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DEATH OF CONFLICTS

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THIS ARTICLE is about choice of law. It is about making choices of law fit the policies of the underlying substantive law and about why that fit is important both to the choice of law and to the substantive law.

Courts all across this country still are in Prosser's quagmire¹ of choice of law. They are so busy counting up contacts or weighing out relations that they have lost sight of the substantive law itself and the policies that give the law form. They bog down in a welter of details and, from the perspective of their own related non-conflicts cases, often reach the incorrect result. They thus lose the chance to achieve clarity not only in choice of law but also in the analysis and theory of substantive law.

Courts continue to sink beneath the dismal waters of the conflicts quagmire, but there is a lifeline: Keep choice of law consonant with the policies of the underlying substantive law.² Courts that grab this lifeline soon will see that those policies and laws usually contain no geographic strings and that choice of law decisions may be cut loose from the illicit geographic focus of the old and new choice of law theories. Having cut conflicts loose from geography, the courts will not be lost in a swamp with no reasoned way to resolve conflicts; for there remains the substantive law itself and its informing and enforming policies, in which the conflict has arisen in the first place and through which the road to *terra firma* lies. By traveling that road, the

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1. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953). Dean Prosser noted that "[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible language." *Id.*

2. Some commentators have flatly rejected any notion of conflict of laws based on substantive law policies. *See, e.g.*, E. SCOLES & P. HAY, CONFLICT OF LAWS § 2.12 n.4 (1982).

courts not only will resolve the conflicts but also will discover newly-shaped substantive law continents.

The best way to examine a problem is to inspect it at close quarters. This is especially true in choice of law analysis. Because choice of law doctrines traditionally have been made to encompass distinct areas of substantive law, we should expect analyses of choice of law decisions to focus on how a particular court deals with the breadth of substantive conflicts. Paradoxically, the traditional mode of analysis is to skip all over the map to discuss a multiplicity of courts' tort conflicts decisions, for example, without any reference to other areas of substantive law conflicts. Rarely have scholars critically analyzed all of one court's conflicts decisions directly. Even more problematically, the traditional mode of analysis for choice of law has been to concentrate on only choice of law—rules for making choices, factors to consider, results other courts reach—instead of connecting a court's choice of law decisions with its non-conflicts decisions in the related substantive law.

That concentration has led our courts astray, for it leads courts to believe they are doing something intrinsically distinct in resolving conflicts in the choice of law context. They are not. The fundamental problem in choice of law is the same as the one in developing common law: to shape the law to conform to substantive policies and thereby smooth out the bristling edges of the law.

In this article I analyze a variety of choice of law decisions of one court and connect those decisions with the court's related non-conflicts decisions. I use the cases of the Minnesota Supreme Court because of its recent flurry of choice of law decisions and the critical scholarly discussion of the court's unique approach. Further, this court is an ordinary court. There is no Cardozo, Lehman, or Andrews on this bench. Yet this ordinary court is doing a yeoman's job of work in choice of law in which it has shown signs of both breakthrough and breakdown in its use of "choice-influencing-considerations" methodology.³

The choice-influencing-considerations methodology has been described as dangerous,⁴ and so it is, for it easily encourages intellectual carelessness and unsophisticated bumbling. But it also is beautifully dangerous and, like all beautiful and volatile concepts, contains both the seeds of its own destruction and the germs for the next stage.

3. See R. LEFLAR, *AMERICAN CONFLICTS OF LAW* 195 (3d ed. 1977); Leflar, *Conflicts Law: More on Choice Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

4. See Neuhaus, *Legal Certainty Versus Equity in Conflict of Laws*, 28 LAW & CONTEMP. PROBS. 795, 802 (1963).

That stage is the death of choice of law and its replacement with clear, hardheaded, thorough substantive law analysis and theory. The reward for engaging head on the substantive law and its underlying policies in the choice of law determination—despite consequent difficulties and complexities—will be an increasingly fruitful national debate about substantive law. Courts would soon discover that for much of the substantive law of tort or contract or estates there may be universal policies running the breadth of this country, instead of stopping at borders which only geographers and police officers recognize. Moreover, courts and lawyers and the people might feel at ease with differences among very well developed and articulate views about substantive law. Each of these possibilities means the death of conflicts because there will be no conflict between just decisions, and just decisions are ones grounded in coherent, even if different, policies that run beyond the confines of the individual decision or type of decision.

I. A GENERAL CRITIQUE OF CHOICE OF LAW APPROACHES

The aim of choice of law is to effectuate the policies of the underlying substantive law.⁵ The reason there are choice of law problems is that there are conflicting substantive laws. The importance of this conflict does not lie in the existence of more than one substantive law with regard to one particular area, for example, automobile accidents. If that were the whole of the conflicts problem, the problem would be one of form, not one of substance. Rather, the importance of the conflict of substantive laws is in the conflict of the policies underlying the conflicting laws.⁶

If there were only one law of tort, or if tort law and contract law were entirely distinct, there would be no conflicts among laws of tort, or between tort and contract; and there would be no related choice of law problems for courts to resolve. In fact, however, some laws allow guests to recover from hosts for ordinary negligence in driving automobiles, and other laws allow the guest to recover only for gross negligence.⁷ The effect of the requirement of gross negligence is to prevent recoveries otherwise available under ordinary negligence law; its purpose is to prevent these recoveries by providing the host with a shield from ordinary negligence liability.⁸ The purpose of the ordi-

5. For the fainthearted, the "is" is prescriptive.

6. See E. SCOLES & P. HAY, *supra* note 2, § 2.6 at 17-18; R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 1.3 (2d ed. 1980).

7. As of Oct. 1, 1979, eight geographically scattered states retained traditional guest statutes requiring gross negligence of recklessness on the part of the host. See R. WEINTRAUB, *supra* note 6, § 6.9.

8. More specifically, the rule might further two policies: protecting the host

nary negligence law is to provide compensation to the tort victim.⁹ When a court could apply either of these two laws to a lawsuit, the court faces a choice of law problem¹⁰ in which one choice will give effect to the policies underlying one substantive law, and the other choice will give effect to different policies underlying another substantive law. The court cannot escape giving effect to underlying substantive law policies. The only question is, to which of the conflicting policies should the court give effect?

There used to be, and in some jurisdictions still are, strict rules for choice of law. These rules, known as *lex loci* rules, told courts which of two substantive laws to choose solely on the basis of the location of the events giving rise to the litigation.¹¹ Courts began to chafe under the yoke of these rules and frequently sought to avoid giving effect to the policies of the underlying substantive law to which

from the "ingratitude" of the guest and preventing the instigation of collusive suits against the host's insurer. *See* W. PROSSER, LAW OF TORTS § 34 (4th ed. 1974).

9. *See id.* § 1. Prosser's view is that the law of negligence serves to allocate the losses arising from human activity, but no doubt, it also provides an element of admonition to the wrongdoer. *Id.* § 5. Some courts agree with Prosser. *See, e.g.,* Kalavity v. United States, 584 F.2d 809, 811 (6th Cir. 1978) (tort law mixes compensation and deterrence in its ordinary damages); Russell v. Massachusetts Mut. Life Ins. Co., 115 L.R.R.M. (BNA) 2669 (1983) (implying an exception to worker's compensation statute, which is "no fault" and "exclusive" remedy, to allow tort action for intentional infliction of emotional distress for wrongful discharge in order to further deterrent function of tort law).

Whether today there are punishment and deterrence goals in tort causes of action for damages ought to be seriously questioned. The intentional torts and libel are among the best candidates for proving there are such tort goals. Historically, these torts have not required the plaintiff to prove actual damages as an element of the cause of action. Thus, the plaintiff did not have to prove the defendant was at fault, which (paradoxically) has suggested these tort actions further punishment and deterrence goals. One should compare negligence suits, in which the actual damage requirement clearly functions to say that a plaintiff who cannot show he needs to be compensated has no cause of action. With the constitutional changes in libel (at least as against the media) to require a minimum of a fault basis for the action and the increasing authority for requiring a showing of actual damage in, for example, "unintentional" trespass, there have been serious inroads on the putative punishment and deterrence goals in tort damages actions. *See, e.g.,* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-45 (1974); RESTATEMENT (SECOND) OF TORTS § 35(2), comment *h* (1965).

10. Throughout this article, for purposes of discussion, I assume that the forum has jurisdiction over the parties and that there is a "true" conflict in the limited sense that more than one law may constitutionally be applied, one of which, generally speaking, will be the forum law.

11. *See* RESTATEMENT OF THE LAW OF THE CONFLICT OF LAWS (1934). The territorial rules of the First Restatement are descendants of the theories James Kent and Joseph Story developed in the early nineteenth century and of the vested rights approach of Joseph Beale, the reporter for the First Restatement. *See* J. H. BEALE, THE CONFLICT OF LAWS (1935); J. KENT, 4 COMMENTARIES ON AMERICAN LAW (1836); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (1834).

the rules pointed through rule manipulation. In the *lex loci* system, courts could manipulate the rules, for example, by characterizing a lawsuit as being one in contract rather than tort so that the rules might point to the law of a different jurisdiction.¹² Additionally, courts could “relocate” the place of the tortious wrong.¹³ In either case, courts attempted to manipulate the strict rules to resolve a choice of law problem through the application of the substantive policies of the law.

Scholars, who always have played an active role in choice of law, began to point out that the *lex loci* rules lacked soundness because the rules focused on fortuitous factors such as place rather than on the policies underlying the substantive laws. They urged courts to substitute analysis for rules.¹⁴ Predictably, the scholars did not speak with

12. Courts have vast experience in rule manipulation; they engage in it at the slightest opening wedge between rule and policy. See, e.g., *Levy v. Daniels U-Drive Auto Renting Co.*, 188 Conn. 333, 143 A. 163 (1928). See generally, W. REESE & M. ROSENBERG, *CONFLICT OF LAWS* 440-49 (7th ed. 1982).

