted in the application of the law of New York and have, indeed, indicated proper recognition and respect for the legitimate concerns of other jurisdictions and the real expectations of the parties. As we recently observed in . . . [*Miller v. Miller*], "[w]e must recognize that, in addition to the interest in affording the plaintiff full recovery, there may be other more general considerations which should concern 'a justice-dispensing court in a modern American state'. . . . Among other considerations are the 'fairness' of applying our law where a nonresident or even a resident has patterned his conduct upon the law of the jurisdiction in which he was acting . . . as well as the possible interest of a sister State in providing the remedy for injuries sus-

437. *Id.* at 457. The reference is to language in *Babcock v. Jackson*, 191 N.E.2d 279, 283 (N.Y. 1963).

438. Bickel, *Watergate and the Legal Order*, 57 COMMENTARY, Jan. 1974, at 24.

439. *Tooker*, 249 N.E.2d at 401.

tained as a result of conduct undertaken within its borders."⁴⁴⁰

Here at last is some recognition of the possible relevance of the state of injury to choice-of-law determinations, a relevance that was largely obscured in the host-guest cases by the false nature of the conflicts involved and by the court's preoccupation with the new learning of interest analysis. Here, also, less explicit but unmistakable nevertheless, is the intimation that, to a fair-minded court, anything like a systematic application of forum law would be too intolerably arrogant and overreaching to commend itself as a settled approach to conflicts resolution. What provoked Judge Keating's retort was this language from the dissent of Judge Breitel, who said, with respect to the significance of the place of injury, that "[w]hat has happened of course, is that lip service is paid to the factor of place, and promptly ignored thereafter, if the forum prefers its own policy preconceptions and especially if it requires denial of recovery to a plaintiff in a tort case."⁴⁴¹

The reference by Judge Keating to his own majority opinion in *Miller v. Miller*⁴⁴² is significant. Decided the year before *Tooker* and not one of the host-guest cases in the *Babcock* line, *Miller*, perhaps more than any other case before *Neumeier*, forced the court to consider the full implications of the still-evolving but nearly in place interest-analysis approach that *Tooker* would solidify. But for the happenstance of two post-occurrence events, *Miller* would have presented the court with a true conflict in the classic pattern in which the parties reside in different states with different laws, and each state's law favors its own resident. The conflict this time was between New York's constitutionally mandated unlimited recovery in wrongful death actions and Maine's limitation of \$20,000 on such recoveries.⁴⁴³ *Miller* was a resident of New York. His brother was a resident of Maine, where he ran a business in which both were interested. While visiting his brother on business in Maine, *Miller* was killed when the car in which he was riding, driven by his brother, hit a bridge railing. Shortly thereafter, the brother moved to New York and became a resident there. *Miller's* wife then brought a wrongful death action against him in New York. During the course of the litigation, Maine repealed its limi-

440. *Id.* (quoting *Miller v. Miller*, 237 N.E.2d 877, 881 (N.Y. 1968)).

441. *Tooker*, 249 N.E.2d at 411 (Breitel, J., dissenting).

442. 237 N.E.2d 877 (N.Y. 1968).

443. *Id.* at 878.

tation on wrongful death damages.⁴⁴⁴

In a four-to-three decision, the court took virtually the same interest-analysis approach that it would use in *Tooker* and held that New York law governed. New York's interest in full recovery for the surviving spouse was obviously strong.⁴⁴⁵ Whatever interest Maine might have in the application of its law had been erased by the post-occurrence happenings:

[W]e turn next to the question of whether the application of New York law here will unduly interfere with a legitimate interest of a sister State in regulating the rights of its citizens, at least with regard to conduct within its borders. . . . To the extent that the Maine limitation evinced a desire to protect its residents in wrongful death actions, that purpose cannot be defeated here since no judgment in this action will be entered against a Maine resident. Maine would have no concern with the nature of the recovery awarded against defendants who are no longer residents of that State and who are, therefore, no longer proper objects of its legislative concern. . . . Any claim that Maine has a paternalistic interest in protecting its residents against liability for acts committed while they were in Maine . . . ignores the fact that for the very same acts committed today Maine would impose the same liability as New York.⁴⁴⁶

Had these post-accident events not occurred, particularly the change in residence, it seems obvious that Maine's interest in the application of its law limiting recovery to protect its own residents would have been at least as great as New York's, and that the full implications of the fact that the injury occurred in Maine could not then have been avoided. Unless the court was simply prepared to say at that point that its own policy of full recovery was better than limited recovery, or that New York residents were somehow more deserving of the protection of New York law than Maine residents were of Maine's, it is hard to see how a decision applying New York law could have been rationalized.