13. Compare *Sestito v. Knop*, 297 F.2d 33 (7th Cir. 1961) (place of the wrong for loss of consortium is place of physical injury, not of marital domicile) with *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (governing place is one of marital domicile, not place of physical injury).

14. See generally D. CAVERS, *THE CHOICE OF LAW PROCESS* (1965); B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963); Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924).

Leflar has stated that “in the minds of all the commentators there has always been a continuing urge to focus on the true reasons that underlie choice-of-law adjudications, the basic choice-influencing considerations that *actually* lead, or should lead, the courts to one result or another in particular types of cases.” Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1585 (1966).

Urging the courts to analyze the choice of law issues rather than simply apply territorial rules should not suggest to anyone that analysis is something new. The functional equivalent of analysis of some substantive law policies and of government interests, for example, were built into *lex loci* rules. The analysis was not perfect, and the rules reflected that imperfection. Thus, the analysis of governmental interests built into the tort *lex loci* rule was that the forum of the tort has interests in, for example, its highways and its courts that are reflected in the forum’s attitude about, say, guest statutes and that these forum policies should be furthered for forum torts. The analysis of the policies of substantive law built into the contract *lex loci* rule was that parties are reasonably free to contract and should have their intentions enforced and that where the parties contracted is evidence of these intentions.

The *lex loci* rules, then, were not *ex nihilo*. Athena may have sprung full-grown from the brow of Zeus; not so with rules of law. They spring from policy. The *lex loci* rules sprang from policy grounded in a particular analytic theory. Contemporary analytic theories originally differ from the old rules on what the appropriate analyses are, when to do those analyses, and whether to continue to analyze. Insofar as the old rules were based on appropriate analysis, there never has been any reason to abandon the rules. There is reason to examine that analytic basis, however, because some of the old rules have proved to be infected with poor or out-of-step analysis. This is a very different problem than the problem that reasonably, but incorrectly, might be thought to exist by the suggestion that courts substitute analysis for rules.

one voice.¹⁵ There has been a plethora of theories about what courts should analyze and how. Courts have not been sure which theory to follow; moreover, none of these theories is easy to use. One theory identifies seventeen policies for courts to consider in choosing among conflicting laws;¹⁶ another, nine;¹⁷ still another, five.¹⁸ A different set of theories emphasizes the competing governmental interests in the underlying substantive laws,¹⁹ interests that have proved difficult to analyze. Further, the multiple theories of choice of law also have proved to be subject to manipulation, albeit of a more sophisticated kind than was true of the *lexi loci* manipulation.²⁰

Analyzing the policies of a particular substantive law or of a whole area of substantive law is not easy. Nor will analyzed policy standing alone always point to only one of several laws. For example, the policies underlying the defense of contributory negligence and those underlying the lack of that defense may seem to be the same: to deter accidents. However, this ambiguity shows that either the policies underlying such conflicting laws have not been fully articulated, or one of the laws does not fit the policies. It also shows that articulating and analyzing policies is hard work. And it may be work that is not sufficient to resolve the choice of law problem. Thus, for example, if two laws set near, but different, ceilings on tort liability, either

15. Perhaps the most influential early theories were the governmental interests theory of Professor Currie and the *lex fori* theory of Professor Ehrenzweig. See generally B. CURRIE, *supra* note 14; Ehrenzweig, *The Lex Fori—Basic Rules in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960); Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965). For sketches of the views of Currie and Ehrenzweig, the "functional analysis" theories of von Mehren, Trautman, and Weintraub, and the "value-oriented" theories of Leflar and Cavers, see E. SCOLES & P. HAY, *supra* note 2, §§ 2.6-17.

16. Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721 (1957).

17. Cheatham & Reese, *supra* note 14.

18. R. LEFLAR, *supra* note 3, at 195. Leflar's approach is called the "choice-influencing-considerations methodology." It requires examination of five factors: (1) predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interests, and (5) application of the better rule of law. *Id.* The considerations have no fixed priority: "Their relative importance varies according to the area of law involved." *Id.*

19. See RESTATEMENT (SECOND) OF THE LAW OF THE CONFLICT OF LAWS (1971) (hereinafter RESTATEMENT (SECOND)); A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* (1965); B. CURRIE, *supra* note 14.

20. See, e.g., *Griggs v. Riley*, 489 S.W.2d 469 (Mo. Ct. App. 1972). In applying the "most significant relationship" test of the Second Restatement, the court noted that "where it is difficult to determine what state has the most significant relationship, the trial court should continue to apply the substantive law of the place of the tort." *Id.* at 474. See also *Frummer v. Hilton Hotel Int'l*, 60 Misc. 2d 840, 304 N.Y.S.2d 335 (Sup. Ct. 1969).

the court must turn to some principle of resolution other than its standard tort policy analysis, or the court must apply the ceiling in its jurisdiction as the ultimately controlling policy of its legislature. If the court is in a disinterested jurisdiction Z, and the ceiling statutes are from jurisdictions X and Y, clearly the court needs some principle of resolution other than a tort compensation policy that each of the three jurisdictions share. Noticing that, however, is just to notice that even policy reasoning gives out at some point. In general, substantive policy conflict is at the heart of choice of law and, consequently, where we must focus our attention. Then, the rules and methods for choosing among conflicting laws will result in choices that effectuate the policies underlying those substantive laws.

Some of the contemporary analytic approaches appear to give up any hope of a court's ever again being in a rule-applying position. These analytic approaches seem to be geared only to case-by-case adjudication.²¹ Other analytic approaches, however, always were bot-tomed on the expectation that choice of law analysis, over time and through use, would lead a court into a position eventually of being able to lay down rules for choice of law and that these new rules would be better than the old ones of the *lex loci* approach.²² What the scholars forgot to tell courts was how to tell when the court is ready to lay down a new rule.

Because courts prefer not to do case-by-case adjudication, a few courts have refused to retreat from the *lex loci* rules into the plethora of non-rule analytic methods.²³ Other courts have retreated into a new *lex fori* rule.²⁴ The *lex fori* courts have seen that most of the analytic methods lead naturally to forum law anyway;²⁵ these courts prefer to have a clear rule, even if the rule is defeasible in certain circumstances. Still other courts have proceeded with one of the analytic methods. These methods require the court to analyze at least

21. See, e.g., Sedler, *Interstate Accidents and the Unprovided for Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 131 (1973) ("courts should decide conflicts problems on a case by case basis with reference to considerations of policy and fairness to the parties").

22. See, e.g., Cheatham & Reese, *supra* note 14, at 960.

23. See, e.g., McMillan v. McMillan, 219 Va. 1127, 253 S.E.2d 662 (1979).

24. See, e.g., Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972). The *lex fori* rule, developed by Ehrenzweig, holds as a basic principle that the application of foreign law "must be analytically understood as an exception from the basic rule calling for the application of the [law of the forum]." A. EHREZWIEG, CONFLICT OF LAWS § 104 (1962). According to Ehrenzweig, when the forum is sufficiently connected to the litigation, the application of forum law has, from the point of view of the defendant, "reasonable foreseeability and calculability." *Id.* § 266. The notion derives from the procedural and jurisdictional doctrine of *forum non conveniens*. *Id.* § 25.

25. See note 33 and accompanying text *infra*.

the forum's governmental interest in applying the forum law.²⁶ Some of these methods also require the court to analyze each of the conflicting laws to determine which of the laws is better or which law more nearly works justice in the individual case.²⁷

Courts have made some headway in handling each of these analytical stages. Courts know, for example, that the governmental interest factors include considerations of whether there is a scheme into which the particular law at issue fits, whether the legislature recently has adopted the law, and the different purposes to be served by the law. But in the complex process of weighing various factors and analyzing conflicting laws, courts all too easily lose sight of what should be the ultimate aim of choice of law theories: to assure that the choices among conflicting laws are consonant with the purposes and policies of the underlying substantive contexts in which the choices arise.²⁸ Thus, for example, underlying the abandonment of the tort *lex loci* rule is a basic recognition that the location of an injury has little to do with the substantive law of tort.²⁹ A choice among competing tort laws that turns on the fortuitous factor of where the tort occurred all too easily severs the law of the case from the law of the *kind* of case; that is, it severs the tort choice of law cases from tort law. If, on the other hand, the choice among competing tort laws turns on the substantive law of tort, that choice makes the tort choice of law

26. Most methods scholars use do require some analysis of the governmental interests intended to be served by the application of a particular law. This interest analysis derives from the ground-breaking work of Brainard Currie who asserted that the central question in conflicts of law is whether it is reasonable for a state to assert an interest in the application of a particular law and its underlying policies. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 177. Currie, however, argued it would be inappropriate for a court to evaluate and weigh competing policies when the application of either of two competing laws was reasonable, and thus in the case of a "true conflict", forum law should be applied. Currie, *Comments on Babcock v. Johnson—A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1243 (1963).

Other scholars have suggested that courts must accept the challenge of weighing competing policies and interests where a true conflict exists. *See, e.g.*, A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 76 (1965).

27. Cheatham & Reese, *supra* note 14, at 980-81; R. LEFLAR, *supra* note 3, at 212-15; R. WEINTRAUB, *supra* note 6, at 328-29.

28. Section 6 of the Second Restatement, for example, lists as one of seven relevant "factors" to be applied in a choice of law determination, "the basic policies underlying the particular field of law." RESTATEMENT (SECOND), *supra* note 19, § 6. However, the six other factors substantially diffuse this inquiry. Moreover, the Second Restatement's focus on "contacts" and the place of the "most significant relationships" and its use of presumptions based upon the *lex loci* rules of the First Restatement limit the significance of modern judicial analysis. *See id.* §§ 145-146, 175, 188.

29. *See Babcock v. Johnson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).

cases fit with similar tort cases in which there are no choice of law questions.

Many of the contemporary analytic methods for choice of law do attempt, if not consciously or completely, to reach this kind of consistency by requiring that the court identify and choose in accordance with interests and policies bound up with the underlying substantive context in which conflict occurs. These methods thus could require the court to choose among conflicting tort laws on substantive tort doctrine grounds. A full recognition of the need for this consistency could act both as the outside constraint on the choice in the particular case and as the basis of an eventual rule for choice of law in cases of this kind. Once the court had made enough analytic choices among, for example, tort laws, the court should have a sufficiently clear understanding of the substantive tort policies of at least its own jurisdiction to be able to lay down a tort choice of law rule. If over a series of cases, a court came to see that the basic philosophy of forum tort law is to compensate tort victims as fully as possible, the court could say the rule for tort choice of law is, "Choose the tort law that leads to fullest compensation." The problem with most of the existing analytic methods is their reliance on so many factors or analytical elements that courts tend too easily to treat what should be the central and controlling factor as just one among many.³⁰

Perhaps any of the contemporary analytic methods for choice of law could lead to choice of law rules that reflect the policies of the underlying substantive law. But of all of these methods, the ones that are most promising in this sense are those that include not only analyses of the policies or interests of the competing jurisdictions in their conflicting substantive laws, but also an analysis of which of these laws is better or more just.³¹ This latter analysis provides the court with an opportunity to keep its forum substantive law consonant with its choice of law decisions. In the typical case, the problem is to keep the choice consonant with the substantive law; occasionally, however, the problem is to keep the substantive law consonant with the choice the court is making. A "better law" analysis, more clearly than any other, allows the court to make these "reverse fit" adjustments. Forced to do more thinking about the substantive law in a choice of

30. See, e.g., Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1586-87 (1966). Leflar's considerations may often be contradictory, and Leflar offers no directions for weighing the individual considerations. For a list of the considerations, see note 18 *supra*.

31. This "better law" analysis has been most clearly articulated by Leflar but also forms a part of the functional approach of von Mehren and Trautman and of Weintraub's analysis. See F. SCOLES & P. HAY, *supra* note 2, § 2.11.

law context than often is required in a substantive law context, the “better law” court may well discover a need to adjust its own substantive law through analyzing choices among laws, and it will be able to use that discovery later in its purely local adjudications.

Of course, a choice of law method that requires the court to analyze governmental interests of competing jurisdictions also affords an opportunity for thorough analysis of substantive policy and the concurrent opportunity to adjust forum substantive law. However, the rejection of forum law on the ground that nonforum law is better or more just more clearly presages a shift in forum substantive law. Such a choice of law result allows the court to announce that it intends to change forum substantive law in the future or that it desires its legislature to make such a change soon.³²

This “reverse fit” potential in choice of law raises a nagging doubt underlying all choice of law methodologies: There is something peculiar and unseemly about a court’s refusal to abide by and further its own substantive law policies and the policies of its own legislature. Yet courts following the *lex loci* rules regularly have made decisions amounting to such refusals. Indeed, any court makes such a refusal when, under any choice of law method, it applies the law of some jurisdiction other than its own, when its own law is one of the competing potential choices.

Perhaps we might expect that a court therefore would follow its own decisional law and the law of its own legislature anytime the forum’s law is one of the competing potential choices, on the ground that we expect courts to further the policies of these laws.³³ To this extent, a *lex fori* rule would make sense. Such a rule automatically keeps the choices in particular cases consonant with the policies em-

32. Currie has questioned the propriety of this as a half-measure: “[W]hen [courts] are convinced that a domestic law is archaic and unjust, they should abrogate it entirely, instead of utilizing the looseness of the system of conflict of laws as an excuse for limited abrogation” B. CURRIE, *supra* note 14, at 154 n.82. The more radical but honest approach, which Currie thus urges, would be to immediately declare a change in forum substantive law concurrently with the choice of law determination.

The problem with Currie’s suggestion is that all too frequently the “archaic” domestic law has become statutory and the only way a court can “abrogate” it is to invalidate it on, for example, equal protection grounds. Professor Calabresi has argued that excessive uses of such methods of overturning statutes weakens the constitutional principles. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

33. See A. EHRENZWEIG, *supra* note 24, § 104. Sedler has stated that “[w]hen a court has been faced with a true conflict [in the tort context] it has almost invariably—unless it continues to apply the place of the wrong rule—ended up applying its own law.” Sedler, *Weintraub’s Commentary on the Conflict of Laws: The Chapter on Torts*, 57 IOWA L. REV. 1229, 1234 (1972).

bodied in the laws of the forum, and this *lex fori* rule avoids the unseemly potential present in other approaches for frustrating forum policies and interests. However, the *lex fori* rule also allows the courts to *avoid* making an intellectually demanding inquiry into those policies and interests. The *lex fori* court has to make no more searching examination of the substantive law than it makes in the purely local case. The *lex fori* rule avoids the basic infelicity of the *lex loci* rules—the frustration of forum policy; and yet has the added advantages of the territorial rules—ease of application and predictability. What it will not provide is any added examination of the substantive law.

A *lex fori* rule requires, however, a clarity about what we mean by “the law of the forum.” Do we mean the statutory law, or do we mean the common law, or do we mean both? When there is an internal conflict in “the law of the forum,” which *lex* of the *lex forum* is the one the court should apply? Should the court choose its legislature’s law and policies, or should the court choose its own view of the law and its own policies?

These are hard questions, and they go to the heart of serious jurisprudential issues that are far wider than the choice of law context in which they occur here. Who is in charge of saying what the law is—the legislature or the court? Who is in charge of saying what the policies of the law are or what the governmental interests are in particular laws? Contemporary approaches to choice of law can throw these hard questions into high relief, irrespective of which approach the court follows. When a Virginia court insists on following the *court’s* territorial rules, its decisions can fly in the face of the policies of the Virginia legislature. The same is true when a forum court decides to apply a nonforum law because the nonforum’s governmental interests outweigh those of the forum or because the nonforum’s “relationship” to the litigation is “more significant” than is the forum’s. Similarly, when a Minnesota court insists on following a “better law” theory for choice of law and insists on being the final arbiter of where the governmental interests of Minnesota lie, the court’s decisions can seem to be lawless insofar as the court rejects a Minnesota statute in favor of an Iowa statute.

There is a saving grace in this last example, however. A “better-law court” that retains control of determining not only which law is better but also where forum governmental interests lie retains control of the substantive law. That court then is a common law court in a traditional sense and can keep the law in tune with the changing scene in ways that the more deferential *lex fori* court is unlikely to be able to do.

This potential for common law development may make more sense in tort cases than, for example, in trusts and estates, since the sovereign has a traditional role in estate law, and the court has a traditional original role in tort law.³⁴ This difference in potential for common law control may be a sign, not that something has gone awry in the tort choice of law case, but that a strong-willed “better law” method is inappropriate in estates choice of law cases. Consequently, courts may need more than one method for determining choice of law issues.

Indeed, the suggestion that there could be one all-encompassing analytic method for choice of law is astonishing. If the outside constraint on choice of law methods is that the choices must be consonant with the underlying substantive law policies, and if there are different kinds of substantive law with different kinds of policies, then we need *different kinds of analytic methods* for these different kinds of choice of law contexts. Yet all of the contemporary analytic methods implicitly suggest that we need only one method as long as this one method allows for differing *uses*.

For example, although the better law methodology is highly sophisticated in that it calls for different sorts of analyses, varying according to the underlying substantive law, not every choice of law issue should turn on one law’s being “better” than another. There still is room for a *lex loci* rule in some estates choice of law issues.³⁵ Of course, the *lex loci* rule in this context easily could be made to fit the “better law” construct. It could be said to be better in the sense that it is the forum’s rule governing the disposition of property located within the forum. Making “better law” the governing consideration would yield a *unitary* theory, there being no other discriminable parts. However, this unity would smack of *a priorism*. It would lead to glossing a choice as a choice of “better law” for no reason other than the fact of the choice—certainly not an advance in choice of law. Rather, when there are two or more possible *foci*, recognizing the existence of all is better than striving for an arbitrary unity.

Leflar understands the multiple *foci* problem. Rather than assigning fixed priorities among the five choice-influencing considerations, he allows the priorities to vary with the substantive context in which the choice of law issue arises.³⁶ The point is that there may be

34. See G.B. BOGART & G.T. BOGART, LAW OF TRUSTS § 7 (5th ed. 1973) (recognizing the vast predominance of statutory authority in estates law).

35. *But see* R. WEINTRAUB, *supra* note 6, § 8.6 (asserting that a selection between two conflicting rules of estates law should turn on the policies and interests of the competing states where the conflict is “real”).

36. See R. LEFLAR, *supra* note 3, § 106, at 245. The choice-influencing-consider-

at least one kind of case in which the traditional *lex loci* rule should provide the rule, and it should be denominated as such. There is no advantage in applying one methodology for the sake of a unitary approach when another would reach the same result and *for the same underlying reasons*.

As Professor Leflar points out, there currently is judicial eclecticism in choice of law that is leading to “‘the’ modern approach.”³⁷ This eclecticism combines several of the contemporary analytic methodologies and

cit[es] all the authors, along with current articles that discuss the court’s specific problem, plus a selection of recent judicial opinions which, regardless of reasoning, have broken away from old-time mechanical choice-of-law rules. Such a collection of authority will almost surely support any sensible non-mechanical choice of law that an intelligent and conscientious court is likely to arrive at.³⁸

But this sort of judicial eclecticism is not sufficiently eclectic. The problem with the territorial rules was *not* that they were territorial, but that some of them were senseless in that geography had no connection with substantive law. The solution does not necessarily lie in rejecting all the old rules in favor of multi-value or multi-factor analyses, no matter how complex and many-colored these analyses might be. But, a court adopting a territorial approach must give a reasoned analysis of the connection between the underlying substantive law and geography. The point is that the substantive policies of the law must dictate the choice of law *methodology* in the particular case; a methodology that turns on geography will be the appropriate

ations methodology has essentially an *ad hoc* unitary form. Such a form can be created for any theory simply by stating the several propositions as disjuncts or conjuncts so as to yield one complex proposition. Unless this complex proposition has the explanative force of an integrated principle, however, it does not yield a *unified* theory. Rather, it will have no more explanatory force than its components had as single discrete principles. This concern has led first amendment theorists to espouse multi-value and multi-principle approaches to resolve speech, expression and conduct issues in constitutional law. *See, e.g.*, Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 276-77 (1981); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915 (1978). *See also* F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982). The search for unified theories, as opposed to unitary ones, arises in physics and philosophy, too. *See, e.g.*, H. FRITZSCH, *QUARKS* 258-65, 281 (M. Roloff & H. Fritzsch trans. 1983); B. Russell, *The Philosophy of Logical Atomism*, in *LOGIC AND KNOWLEDGE* 177 (R. Marsh ed. 1956).