Here again is the issue *Olsen* so sharply presented: when is a resident ever entitled to the benefits and protections of his own state's laws if not while acting there? In *Miller*, the court could avoid the full implications of the significance of the place of injury as well as the bankruptcy of interest analysis in dealing with them.

444. *Id.*

445. *Id.* at 880.

446. *Id.* at 882.

The defendant's post-occurrence change in residence made the conflict false, allowed interest analysis to prevail, and put off to another day the hard questions to which *Neumeier* would supply at least some of the answers. But it was a near thing all the same, and perhaps gave the court all the experience it needed to make the *Neumeier* place-of-the-wrong approach attractive for true conflicts.

For the New York Court of Appeals, the "principled basis" of which *Neumeier* spoke could not be one that automatically selected New York law in every case, or that preferred New York residents over those of other states, or that biased outcomes in favor of plaintiffs and their recovery. As importantly, it could not be one that failed to take account of the sovereign prerogative of other states to make their own laws for their own residents, acting within their own borders. Fine though it might be in false conflict situations, the inability of interest analysis to provide either an impartial or a rational solution to true conflicts was clear. It was too easy to weight the scales, consciously or unconsciously, with subjective biases.⁴⁴⁷ In contrast, the place-of-the-wrong rule was rooted in a recognition of the sovereign power of other states; it was neutral, even-handed, certain, predictable, uniform in operation, and dissuasive of forum shopping. Its adoption for true conflicts in *Neumeier* seems both a natural outgrowth of the New York experience, and the lesson which that experience teaches.

5. *Some Concluding Observations*

There is a marked similarity between the New York approach that *Neumeier* represents and the approach of the second *Restatement*. Both the second *Restatement* and the writings of its Reporter, Professor Reese, were liberally and approvingly cited by Chief Judge Fuld in his *Neumeier* opinion in support of the rules approach there adopted.⁴⁴⁸ The choice-influencing considerations

447. For a sharply differing view of the usefulness of interest analysis in the resolution of true conflicts, see, e.g., Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); Kay, *The Use of Comparative Impairment To Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577 (1980); Sedler, *supra* note 145; Sedler, *Rules of Choice of Law*, *supra* note 429; Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181 (1977) [hereinafter cited as Sedler, *The Governmental Interest*].

448. *Neumeier*, 286 N.E.2d at 455, 457-58. Chief Judge Fuld, writing for a majority of the court, stated with reference to the three *Neumeier* rules: "Professor Willis Reese, the Reporter for the current Conflict of Laws Restatement, expressed approval of rules such as those suggested above; they are, he wrote, 'the sort of rules at which the courts should

of the *Restatement's* section 6 state the values that are likely to be important in choice-of-law determinations; interest analysis is decidedly among them. But within this framework for approaching such problems, the second *Restatement* contemplates the gradual development of "far narrower rules . . . directed to particular issues."⁴⁴⁹ This is reflected in the presumption embodied in the specific torts provisions. Unless displaced by the principles of section 6, "the local law of the state where the injury occurred" is determinative.⁴⁵⁰ This is a rule or at least a clear indication of what the rule ought to be. It hardly represents an invitation to return to the rigid inflexibility of *lex loci delicti*, as some critics have charged; it is far more an expression of Professor Reese's own view of what the Constitution and the needs of the interstate system require.⁴⁵¹

With *Hague*, the United States Supreme Court made clear that the Constitution would check the choice-of-law determinations of individual states in none but the most extreme cases. With the freedom thereby conferred goes an obvious potential for abuse. Minnesota is a case in point, choosing its own law, apparently, whenever it can get away with it. But there is something disturbing and unprincipled in that kind of reckless pursuit of self-interest. In a federation like the United States, one sovereign state owes another more than that. As vague and ill-defined as it is, the first of the second *Restatement's* choice-influencing considerations, "the needs of the interstate system," is obviously addressed to the issue

aim.'" *Id.* at 458 (citing Reese, *supra* note 171, at 562). Also cited in the opinion was Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 321, 323, 328 (1972) [hereinafter cited as Reese, *Choice of Law*]. *Neumeier*, 286 N.E.2d at 457, 458. Sections 146 (personal injuries) and 159 (duty owed plaintiff) of the second *Restatement* were cited in support of the third *Neumeier* rule with a "cf." signal. *Id.* at 458.

449. Reese, *supra* note 171, at 561.

450. *E.g.*, RESTATEMENT (SECOND) §§ 146 (personal injuries), 147 (injuries to tangible things), 156(2) (tortious character of conduct), 157(2) (standard of care), 158(2) (interest entitled to legal protection), 159(2) (duty owed plaintiff), 160(2) (legal cause), 162(2) (specific conditions of liability), 164(2) (contributory fault), 165(2) (assumption of risk), 166(2) (imputed negligence), 172(2) (joint torts), 175-180 (right of action for death and related issues). These and other sections prompted Professor Leflar, himself an adviser to the American Law Institute in the preparation of the torts provisions of the second *Restatement*, to write that

the old *Restatement's* "place of the injury" rule hovers like a ghost over the entire chapter. . . . [I]n an apparent effort to appease Beale's lingering spirit, those sections of the chapter dealing with particular torts and specific issues arising in tort actions constantly reiterate that "the applicable law will usually be the local law of the state where the injury occurred."

Leflar, *The Torts Provisions of the Restatement (Second)*, 72 COLUM. L. REV. 267, 269 (1972).

451. *See, e.g.*, Reese, *supra* note 148; Reese, *supra* note 248.

of judicial self-restraint. Applying the place-of-the-wrong rule in true conflict cases will not only always be a clearly constitutional solution, but one that pays due regard to the sovereign law-making character of other states as well.

With its decision in *Olsen*, we think the Florida Supreme Court made clear that it intends to accord determinative significance to the law of the state of injury in true conflict cases. If so, the court will have collapsed into one decision a decade's experience in New York. It is certainly clear that such an approach is consistent with the philosophy of the second *Restatement*. It is consistent, too, with Florida's historical approach to choice-of-law problems. Before *Bishop*, Florida was not a state that struggled to rationalize preferences for Florida law or Florida residents or plaintiffs generally in avoidance of *lex loci delicti*. Only once, in *Colhoun v. Greyhound Lines, Inc.*,⁴⁵² did the court characterize a suit in such a way as to permit a Florida resident injured in another state to maintain her cause of action; and only once, in *Hopkins v. Lockheed Aircraft Corp.*,⁴⁵³ did it even threaten to join the rush of states receding from *lex loci delicti*. There is an attitude of sorts in such judicial quiescence.

In Beale's view, the enforcement of rights created elsewhere was a matter of obligation. But in Story's thinking, equally territorial in orientation, such enforcement was a matter of voluntary consent. This was the notion of comity. Rights created elsewhere were not enforced by a court because it had no other choice, but because in doing so it gave appropriate deference and respect to the sovereign nature of other states. Historically, Florida justified its adherence to *lex loci delicti* in terms of comity. The supreme court never adopted Beale's first *Restatement* or the vested rights theory on which it rested. In an early case, *Hartford Accident & Indemnity Co. v. City of Thomasville*,⁴⁵⁴ the court said that the "rule of judicial comity" had reference to the principle under which a court gives "effect to the laws and judicial decisions of another state, not as a matter of obligation, but out of deference and respect."⁴⁵⁵ References to the term recur in the court's decisions.⁴⁵⁶ Whatever the

452. 265 So. 2d 18 (Fla. 1972).

453. 201 So. 2d 743 (Fla. 1967).

454. 130 So. 7 (Fla. 1930).

455. *Id.* at 8.

456. See, e.g., *Hertz Corp. v. Piccolo*, 453 So. 2d 12, 16 (Fla. 1984) (Shaw, J., dissenting); *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 375 (Fla. 1977); *Gillen v. United Serv. Auto. Ass'n*, 300 So. 2d 3, 6 (Fla. 1974); *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743, 746

underlying reasons, it is not too much to suggest a strong judicial affinity in Florida for the ideas expressed in the notion of comity. It is a concept that ascribing controlling significance to the place where injury occurs reinforces, and that finds contemporary expression in the second *Restatement's* concern for the needs of the interstate system.