37. R. LEFLAR, *supra* note 3, at 197.

38. *Id.* at 219-20.

methodology for a case if the substantive law of the case intimately involves geography.

This has been a long introduction to a complex of problems and issues connected with rules and analytic methods for choice of law. In the sections that follow, I examine some recent choice of law decisions by the Minnesota Supreme Court and its related non-conflicts decisions. A rational reconstruction of the experience of this court with its singular analytic method is instructive. Minnesota is poised to lay down a rule for choice of law in tort, yet is having serious difficulties in other areas—difficulties that stem from attempts to make one analytic method do the work of several. Minnesota's experience throws into high relief problems common to all of the choice of law approaches and to the eternal question of the place of the courts in our society.³⁹

39. The theories and principles I ascribe to the court in this article are based upon what might be called a rational reconstruction of a number of that court's decisions. In a sense, this is little different from the process that led Leflar to develop his choice-influencing-considerations methodology. Leflar asserted that "[i]n the minds of all commentators there has always been a continuing urge to focus upon the true reasons that underlie choice-of-law adjudications, the basic choice-influencing-considerations that actually lead or should lead the courts to one result or another in particular cases or types of cases." Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1585 (1966). A rational reconstruction, however, casts a wider net than an analysis of the precise language of the court. More importantly, the Minnesota court has a peculiar approach in writing opinions that may be a reflection of a philosophy of deciding cases on an *ad hoc* basis. The court regularly has not grounded its decisions in a solid substantive analysis. Rather the court often is content simply to state a rule for a case without citation to its own relevant precedent or statutes or without attempting to reconcile conflicting precedents. Sometimes the court will remain silent in this regard; other times it cites precedent from other jurisdictions without considering the precedent peculiar to that jurisdiction.

See, e.g., *Melina v. Chapin*, 327 N.W.2d 19 (Minn. 1982). In *Melina*, the court refused to overturn a punitive damages award, allegedly excessive as a matter of law, when there had been no evidence below concerning the defendant's ability to pay punitive damages. The court cited (and arguably misinterpreted) a California decision for the proposition that punitive damages are to be limited to an amount reasonably necessary to punish and deter. *Id.* at 20 n.1 (citing *Neal v. Farmers Ins. Exch.*, 21 Cal. App. 3d 910, 928, 148 Cal. Rptr. 389, 399, 582 P.2d 980, 990 (1978)). *See* K. REDDEN, PUNITIVE DAMAGES § 10.3(D) (1980). In the process, the court ignored an entire line of Minnesota precedent on the issue. *See* *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 408 (Minn. 1982) (punitive damages are to punish and deter tortfeasor; not available when tortfeasor is dead); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 741 (Minn. 1980); *Wilson v. City of Eagan*, 297 N.W.2d 146, 151 (Minn. 1980); *Hammersten v. Reiling*, 262 Minn. 200, 209, 115 N.W.2d 259, 266 (jury discretion on amount of punitives will not be disturbed on appeal unless so excessive as to be deemed unreasonable), *cert. denied*, 371 U.S. 862 (1962); *Nelson v. Halvorson*, 117 Minn. 255, 135 N.W. 818 (1912) (evidence of defendant's ability to pay punitives is admissible because the purpose of punitives is punishment). *See also* MINN. STAT. § 549.20 (1980) (award amount necessary to further purpose of punitives; factors include defendant's ability to pay); 4 MINN. PRAC. JIG-II, 195 G-S (2d

II. A POTENTIAL TORT CHOICE OF LAW RULE FOR A BETTER LAW COURT

The Minnesota Supreme Court long has been under fire for its decisions on choice of law issues. Members of that court frequently fire salvos in dissent,⁴⁰ and since 1973, scholars have kept up a barrage.⁴¹ Even members of the United States Supreme Court have taken some pot shots.⁴² The Minnesota court follows choice-influencing-considerations methodology for choice of law decisions.⁴³ Although Minnesota is not alone in utilizing this methodology,⁴⁴ there

ed. 1974) (recommended jury instruction to award amount necessary to punish defendant).

Admittedly, none of the above-cited precedent is precisely dispositive of the *Melina* case. However, by ignoring it, the court sends a message to the practicing bar that an issue not precisely "on all fours" with local precedent is "up for grabs." The message the court should send is that decisions of the court ought to fit together to provide a cohesive structure upon which to develop the law. The rational reconstruction of Minnesota decisions in this article assumes this kind of cohesive structure in order to examine a more general and pervasive question about the law of conflicts when, in fact, the court's history has indicated an *ad hoc* approach.

40. *See, e.g.*, *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 54 (Minn. 1979) (Otis, J., dissenting), *aff'd*, 449 U.S. 302 (1981); *id.* at 49 (Peterson, J., concurring); *Milkovich v. Saari*, 295 Minn. 155, 171, 203 N.W.2d 408, 417 (1973) (Peterson, J., dissenting).

41. *See* Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 886-88 (1980); Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflict Tort Cases*, 44 TENN. L. REV. 975, 1007-09 (1977); Comment, *Conflict of Laws: Minnesota Rejects the "Significant Contacts" Doctrine in Favor of the "Better Law" Test*, 58 MINN. L. REV. 199, 210 (1973); Note, *The Minnesota Supreme Court: 1979*, 64 MINN. L. REV. 1181, 1187-91 (1980).

Of particular interest is Leflar's criticism that in applying his choice-influencing-considerations methodology, the Minnesota court has erred in at least one instance. *See* Leflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080, 1089 n.48 (1981).

42. *See* *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320, 324 (1981) (Stevens, J., concurring) ("the Minnesota court's decision to apply Minnesota law was plainly unsound as a matter of normal conflicts law"), *aff'g* 289 N.W.2d 43 (Minn. 1979); *id.* at 307 (Brennan, J. concurring) (declining to say "whether we would make the same choice of law decision if sitting as the Minnesota Supreme Court").

Commentary on the decision of the United States Supreme Court in *Allstate Insurance Co.* has raised a number of questions about the need for a national conflict of laws policy in general, and the Minnesota court's standard in particular. *See* Brillmeyer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315 (1981); Shreve, *In Search of a Choice-of-Law Reviewing Standard—Reflections on Allstate Insurance Co. v. Hague*, 66 MINN. L. REV. 327, 336-40 (1982).

43. *See* *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973) (adopting the choice-influencing-considerations methodology). *See generally* R. LEFLAR, *supra* note 3, at 195; Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966). For a list of Leflar's five choice-influencing-considerations, see note 18 *supra*.

44. *See* *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

is a special kind of criticism leveled at its court's decisions.⁴⁵ This different treatment apparently stems from what the critics perceive as the Minnesota Supreme Court's unswerving loyalty to Minnesota law, as the "better rule of law" in choice of law problems. Some writers have gone so far as to claim that the Minnesota Supreme Court's choice of law "methodology" really is just the rule that "'forum law applies' or, more simply, 'plaintiff wins.'"⁴⁶

That there is a difference between "forum law applies" and "plaintiff wins" in choice of law problems was apparent in the court's 1981 decision in *Bigelow v. Estate of Mathias*.⁴⁷ In that case, the Minnesota court chose an Iowa statute as the better law, thus allowing the Iowa plaintiff to recover.⁴⁸ This case is noteworthy not only because the court finally broke its pattern of always choosing Minnesota law as the "better law" in tort, but also because the Minnesota statute the court rejected in *Bigelow* turned out five months later to be held unconstitutional in *Thompson v. Estate of Petroff*.⁴⁹ This latter case in turn appears seriously to soften the impact of the former and to leave the reputation of the Minnesota Supreme Court in the area of conflicts decisions substantially intact. Its reputation is that Minnesota's choice of law issues always are resolved in favor of Minnesota law, on a choice-influencing-considerations analysis that revolves on only a "better law" label for Minnesota law.

Some scholars have objected to "better law" theories of choice of law as "treacherous," "illegitimate in principle," too likely to be "parochial or self-regarding," and "too dangerous."⁵⁰ Such critical charges would be all too true if a court that uses a better law rule has no theory about wherein the betterness lies.⁵¹ The Minnesota

45. *But see* R. WEINTRAUB, *supra* note 6, at 328-29 (criticizing the use of the choice-influencing-considerations methodology in both New Hampshire and Wisconsin).

46. Comment, *supra* note 41, at 203. *See also* Davies, *A Legislator's Look at Hague and Choice of Law*, 10 HOFSTRA L. REV. 171 (1981). Professor Davies argued that "[t]he Minnesota Supreme Court acts as if the state's manifest destiny is to rule all, that its own law is to be applied in any event, despite the state boundary." *Id.* at 180.

47. 313 N.W.2d 10 (Minn. 1981).

48. *Id.* at 16.

49. 319 N.W.2d 400 (Minn. 1982). For further discussion of *Bigelow* and *Thompson*, see notes 60-76 and accompanying text *infra*.

50. Trautman, *Rule or Reason in Choice of Law: A Comment on Neumeier*, 1 VT. L. REV. 1, 14 n.36 (1976). *See also* Shreve, *supra* note 42, at 341-42.

51. Without the objective analysis required by the better law rule, this approach could degenerate into a "labelling" methodology whereby the forum law or the law most favorable to the plaintiff simply would be declared to be the better law. For example, the plaintiff in one Minnesota case, in urging the Minnesota court to apply Minnesota's favorable automobile insurance "stacking" rule, simply cited a favorable domestic decision and declared, "[T]herefore, there is no doubt that Minnesota law,

Supreme Court not only has a theory about what makes one law better than another in tort conflicts cases, the court has stated that theory fairly clearly in its choice of law decisions. Further, this theory is one the Minnesota Supreme Court utilizes even in tort cases that do not involve choice of law issues.