IV. CONCLUSION

With *Bishop v. Florida Specialty Paint Co.*,⁴⁵⁷ the Florida Supreme Court abandoned its traditional approach to choice-of-law problems in tort, that of rigid and inflexible adherence to the place-of-the-wrong rule, and replaced it with the formulation of the second *Restatement*, which calls for application of the law of the state having the "most significant relationship to the occurrence and the parties" under the choice-influencing considerations set out in section 6. The second *Restatement* is probably as sound a method as the court could have adopted.⁴⁵⁸ Its Reporter, Professor Willis Reese, has suggested that it provides an approach within which experience over time will make possible the development of specific rules for the decision of recurring kinds of cases, thus promoting certainty and predictability in this complex area of law.⁴⁵⁹

Bishop, as we have seen, was a false conflict. It is in this kind of case that interest analysis has made its greatest contribution and has its maximum utility. The second *Restatement's* section 6 invites a forum court to consider "the relevant policies of the forum" and "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue."⁴⁶⁰ If this consideration reveals that only one state has any interest in the application of its law, then it is the state of the "most significant relationship," and its law should be applied. This is the clear intimation of *Bishop*. In one stroke the court cured the chief defect in the traditional *lex loci delicti* method, cutting out for easy and sensible disposition an entire class of cases in which it

(Fla. 1967); *Beverly Beach Properties, Inc. v. Nelson*, 68 So. 2d 604, 609 (Fla. 1953); *Markham v. Nisbet*, 60 So. 2d 393, 394 (Fla. 1952); *Kellogg-Citizens Nat'l Bank v. Felton*, 199 So. 50, 54 (Fla. 1940); *Beckwith v. Bailey*, 161 So. 577, 581 (Fla. 1935); *Mott v. First Nat'l Bank*, 124 So. 36, 37 (Fla. 1929); *Herron v. Passailaigue*, 110 So. 539, 542 (Fla. 1926).

457. 389 So. 2d 999 (Fla. 1980).

458. According to a recent tabulation by Professor Kay, 14 states have adopted the second *Restatement* approach. See Kay, *supra* note 145, at 591-92; see also R. CRAMTON, *supra* note 2, at 324-25.

459. See Reese, *supra* note 148, at 513; Reese, *Choice of Law*, *supra* note 448.

460. RESTATEMENT (SECOND) § 6(2)(b), (c).

had never made sense to apply the law of the state of injury because to do so would serve no useful purpose in terms of advancing the policies and purposes embodied in that state's ostensibly conflicting rule of law. Since *Bishop*, the lower courts in Florida have taken this sensible approach to cases of false conflict.⁴⁶¹

As to true conflicts, on the other hand, the court all but said in *State Farm Mutual Automobile Insurance Co. v. Olsen*⁴⁶² that the state where the injury occurs will have the "most significant relationship" to the occurrence and the parties, and that therefore its law will be applied. How decisively and abruptly this presumption can operate is illustrated by the court's recent decision in *Hertz Corp. v. Piccolo*,⁴⁶³ the first true conflict case to arise since *Olsen* and, interestingly enough, one of the "unprovided-for" class. Frank Piccolo, a Florida resident, was injured in Louisiana when his car was struck by a truck. The truck had been rented from Hertz in Louisiana by one John Kiern, whose residence is unstated in the opinion. Piccolo and his wife brought suit in Florida to recover for his injuries. Their suit was directly and solely against Hertz as the insurer of the tortfeasor Kiern and was based on Louisiana's direct-action statute. Hertz moved to dismiss on the ground that under Florida law, the Piccolos could not sue it without also joining the tortfeasor. The trial court granted the motion. The First District Court of Appeal reversed, holding that the Louisiana direct-action statute was substantive, controlled, and permitted suit directly against Hertz without joinder of the tortfeasor.⁴⁶⁴

The supreme court affirmed. In its view, the principal issue was whether Louisiana's direct-action statute was substantive or procedural. The court adopted as a "correct statement of the law"⁴⁶⁵ section 125 of the second *Restatement*, which provides that "[t]he local law of the forum determines who may and who must be parties to a proceeding unless the substantial rights and duties of the parties would be affected by the determination of this issue."⁴⁶⁶ But there was a second and, for our purposes, far more important conflicts issue in the case. If the Louisiana statute was procedural,

461. See *supra* note 200.

462. 406 So. 2d 1109 (Fla. 1981).

463. 453 So. 2d 12 (Fla. 1984).

464. *Piccolo v. Hertz Corp.*, 421 So. 2d 535 (Fla. 1st DCA 1982).

465. *Piccolo*, 453 So. 2d at 14.