In the realm of cases that have no tort aspects to them, for example pure contract cases rather than accident insurance contract cases, the Minnesota Supreme Court has not recently had occasion to speak in a choice of law context. But this merely raises a problem of theory construction, and thus it is one evolving common law courts always face: What shall be the theoretical content of "better law" here? We could use some of the court's other contract decisions to forecast its theoretic approach in pure contract conflicts cases. Here, however, perhaps the court should not develop a better law theory. For saying the court should apply the better of two competing rules of law in all choice of law cases suggests, wrongly, that there can be one all-encompassing theory for choice of law decisions.

The Minnesota Supreme Court appears to have a two-part theory about what makes one rule of law better than another. The first and more general part of this better law theory is that those rules of law comporting with current social, economic, and legal reality are better than those founded on outdated social, economic, and legal attitudes; and that those rules of law a majority of jurisdictions follow are better than those a minority of jurisdictions follow.⁵² Each of these principles of this first part in turn is undergirded by a deeper theory. Many plausible reasons exist for preferring more "modern" rules or majority rules. Agreeing with the majority may be "easier" than justifying a different opinion, or safer because the majority is more likely to be correct. Moreover, agreeing with the majority may contribute to a goal of uniformity. Not all such reasons are equally good as deep theories of "betterness." Further, each of them is highly

which allows stacking, is the better rule of law." Brief for Respondents at 17, *Allstate Ins. Co. v. Hague*, 289 N.W.2d 43 (Minn. 1979) (citing *Ehlert v. Western Nat'l Mut. Ins. Co.*, 296 Minn. 195, 207 N.W.2d 334 (1973)). However, this labelling approach is not a problem peculiar to a "better law" methodology, but arises in all "analytic" methodologies. See notes 12-13 and accompanying text *supra*.

52. The Minnesota court has taken notice of the "needs of society" and "rules of law which make good economic sense" in the recent decisions applying the "better law" analysis. See *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 407 (Minn. 1982); *Bigelow v. Halloran*, 313 N.W.2d 10, 13 (Minn. 1981) (quoting Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV 1084, 1088 (1966)). When there is a conflict between current social, economic, and legal reality and the rules of a majority of jurisdictions, those rules that comport with the growing "trend" are better than the out-dated rules of the majority. See *Bigelow*, 313 N.W.2d at 12-13; R. WEINTRAUB, *supra* note 6, § 6.6.

likely to represent the personal view of individual judges rather than the common vantage point of a whole court. This level of theory construction raises issues of jurisprudence and philosophy beyond the scope of this article.

The general principle of the second part of the Minnesota's better law theory seems to be that those rules of law that fit the theory of, and further the goals of, the body of the particular area of substantive law giving rise to the cause of action are better than those that do not. The individual principles of this second part of Minnesota's better law theory then would be principles derived from the court's own theories of various areas of substantive law. For example, the court's theory of modern tort law is that it is a body of law based on a compensation philosophy.⁵³ Tort rules that further this compensatory policy, then, would be better than those that do not, and tort rules that lead to full compensation are better than those that might tend to undercompensate or deny compensation.⁵⁴ Given this view of the basic policy of tort, Minnesota then could lay down a choice of law rule for tort conflicts cases: Choose the substantive tort law that leads to greater recovery for the tort victim.

Arguably, a court might view tort law as based on both a compensation and a punishment philosophy. This bifocal compensation-punishment view of tort is defensible historically, for tort grew out of criminal law and continues today as one of the ways in which society civilizes its members into meeting certain standards of conduct and care.⁵⁵ A court also might adhere to this bifocal view of tort because it holds a limited view of the propriety of compensating the citizens of another jurisdiction injured within the forum state when compensation would not be available in the tort victim's state, but nonetheless seeks to deter injurious conduct within its borders.⁵⁶ That is, choice

53. See *Bigelow v. Halloran*, 313 N.W.2d at 12-13. In *Bigelow*, the court found that Minnesota's statutory bar to tort liability after the death of the tortfeasor was out of line with the compensatory nature of modern tort causes of action, and therefore applied an Iowa law as a "better" rule of law in a conflicts case. *Id.*

54. For a discussion of the difference between undercompensation and no compensation, see notes 90-94 and accompanying text *infra*.

55. See W. PROSSER, *LAW OF TORTS* 6-16, 898 (4th ed. 1971). See also 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 510-42 (2d ed. 1898).

56. Traditional interest analysis recognizes a state's interest in protecting its own citizens whether acting in-state or out-of-state and, thus, having its rules applied for the benefit of its citizens. See, e.g., B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 85-86 (1963). Professor Ely, for one, has criticized this view. See Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981) (arguing for return to the *lex loci* rules except where both parties share a common domicile). The converse of this analysis, with some basis in principles of comity among the states, is that a state has no interest in protecting the citizens of other

of law considerations might prompt a court to continue seeing a punishment policy in tort. If a court were to recognize both the punishment and compensation policies of tort law,⁵⁷ then it could choose forum law for its own tort victim citizens whenever that choice leads to a higher recovery than nonforum law would afford by claiming a governmental interest in affording its own plaintiffs full compensation.⁵⁸ With a bit of prompting, the forum also could extend this interest to those plaintiffs who were neither citizens of, nor residents in, the forum but who, because they were injured in the forum, have outstanding medical or property repair expenses there.⁵⁹ By provid-

states. *Cf.* *Sexton v. Ryder Truck Rental, Inc.*, 413 Mich. 406, 320 N.W.2d 843 (1982) (applying forum law to events occurring outside the forum where both parties were forum domiciliaries, but reserving the question of whether its laws could govern the conduct of non-citizens outside the forum).

57. At one time Minnesota seemed to recognize a punishment policy in tort. For example, in one case, the Minnesota court applied a Minnesota dramshop statute in an action against a Minnesota seller of liquor but arising from an accident in Wisconsin. *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957). In *Schmidt* the court purported to follow the *lex loci* rule but characterized the place of injury as Minnesota because the harmful action was based upon the sale of liquor in Minnesota. *Id.* at 367. In doing so, however, the court emphasized Minnesota's interest in "admonishing" dramshop proprietors by applying a law which was "essentially remedial" and "penal in its characteristics." *Id.* at 367-68. Commentators have praised the *Schmidt* decision. *See* Davies, *supra* note 46, at 174 n.17 (noting *Schmidt* as one of Minnesota's "finest cases"); R. WEINTRAUB, *supra* note 6, at 301-02 (noting *Schmidt* as the case that "opened the door" to modern tort conflicts analysis).

In a second case, the Minnesota court refused to allow the application of the dramshop act, which provided for strict liability, against a Wisconsin dramshop owner. The court did allow a common law action based upon negligence. *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980). In *Blamey*, the court made no mention of the penal characteristics of the dramshop statute. Later cases have seemed to confuse the purpose and nature of the dramshop act. *See* *Seim v. Garavalia*, 306 N.W.2d 806, 811-12 (Minn. 1981) (referring to the statute as providing for "absolute" liability); *Conde v. City of Spring Lake Park*, 290 N.W.2d 164, 166 (Minn. 1980) (commenting that the statute "has been described as both penal and remedial in nature"). The court's tendency to shift its emphasis of the purposes of such a statute is unsettling and further points out the *ad hoc* nature of the Minnesota Supreme Court's decisions. *See* note 39 *supra*.

58. *See, e.g.*, *Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977) (asserting forum's governmental interest in protecting resident plaintiffs as justification for applying forum comparative fault statute over foreign contributory negligence rule); *Griffith v. United Air Lines*, 416 Pa. 1, 203 A.2d 796 (1964) (asserting forum interest in welfare of its domiciliaries in applying forum law providing for unlimited recovery).

59. *See* *Milkovich v. Saari*, 295 Minn. 155, 170-71, 203 N.W.2d 408, 417 (1973).

The court in *Milkovich* noted that

persons injured in automobile accidents occurring within our borders can reasonably be expected to require treatment in our medical facilities, both public and private. In the instant case, plaintiff incurred medical bills in a Duluth hospital which have already been paid, but we are loath to place weight on the individual case for fear it might offer even minor incentives to "hospital shop" or to create litigation-directed pressures on the payment of debts to medical facilities. Suffice it to say that we recognize the medical

ing the fullest possible compensation to these plaintiffs, the forum would make other forum citizens more likely to be paid for the services rendered to the tort victim.

Because the forum could claim a governmental interest in keeping tort victims from being charges on its own citizens' resources, the court could choose full compensation tort law for anyone who resides in or is injured in the forum state. Any of these people may incur medical expenses that they are unable to pay, the costs of which then rest on the public through taxes, increased fees, or increased insurance premiums. The unpaid physician, for example, recoups his or her losses by charging higher fees to other patients. Further, the court would not want to discourage tort plaintiffs from paying their medical or other bills by extending the full-compensation protection to only those nonforum plaintiffs injured in the forum who had *unpaid* medical and other bills at the time of trial. Hence, that these plaintiffs had incurred such tort expenses in the forum would be sufficient justification for affording them full relief.

Having taken this step in reasoning, the forum court then could say that a nonforum tort victim injured in the forum would be entitled to forum compensation protection even if the tort victim had not incurred such outstanding expenses in the forum as long as the tort victim *might* have incurred such expenses. Thus, a North Dakota woman injured in Minnesota should not have her substantive and remedial rights turn on the vagaries of which nearest physician and hospital render medical services to her. Moreover, a North Dakota plaintiff injured in Minnesota should be afforded the same full compensation even if the plaintiff does not discover the need for medical attention until the plaintiff returns to North Dakota or willingly foregoes medical attention until returning to her own North Dakota doctor. By reasoning along these lines, a forum court could properly extend its full-compensation policy to nonforum plaintiffs who are injured in the forum but who do not incur medical or other expenses there.