466. The court also cited and quoted a portion of the comment to RESTATEMENT (SECOND) § 125, which states that the local law of the forum "will not be applied to determine whether a direct action can be maintained against an insurance company without the need of first obtaining a judgment against the insured . . ." *Piccolo*, 453 So. 2d at 14 n.4.

Florida law would automatically govern. But if it was substantive, "the rule adopted by this court in *Bishop* . . . applies,"⁴⁶⁷ and the law of the state having the "most significant relationship" to the occurrence and the parties would control. Which state, then, had the "most significant relationship" to this issue? Here is how the court made that determination:

Based on the "significant relationship" test of *Bishop*, it would be possible for Florida law to apply even if the Louisiana statute were substantive, if Florida had a more significant relationship to the issue than Louisiana. However, clearly in the instant case Louisiana has a more significant relationship to the issue than Florida. The controlling question therefore is whether the Louisiana direct action statute is substantive.⁴⁶⁸

The court went on to find the statute substantive and therefore applied the law of Louisiana, the place of the wrong.⁴⁶⁹ The speed with which the choice-of-law determination was made, in a single, conclusory sentence without analysis or discussion of any of the relevant policies underlying the conflicting rules, is a little breathtaking. But it sharply underscores the decisive importance of the place of the wrong in Florida's approach to true conflicts.

Piccolo was a true conflict. The relevant policies underlying the conflicting laws of both states would have been furthered by their application in the case. Section 627.7262 of the Florida Statutes requires in the strongest possible language that an injured person first obtain a judgment against an insured tortfeasor before proceeding against the insurer. The constitutionality of this controversial statute was upheld in *VanBibber v. Hartford Accident & Indemnity Insurance Co.*⁴⁷⁰ The policy of the statute, strongly held, as Justice Shaw pointed out in his dissent, is the protection of insurance companies from just this kind of direct suit in the courts of Florida.⁴⁷¹ That policy would have been furthered by applying the statute in this case. The policy of the Louisiana direct-action statute, set out by the court in the margin of the opinion,⁴⁷² is the protection of both insured tortfeasors and the persons they injure

467. *Piccolo*, 453 So. 2d at 14 (citation omitted). The court quoted *Bishop*, 389 So. 2d at 1001, which in turn quoted RESTATEMENT (SECOND) § 146.

468. *Piccolo*, 453 So. 2d at 14. The opinion makes no reference to the decision in *Olsen*.

469. *Id.* at 15.

470. 439 So. 2d 880 (Fla. 1983).

471. *Piccolo*, 453 So. 2d at 16 & n.1 (Shaw, J., dissenting).

472. *Id.* at 13 n.2.

in accidents occurring within Louisiana.⁴⁷³ That policy, too, would have been furthered by the application of the statute. Since both states were interested in the application of their laws, the conflict was a true one, although of the "unprovided-for" kind.⁴⁷⁴ Hertz,

473. In *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66 (1954), the Supreme Court sustained the constitutionality of this statute against due process and full faith and credit challenges in an action brought by an injured Louisiana resident directly against the insurer of the manufacturer of the injury-causing product. The insurance policy contained a "no action" clause which prohibited direct actions against the insurer until the manufacturer's liability had been established. The policy was negotiated and issued in Massachusetts and delivered there and in Illinois; both of these states recognized and enforced such clauses. Permitting the direct action, the Court said:

Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages. . . . What has been said is enough to show Louisiana's legitimate interest in safeguarding the rights of persons injured there.

Id. at 72-73. In other words, the policy underlying the statute is the protection of all persons injured in Louisiana, whether residing there or not.

474. In Brainerd Currie's formulation of interest analysis, a state was interested in the application of its law only when the law operated to protect or benefit that state's own residents or domiciliaries. If in a particular case the application of a state's law disadvantaged its own residents or domiciliaries, that state, by definition, had no interest in having its law applied: hence the necessity for the distinction between normal true conflicts and the unprovided-for case. See B. CURRIE, *supra* note 2, at 85-86, 152-53. This is the gloss, at least, that has conventionally been put on his work by numerous commentators. See, e.g., Twerski, *supra* note 207, at 107-08. Yet Currie's own definition of a state's "interest" in a conflicts sense does not require this distinction. A state was interested, he said, when the purposes or policies embodied in a particular law would be furthered by its application in a particular case. See, e.g., B. CURRIE, *supra* note 2, at 183-84. A statute or common law rule may occasionally be intended by its makers to work to the disadvantage of the individual residents of a state in order to further a public purpose of a different order. The Florida no-direct-action statute involved in *Piccolo* is a good example. Whatever benefit may accrue to Floridians generally through lower insurance premiums, that statute will operate to the disadvantage of individual Florida residents and domiciliaries, namely tortfeasor-defendants and the plaintiffs they have injured. But there is no question that had the statute been applied to bar the Piccolos' suit directly against Hertz, the policy underlying the statute would have been furthered.