Logically there is room to distinguish between the plaintiff who does incur such expenses in the forum and the plaintiff who does not incur these expenses in the forum. There is this room because the alleged foundation for the forum governmental interests is the *possibility* that the plaintiff will become a charge of the state or that other

costs are likely to be incurred with a consequent governmental interest that injured persons not be denied recovery on the basis of doctrines foreign to Minnesota.

Id.

forum citizens who have rendered services to the plaintiff might go unpaid because the plaintiff is unable or unwilling to pay without receiving full compensation. The upshot of this realization, however, should not be a refusal to extend the full compensation policy to those who did not incur expenses in the forum. Rather, we should realize that this is no more than *lex loci* in disguise: forum plaintiff or forum tort or actual forum expenses. Although there may be room for a distinction between nonforum plaintiffs who incurred forum expenses and those who did not, a court should ignore that distinction, which only gives life to a relic of the past.

Thus, a forum court could easily arrive at a tort choice of law rule that selects the fully compensating forum law for all its citizen tort plaintiffs, wherever injured, and all tort plaintiffs injured in the forum, on the grounds that this rule results in choices that advance forum governmental interests and are choices of the better law, because that law is more fully compensatory.

What, then, about the tort plaintiff who is not from the forum and who is not injured in the forum? One answer is to say that the forum will extend its policy of full compensation to this tort plaintiff when the tort defendant is from the forum, emphasizing not a compensation interest but a punitive interest. The forum could claim a governmental interest in having forum citizen defendants held to a uniform standard of care, irrespective of who the plaintiff is or where the injury occurred. Allowing this forum defendant to escape liability not only may begin the erosion of the standard of care, but also would be unfair to other potential forum tort defendants. Hence, the forum court, in almost any tort claim, could justify a choice of forum law as the "better law" when that law furthers the forum's interest in providing compensation and punishment.

One hard case, however, points out the pitfalls in viewing tort as being undergirded by both a compensation policy and a punishment policy. This case arises in a choice of law context, where the forum's tort recovery rule is restrictive and is statutorily fashioned by a legislature that does not share the hypothetical forum court's view that fuller compensation in tort better serves the underlying policies of tort law. The consideration of advancing forum governmental interest then would seem to favor choosing the forum statute (undergirded by the *legislature's* view of forum governmental interest). The consideration of applying the better law, however, would seem to favor the nonforum law, which provides fuller compensation for the tort victim and greater punishment for the forum citizen tortfeasor (a function of the court's view about tort).

The most acute version of this particularly hard case then will be one in which a non-resident plaintiff is injured outside the forum by a forum defendant. In such a case, the court's bifocal theory of the goals of tort law will point to choosing forum law as a result of the legislature's declared governmental interest in shielding forum defendants from tort liability. Moreover, the legislature would also have declared a governmental interest in not affording even forum tort plaintiffs full compensation for those torts.

There are at least three ways to sever this Gordian knot. One is to choose the forum law because it advances forum governmental interest, as the legislature perceived it, although it is not the better rule of law as the court views the matter. A second way to resolve the problem is to choose the full compensation, nonforum law *because* the plaintiff and the place of the tort are nonforum. However, a choice so grounded is a choice grounded on a *lex loci* rule and reasoning, and that rule is not one a choice-influencing-considerations court can use consistently with its declared methodology.

The third way to resolve the problem is to choose the nonforum law that provides full recovery because it is better law. This choice, however, would require recasting the court's rationale of wherein "betterness" lies among tort recovery rules; the court would have to drop the punishment rationale from its view about the forum's governmental interest. Hypothetically, that rationale is all that anchored a choice of forum law for a nonforum tort victim on a nonforum tort, and here the forum law essentially shields the forum defendant from punishment. In the alternative, the court would have to say that when there is a conflict between the forum's governmental interest (no punishment) and the better rule of law (full compensation), the latter outweighs the former. This second alternative has the effect of keeping two of the choice-influencing considerations alive as separate considerations. The first alternative has the effect of collapsing them; for it keeps the forum's governmental interest consonant with the better rule of law, as the *court* perceives both betterness and forum interests.

The Minnesota tort choice of law decisions long have been pregnant with an instinct to provide the tort plaintiff with compensation, and, until recently, giving the tort plaintiff compensation or greater compensation coincidentally was coextensive with choosing Minnesota law.⁶⁰ Certainly the court understood in the earliest guest-stat-

60. This has been particularly apparent in cases involving non-forum guest statutes, the application of which the Minnesota court consistently has avoided. *See Allen v. Gannaway*, 294 Minn. 1, 199 N.W.2d 424 (1972); *Bolgreaan v. Stich*, 293 Minn.

ute cases that it chose Minnesota law in that context because otherwise there would be no recovery or because otherwise the plaintiff's burden of proof made recovery unlikely. Certainly, too, the court knew that it chose Minnesota law in one of its most controversial cases because that choice allowed the plaintiff greater recovery than would the law of the other state.⁶¹ But not until *Bigelow v. Estate of Mathias*⁶² did the court have to face head-on the hardest form of the compensation issue. For not until *Bigelow* did the court have to make the choice of law really fit within the framework of a better law theory for the substantive law of torts. Moreover, in *Thompson v. Estate of Petroff*,⁶³ the court reinforced its choice in *Bigelow* by holding that the Minnesota statute, which the court rejected in *Bigelow* in favor of a "better" Iowa statute, violated the equal protection clause of the Minnesota Constitution. Each of these cases involved nearly identical facts and involved the application of a restrictive Minnesota survival statute. Only the earlier *Bigelow* case, however, was cast in choice of law terms.

In *Bigelow*, the plaintiff, an Iowa resident,⁶⁴ was assaulted and seriously injured in her Iowa home by a Minnesota resident who subsequently committed suicide.⁶⁵ In a suit against the estate of the assailant in Minnesota state court, the defendant argued for the application of Minnesota's survival statute, which provided that a cause of action for an intentional tort died with the tortfeasor.⁶⁶ The plaintiff urged that Iowa's law allowing the survival of the action should apply.⁶⁷ The trial court applied Iowa law as the "better law," and the Minnesota Supreme Court affirmed.⁶⁸

8, 196 N.W.2d 442 (1972); *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254 (1968); *Kopp v. Rechtzigel*, 273 Minn. 441, 141 N.W.2d 526 (1966). *See also* *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 65 (1966) (rejecting application of non-forum rule of interspousal immunity).

61. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1979), *aff'd* 449 U.S. 302 (1981). For a discussion of *Hague*, see notes 153-85 and accompanying text *infra*.

62. 313 N.W.2d 10 (Minn. 1981).

63. 319 N.W.2d 400 (Minn. 1982).

64. At the time of suit, the plaintiff had become a Minnesota resident. *Bigelow*, 313 N.W.2d at 12.

65. *Id.*

66. *Id.* at 11.

67. *Id.* at 12.

68. *Id.* at 12-13. Relying on *Milkovich*, the Minnesota Supreme Court noted that only the last two elements of the choice-influencing methodology, the advancement of forum governmental interests and the application of the better rule of law, were relevant to cases arising in tort. *Id.* at 12. The court found that the forum had no legitimate governmental interest in excluding recovery by the intentionally injured tort victim when such recovery would be permitted if the cause of action were for negligent conduct. *Id.* In finding that the Iowa rule was the better rule, the court

In *Thompson*, Luella Thompson was assaulted in her home by Raymond Petroff who "cut her with a knife, raped her, and twice threatened to kill her."⁶⁹ Thompson then got hold of a gun, which discharged and killed Petroff as the latter lunged for it.⁷⁰ Thompson, acquitted of murder and manslaughter charges on the grounds of self defense, sued Petroff's estate in Minnesota state court for compensatory and punitive damages.⁷¹ Unlike the plaintiff in *Bigelow*, Thompson could not circumvent the Minnesota survival statute because both parties were Minnesota residents and the assault had occurred in Minnesota. There was, then, no choice of law issue in *Thompson*. However, the Minnesota Supreme Court held the Minnesota survival statute violated the equal protection clause of the Minnesota Constitution,⁷² and gave Thompson a cause of action for an intentional tort against the decedent-tortfeasor's estate for compensatory, but not punitive, damages.⁷³

In deciding *Bigelow*, the Minnesota Supreme Court had to answer at least one of two questions: (1) Does Minnesota's governmental interest in tort include punishing Minnesota tortfeasors; and (2) Is Minnesota's statute precluding recovery for intentional torts against the estates of tortfeasors better than an Iowa statute that provides for the survival of a cause of action for intentional torts against the representatives of decedent tortfeasors? To the court's everlasting credit, it answered both these questions in *Bigelow* and reinforced those answers in *Thompson*. In giving these answers, the court came to the point that it could now set forth a rule for choice of law in tort. The court also placed itself in a position to see that it need not take a limited view of the propriety of extending protection to tort plaintiffs hailing from other jurisdictions.⁷⁴

The Minnesota Supreme Court stressed in each of these cases that the policy central to tort law is compensation for injury. Moreover, it rejected any theory of tort based on a punitive philosophy. Modern tort law, the court said, looks toward compensation of the tort victim, not toward punishment of the tortfeasor.⁷⁵ By rejecting a

recognized that "[t]he modern law of assault and battery is essentially compensatory and not punitive. . . ." *Id.*

69. 319 N.W.2d at 401.

70. *Id.*

71. *Id.*

72. *Id.* at 406.

73. *Id.* at 408.

74. For a discussion of the tort choice of law rules that Minnesota could now establish, see notes 77-94 and accompanying text *infra*.

75. *Thompson*, 319 N.W.2d at 405-407; *Bigelow*, 313 N.W.2d at 12. In *Thompson*, the court explicitly noted that "compensation rather than punishment is now the

punishment as a tort goal, the court cleared the way for choosing the Iowa statute as the better law in *Bigelow*, and for invalidating the Minnesota statute in *Thompson*. In *Bigelow*, the Minnesota court could not further the compensation policy the court otherwise would see in tort law by choosing a Minnesota law designed to deny compensation (and similarly to prevent punishment). None of the policy reasons a court ordinarily might have had in *Bigelow* for choosing Minnesota law could be furthered, then, by choosing Minnesota law; but these policies could be furthered by choosing Iowa law. Yet the policies of the Minnesota legislature would have been furthered only by choosing Minnesota law. The consideration of advancing Minnesota's governmental interest seemed to point in opposite directions.