Statutes may also be intended, as in the case of the Louisiana direct-action statute, to benefit a class of persons larger than one comprising the residents or domiciliaries of a state. The Louisiana direct-action statute was enacted to protect any person tortiously injured within Louisiana. See *supra* note 473. The Piccolos, though not Louisiana residents, were such persons. Permitting them to sue Hertz directly furthered the policy embodied in that statute. In this sense, the *Piccolo* case presented a true conflict of the normal variety: both states had a real and legitimate interest in the application of their laws because the policies of each would have been advanced by such application. Only the added and perhaps unnecessary stipulation that the laws must operate to protect or benefit the residents of the concerned states makes *Piccolo* an unprovided-for true conflict. Cf. Reppy, *Eclecticism in*

seen as a Louisiana resident, would have been disfavored by the application of Louisiana law, whereas application of Florida law would have disfavored the Piccolos, Florida residents. With both states plainly interested in the application of their laws, what made it so pellucidly clear that Louisiana's relationship was more significant than Florida's if not the fact that it was the place of the wrong?

Note that the resolution of this conflict in favor of the place of the wrong not only disposed of the choice-of-law question with dispatch, but had the added advantage of avoiding any constitutional problem arising out of the manner in which personal jurisdiction over Hertz was obtained. Though the opinion does not say, it seems likely that the Piccolos were able to sue Hertz in Florida because it was present and doing business here, as in all other states. Its presence in Florida, however, was unrelated to the cause of action, which arose out of its presence in Louisiana and its leasing there of the truck involved in the accident. Had this not been an "unprovided-for" case but rather a paradigm true conflict in which the application of Florida law would have worked to Hertz' disadvantage, one of the questions which *Hague* left unanswered might have been sharply raised. That question is whether a corporation's presence in a state where it is being sued on a cause of action arising elsewhere and unrelated to its presence in the state suffices not only for personal jurisdiction but also for choice-of-law jurisdiction, so that that state's law can constitutionally be applied to the controversy. Such difficult and still unanswered questions are always avoided by application of the law of the state of injury.

The Florida Supreme Court has not said in so many words that it intends to resolve true conflicts by application of the law of the place of the wrong. Nothing requires it to say so, although some guidance would surely prove helpful to Florida's lower courts. It may prefer instead, in the best tradition of common law incremen-

Choice of Law: Hybrid Method or Mishmash?, 34 MERCER L. REV. 645, 647-50 (1983). Professor Sedler, a leading proponent of interest analysis, is even more pointed in his rejection of the notion that a state is interested in the application of its law only when such application would benefit or protect its own residents:

As the cases make abundantly clear, interest analysis has nothing to do with enabling a resident party to prevail over a nonresident party. Interest analysis is premised on a state's interest in applying its law in order to implement the policy reflected in that law, and, in some circumstances, the application of a state's law on this basis will enable a nonresident to prevail over a resident.

Sedler, *supra* note 145, at 624. *But see* Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 175-78 (1981).

tal decision making, the flexibility inherent in the second *Restatement's* much vaguer "most significant relationship" language. But in giving content to that language, the court has thus far acted as if the place of the wrong was decisive.

We have explored at considerable length why this approach, if consistently adhered to, would make for the best possible solution to this troublesome kind of case. It will always be constitutional; it is entirely consistent with the philosophy of the second *Restatement* and its Reporter, Professor Reese. It pays appropriate deference to the rulemaking power of other sovereign states and is neutral and even-handed in operation, as free from bias as any such arbitrary rule can be. It is certainly a simple rule, certain, predictable, and easy of administration. All of these virtues were exemplified in *Olsen* and in *Hertz Corp. v. Piccolo*.⁴⁷⁵

This approach will not meet everyone's objections. With it, Florida will not "rule the world." When claims arising out of accidents that occur in other states are litigated in Florida, the place-of-the-wrong rule will subordinate the policies underlying Florida's laws to those of other states. Except in the "unprovided-for" class of true conflict cases, it will frequently subordinate the interests of