Bigelow and *Thompson* show something more than the possibility of generating a substantively-based tort choice of law rule. They also show that, for tort cases at least, the Minnesota Supreme Court's choice-influencing-considerations methodology really does boil down to a "better law" rule. The Minnesota Supreme Court is unwilling to take the Minnesota legislature's view of Minnesota's governmental interest when the interest is in conflict with what the supreme court views as the better rule of law. When there is a conflict between the legislature's view of Minnesota's interests and the court's view that a non-Minnesota law is better, the court has chosen the better law and said, in effect, that that *choice* and that *law* advance Minnesota's governmental interests.⁷⁶ The court thus insists on being the ultimate

essential purpose of any tort cause of action. . . ." 319 N.W.2d at 405. In other cases, the court has put the tort policy in terms of "fullest compensation." Compare *Hague*, 289 N.W.2d at 49 ("fully compensating," "compensate. . . to the full extent") and at 47 ("interest in maximizing the tort recovery," "compensating. . . to the maximum extent. . . even where this recovery is greater than minimum requirements") with *Bigelow*, 313 N.W.2d at 12 ("fully compensated"). But note that when the *Bigelow* court cites *Hague* in connection with tort compensation policy, it cites *Hague* at 48 ("full compensation"), not at 47 or 49. *Id.* For further discussion of the problem *Hague* poses to my analysis of the tort choice of law rule, see notes 153-85 and accompanying text *infra*.

76. In *Bigelow* the court noted as follows: "[T]his court has often said that it is in the interest of this state to see that tort victims are fully compensated." 313 N.W.2d at 12 (citing *Hague v. Allstate Ins. Co.*, 289 N.W.2d 45, 48 (Minn. 1978), *aff'd*, 449 U.S. 302 (1981)). In *Thompson*, the court invalidated the Minnesota survival statute under the state requirement of equal protection, stressing that "[i]ntentional torts have been omitted from the survival statute for no apparent reason other than the legislature's failure to keep up with the development of modern tort law." 319 N.W.2d at 405 (emphasis added) In a sweeping assertion of judicial authority, the court continued by noting that

when an old rule is found no longer to serve the needs of society, it should be set aside and replaced with one that reflects the interests and the will of the people and the demands of justice. "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified . . ."

arbiter of wherein lie Minnesota's governmental interests. This means there is no real distinction in Minnesota between the consideration of advancing forum governmental interest and the consideration of choosing the better law in tort choice of law. The Minnesota Supreme Court's approach thus is one of a "better law" theory for tort issues; it is not today a choice-influencing-considerations methodology.

III. FITTING A TORT CHOICE OF LAW RULE WITH NON-CONFLICTS TORT CASES

The rule Minnesota now could lay down for choice of law in tort is "choose the more fully compensating tort law."⁷⁷ This rule would be geared to the policy of compensation in tort. Choices in accordance with this rule would result in the application of tort laws that give effect to the underlying policies of tort as the *court* perceives those policies. This rule could not be applied, however, without a reasoned analysis of the conflicting substantive laws to determine which of them is more fully compensating. But this analysis would eliminate any analysis of, or reference to, the fortuitous *loci* factors of old, as well as any weighing of the governmental interests of different jurisdictions. Such a tort choice of law rule would mark a complete break with the *lex loci* past. For all that, however, this probably is not the tort choice of law rule Minnesota would or should announce.

Suppose, for example, a Minnesota state employee, acting within the scope of employment, negligently injured a Californian in California, where there is no statutory ceiling on negligence recoveries for personal injury. In general, Minnesota waives sovereign immunity in tort to a statutory ceiling of \$500,000.⁷⁸ If the California tort victim were foolish enough to sue in a Minnesota state court, would the Minnesota court limit the plaintiff's recovery to the \$500,000 ceiling, or would the court apply California law as the better rule of law because it leads to fuller compensation?

Arguably, Minnesota case law suggests the court would not apply Minnesota law but rather that it would apply the California no-

Id. at 407 (quoting *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J. dissenting)).

77. By consistently framing tort policy in terms of "full compensation," the Minnesota court has given the appearance of having already adopted this rule. *See* note 75 *supra*. Although the court may have suggested the adoption of this rule, it is not the rule suggested by this article. For a discussion of the particular challenges that the *Hague* decision raises to the choice of law analysis offered in this article, see notes 153-85 and accompanying text *infra*.

78. *See* MINN. STAT. § 3.736(4)(b) (1982).

ceiling law because it is more fully compensating.⁷⁹ Irrespective of these predictions, however, clearly the California tort victim would be foolish to sue in Minnesota, in light of the greater chance of successful suit in California.⁸⁰ By bringing suit in Minnesota, the plaintiff would forego a low-risk alternative to force a conflict between the Minnesota judiciary and legislature over the forum's appropriate tort policy. In effect, the plaintiff would risk that the court would sidestep the conflict and defer to the legislature's formulation of tort policy by applying forum law.

That *Bigelow*, *Thompson*, and other Minnesota cases somehow dictate that a Minnesota court would choose California law and later invalidate Minnesota's statutory ceiling actually is far from clear. There is a substantial difference between giving the tort victim a real opportunity of compensation and providing the fullest possible compensation. In the survival-of-action cases, the court faced a choice between no compensation and some compensation.⁸¹ In the guest statute cases, the court faced a choice between unlikely-to-yield compensation on a gross negligence standard and likely-to-yield compensation on an ordinary negligence standard.⁸² In the hypothetical statutory ceiling case, the choice is between some compensation and more compensation.⁸³ In view of this variation of the problem, the

79. Moreover, the Minnesota court's decision in *Thompson* suggested that the court would later invalidate the Minnesota statutory ceiling in order to bring the court's purely local decisions into line with its choice of law decisions. See notes 69-73 and accompanying text *supra*. Minnesota has in fact invalidated a statutory ceiling on tort damages contained in a portion of the dramshop statute. See *McGuire v. C & L Restaurant*, 346 N.W.2d 605 (Minn. 1984). *McGuire* involved a Minnesota plaintiff whose cause of action arose before the legislature had repealed the statutory ceiling. *Id.* at 608-09. The court invalidated the ceiling in this case on state equal protection and tort compensation policy grounds. *Id.* at 615.

For a discussion of the need for consistency between choice of law decisions and "local" decisions, see notes 31-33 and accompanying text *supra*.

80. *Cf.* *Hall v. University of Nevada*, 8 Cal. 3d 522, 503 P.2d 1363, 105 Cal. Rptr. 355 (1972) (rejecting application of Nevada statute limiting liability of state government where Nevada employee injured California residents on a California highway), *cert. denied*, 414 U.S. 820 (1973), *on remand*, 74 Cal. App. 3d 280, 141 Cal. Rptr. 439 (1977), *aff'd*, 440 U.S. 410 (1979). The hypothetical in the text is based upon the facts of the *Hall* case except that the place of the injury is moved from the forum to the non-forum state.

81. See notes 64-68 and accompanying text *supra*.

82. See, e.g., *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973). *Milkovich* presented the choice between a non-forum guest statute unlikely to yield compensation because it required proof of gross negligence and the general negligence rule of the forum. *Id.* at 157, 203 N.W.2d at 410.

83. This choice between greater compensation and less compensation has been faced by the Minnesota Supreme Court. See *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981). For a discussion of *Hague*, see notes 138-69 and accompanying text *infra*.

suggested tort choice of law rule becomes plainly overly simplistic. The inadequacy of this rule is further illustrated by the fact that it ignores the notion of any punishment policy underlying some substantive tort laws, and particularly tort remedy laws.⁸⁴ Thus, a rule such as "choose the more fully compensating tort law" is not sufficiently complex for all tort choice of law problems.

In the *Thompson* decision, the Minnesota Supreme Court refused to award punitive damages for intentional conduct in a suit brought against the estate of a dead tortfeasor.⁸⁵ A few courts have claimed that punitive damages in personal injury suits are really compensation to the plaintiff for "imponderables" rather than punishment of the defendant.⁸⁶ In Minnesota, however, punitive damages are awarded simply to punish the tortfeasor for his outrageous conduct and to deter him from repeating that conduct.⁸⁷ Therefore, as the court in *Thompson* held, where the tortfeasor is dead there is no one to punish, no potential for repetition, and punitive damages should not be available.

Punitive damages awards usually reflect a punishment policy. There are other tort remedy rules that have punishment built into the measure of damages.⁸⁸ Such rules often will be statutory, representing a departure from the modern common law norm of the compensation policy in tort. Perhaps when Minnesota courts state that "tort policy is one of compensation," the courts are making particular and singular reference to tort *liability* rules, such as whether there is a cause of action, what are the applicable standards of care and what

84. See, e.g., MINN. STAT. § 561.04 (1982) (providing treble damages for the willful severance of timber from state lands).

85. 319 N.W.2d at 408.

86. Michigan, in particular, recognizes punitive or "exemplary" damages as compensation for humiliation, outrage, or mental distress. See *Ten Hopen v. Walker*, 96 Mich. 236, 240, 55 N.W. 657, 658 (1893); *Veselenak v. Smith*, 414 Mich. 567, 572-74, 327 N.W.2d 261, 264 (1982); *Kewin v. Massachusetts Mutual Life Ins. Co.*, 409 Mich. 401, 419, 295 N.W.2d 50, 55 (1980) (dictum); *McFaddan v. Tate*, 350 Mich. 84, 89, 85 N.W.2d 181, 184 (1957). See also *Fay v. Parker*, 53 N.H. 342, 382 (1873) (allowing increased *compensatory* damages for wanton acts, but rejecting the notion that a civil court may punish a tortfeasor as "monstrous heresy").