475. This approach was also taken in *Steele v. Southern Truck Body Corp.*, 397 So. 2d 1209 (Fla. 2d DCA 1981). With the exception of *Proprietors Ins. Co. v. Valsecchi*, discussed *supra* note 204, and to our minds a true conflict though not dealt with as such by the court, *Steele* is the only case of true conflict to be decided in Florida's lower courts since *Bishop*. The decision was rendered in May 1981, while *Olsen* was still pending in the supreme court. *Steele* arose out of a fatal accident that occurred in West Virginia when the refrigerated van portion of a truck designed and manufactured in Florida by defendant Southern, a Florida corporation, separated from its truck bed and killed a West Virginia resident in a nearby automobile. A wrongful death suit was brought in West Virginia against the owner of the truck, its operator, and Southern; Southern was dismissed from the suit for want of minimum contacts with West Virginia. Subsequently a wrongful death suit was brought against Southern in Florida. Under Florida law, the damages recoverable were nil; under West Virginia law, recovery was much more substantial. The trial court held that Florida law applied. On appeal, the Second District reversed and held that West Virginia law supplied the measure of damages. Florida's only significant relationship with the case, the court stated, was that defendant Southern was "a Florida corporation with its principal place of business in Tampa, and its van was allegedly negligently and defectively designed, manufactured, and sold into the stream of national commerce in Florida." *Id.* at 1211. Relying on *Bishop* and on *RESTATEMENT (SECOND) §§ 146 (personal injuries) and 175 (right of action for death)*, the court found Florida's relationship insufficient to displace the presumption that the law of the state of injury would normally apply. *Steele*, 397 So. 2d at 1211-12. Florida was interested in the application of its law to minimize the exposure of Southern, a corporation domiciled in Florida. West Virginia was similarly interested in the application of its law to permit the maximum recovery possible for its residents in wrongful death actions. Hence the case presented a paradigm true conflict. The court correctly read the message of the *Bishop* opinion, even before *Olsen* was decided.

Florida residents to the interests of residents from other states.⁴⁷⁶ Given the variety of approaches in use today, it can no longer be said, as it could be of Beale's system when every court employed it, that what is taken away in one case will be given back in another. In conflicts with Minnesota, Florida will always lose. There is nothing Florida can do about the methods employed by other states. Until the Supreme Court clarifies its decision in *Allstate Insurance Co. v. Hague*, all Florida can do is adopt its own "principled basis" for the decision of such cases, and, by this standard, the Florida Supreme Court has done well.⁴⁷⁷

476. With this approach, the policies underlying Florida's laws will always be subordinated to those of another state in every case in which injury occurs outside of Florida. The frequency with which the interests of Florida residents will be subordinated to the interests of residents of other states, however, depends upon the frequency of occurrence of normal true conflicts, like *Olsen*, in which Florida law favors Florida residents, as compared to unprovided-for cases, like *Piccolo*, in which Florida law operates to disadvantage Florida residents. Professor Reppy has recently written that the unprovided-for case

is by no means an unusual "phenomenon" subject to "discovery" by Currie nor an "anomaly" [sic] the disclosure of which should astonish. . . . Currie's seminal explanation of interest analysis contained a chart which illustrated that under varying fact-law patterns, the . . . [unprovided-for case] will arise just as often as the . . . [normal true conflict]. Currie, *Married Women's Contracts: A Study in Conflict of Laws Method*, 25 U. CHI. L. REV. 227, 233 . . . (1958) Potential plaintiffs simply do not choose a place to live because of proplaintiff law. Thus the odds are fifty percent that the domiciliary of the proplaintiff state involved in conflicts litigation will be a defendant.

Reppy, *supra* note 474, at 648 n.15 (citations omitted).

Professor Sedler also asserts that unprovided-for cases "have been far more numerous than Currie anticipated." Sedler, *supra* note 447, at 233 n.283. Resolving true conflicts by applying the law of the state of injury will therefore not have the effect of systematically discriminating against Florida residents and domiciliaries.

477. The court's approach thus far is strikingly like that proposed by two student authors in a study that appeared in these pages over ten years ago. See Note, *A Suggested Method for the Resolution of Tort Choice-of-Law Problems in Place-of-the-Wrong Rule Jurisdictions*, 1 FLA. ST. U.L. REV. 463 (1973).