Often an award of punitive damages may be simply a means to reimburse the plaintiff for his attorney fees. Connecticut nearly is explicit in this regard. See *Doroszka v. Lavine*, 111 Conn. 575, 578, 150 A. 692, 692-93 (1980) (measuring "compensatory punitive damages" for the injury to plaintiff by the amount of plaintiff's attorney fees less taxable costs).

87. See, e.g., *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 741 (Minn. 1980). See generally C. McCORMICK, LAW OF DAMAGES, § 77, at 275 (1935); W. PROSSER, *supra* note 8, § 2, at 9.

88. See, e.g., *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955) (anti-trust treble damages).

defenses are available.⁸⁹ To say "Choose the more fully compensatory tort law" in this context is not necessarily to say "Choose the most generous tort remedy."

Minnesota's theories of tort recovery in the areas of conversion and fraud further support the principle that the promotion of a full compensation policy in tort is separate and distinct from a policy advocating the greatest possible recovery. As one example, Minnesota follows a minority rule that an innocent purchaser of converted property is liable to the rightful owner for only the value of the converted property at the time and place of the original conversion.⁹⁰ In such a case, the subsequent converter is not liable for any increased value in the property that arises from additions made by the original converter.⁹¹ This rule imposes a limitation not on the liability of the defendant, but only on the remedy available against him. In the area of fraud, Minnesota follows a minority rule limiting a defrauded plaintiff to the recovery of his out-of-pocket expenses rather than granting the full benefit of the bargain.⁹² Minnesota's adherence to this rule thus further suggests that it does not have a "fullest compensation" tort policy. Ordinarily, the benefit-of-the-bargain rule will lead to greater recovery.⁹³ If Minnesota's cases really stand for the

89. See, e.g., *Thompson*, 319 N.W.2d at 405. The court in *Thompson* stated that "[u]nder modern tort theory, the primary reason for the existence of a cause of action is to provide a means of compensation for the injured victim." *Id.* (emphasis added). For a further discussion of the Minnesota Supreme Court's view of its tort policies, see note 75 *supra*.

90. See *Mineral Resources, Inc. v. Mahnomen Constr. Co.*, 289 Minn. 412, 184 N.W.2d 780 (1971). The court chose this rule at least in part because it saw no need to deter the innocent purchaser's conduct. *Id.* at 419-20.

91. The majority rule is that the innocent purchaser is liable to the original owner for the value of the converted goods at the time and place of his own purchase, thus providing the potential of increased compensation for additions and improvements made by the original converter. See *Grays Harbor Cty. v. Bay City Lumber Co.*, 47 Wash. 2d 879, 289 P.2d 975, 977 (1955). See generally RESTATEMENT (SECOND) OF TORTS § 927 comments d, f and g (1979); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 403 & n.3 (1973).

92. Out-of-pocket damages represent the difference between what the plaintiff paid and the actual value of what he received. See *Lowery v. Dingman*, 251 Minn. 125, 86 N.W.2d 499 (1957); *Lehman v. Hansord Pontiac Co.*, 246 Minn. 1, 74 N.W.2d 305 (1955). See also *Hanson v. Ford Motor Co.*, 278 F.2d 586 (8th Cir. 1960) (applying Minnesota law).

93. The "benefit of the bargain" rule awards damages representing the difference between the actual value of what the plaintiff received and the value as represented. See D. DOBBS, *supra* note 91, at 595. In the common transaction, when the defendant asserts falsely that the actual value is *greater* than the purchase price—that the plaintiff is getting a "deal"—the benefit-of-the-bargain rule will lead to greater recovery than the out-of-pocket rule. See *id.* at 595-96. Applying an out-of-pocket rule in such a situation, however, as Minnesota would, seems to serve an unspoken equitable consideration that the plaintiff is somewhat tainted by his own greed. On the other side of the coin, when there is a representation as to qualitative value rather

proposition that Minnesota's tort policy is one of *fullest* compensation, Minnesota should choose the fuller recovery measure in fraud choice of law and seek to change its own law in fraud later. If the tort choice of law really is a fullest recovery rule, then one should expect to see a wholesale reworking of these Minnesota minority tort remedy rules, which do not comport with a tort policy of *fullest* compensation.

Perhaps, then, a more sophisticated tort choice of law rule could be fashioned, a rule more adequately representing the substantive tort policies of Minnesota. For example, Minnesota could choose the tort *liability* rule that is more likely to enable the tort victim to recover compensation for injuries, but choose the tort *remedy* rule that limits the tort victim's recovery to actual compensation unless there is some special reason to punish this tortfeasor. In most cases, keeping the victim's recovery "tailored to" compensation for loss means erring on the side of undercompensation rather than overcompensation, since only in special cases is the tort remedy law geared to punishing the tortfeasor. That probably is exactly the point the Minnesota Supreme Court intended to make when it explained that the modern policy of tort law is one of compensation for injury but not of punishment for doing harm.⁹⁴ Hence, to return to the hypothetical of the sovereign immunity waiver up to a statutory ceiling, Minnesota could justify choosing Minnesota law under the two-fold rule; this choice would be consistent with the tort views of *Bigelow* and *Thompson* concerning the existence of *causes of action* in tort. Similarly, the court could justify choosing its lower recovery measures for innocent-second-converter and for fraud on the ground that the Minnesota law more adequately limits the remedy to actual damages. Minnesota would do well to announce a tort choice of law rule along these lines.⁹⁵

IV. POTENTIALS FOR TERRITORIALITY FOR CHOICE OF LAW IN ESTATES AND "PROCEDURAL" CASES

A "better law" choice of law theory for tort may lead to an appropriate tort choice of law rule, but will it lead to an adequate rule

than monetary value, application of the out-of-pocket rule will reward the plaintiff who, because of "his own folly," has paid more than the property as represented would be worth. *See, e.g., Estell v. Myers*, 56 Miss. 800 (1879). Because of these anomalies there is some recent movement to reject slavish adherence to either rule in favor of a more flexible approach consistent with the policies of tort, contract, and equity in all of their full-blown complexities. *See D. DOBBS, supra* note 91, at 597.

94. *See* notes 9 & 89, *supra*. *See also Bigelow*, 313 N.W.2d at 12.

95. Without such a rule, the court risks jumbling its cases in the future. Indeed, Minnesota may already have jumbled the cases in *Hague*, but *Hague* involved both tort and contract policies. *See* notes 153-85 and accompanying text *infra*.

for contracts or estates or other areas of the law? More importantly, is there any reason at all to attempt to use this theory outside the tort context?

Two recent Minnesota decisions exemplify the pitfalls of the choice-influencing-considerations methodology outside the context of torts. The first is an estates case in which Minnesota purported to use the choice-influencing-considerations methodology, and the other is a recent case in which Minnesota abandoned that methodology in favor of the questionable distinction between substantive and procedural law. These two cases illustrate that Minnesota is in serious intellectual difficulty in some non-tort choice of law areas.

In *In re Estate of Congdon*,⁹⁶ the Minnesota Supreme Court had to decide whether to apply Minnesota or Colorado law to determine whether a Colorado resident could benefit under a will and various trusts established by a Minnesota decedent.⁹⁷ Under Colorado law, a beneficiary under a will or trust who has been accused of killing the testatrix arguably could plead an acquittal on murder charges to bar a civil suit to determine the beneficiary's right to inherit.⁹⁸ Under Minnesota law, the acquittal could not be pleaded in bar.⁹⁹

The court's discussion of the resolution of this conflict consists almost entirely of two brief paragraphs:

In *Milkovich v. Saari*, this court adopted a method for resolving conflict of laws questions. The analysis involves the following "choice-influencing considerations:" (1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interest; (5) application of the better rule of law.

96. 309 N.W.2d 261 (Minn. 1981).

97. *Id.* at 271. The beneficiary, acquitted in Minnesota on charges of conspiring to murder her mother, sought to have Colorado law applied to determine her status under her mother's will. *Id.* at 263-64. The beneficiary's husband, however, was convicted for the murder. *Id.* at 63.

98. *See* COLO. REV. STAT. § 15-11-802(1) & (5) (1973). Colorado law is at best ambiguous on the point, however. Under the express terms of the statute the point is arguable.

99. MINN. STAT. § 524.2-803(3) (1980). The statute expressly provides that the probate court may determine independently and by a preponderance of the evidence whether the beneficiary intentionally and feloniously killed the testatrix. *Id.* Thus, the acquittal would have no effect in the probate action.

The *Congdon* decision arose from consolidated interlocutory appeals of the grants of motions admitting the will of the testatrix to probate and enjoining the distribution of trust income to the appellant pending the determination of her right to inherit. 309 N.W.2d at 264. Thus, her responsibility for the death of the testatrix had not been determined by the probate court.

In applying these factors, including the application of the Uniform Probate Code which is the law in a majority of jurisdictions—we hold that Minnesota law applies.¹⁰⁰

Milkovich is a torts choice of law case;¹⁰¹ *Congdon* is an estates case. Moreover, *Milkovich* is a “better law” case in that the “betterness” of the Minnesota law ultimately tipped the scales under the choice-influencing-considerations methodology.¹⁰² By citing *Milkovich* and the Uniform Probate Code, the *Congdon* court suggests that *Congdon* is also a “better law” case. The only reason to note the Uniform Probate Code as “the law in a majority of jurisdictions” is in connection with “better law” reasoning.¹⁰³

There might be “better law” decisions in estates conflicts cases, but *Congdon* certainly should not be among them. *Congdon* represents a false conflict in that there is *no* plausible theory of conflicts that would authorize the application of Colorado law.¹⁰⁴ However, instead of recognizing the false conflict, the court quoted from the Minnesota statutes giving Minnesota courts jurisdiction over estates of decedents domiciled in Minnesota,¹⁰⁵ and reasoned that the rest of Minnesota’s probate code, including the statute that would not allow

100. 309 N.W.2d at 271 (citation omitted).

101. *Milkovich* involved the question of the applicability of an Ontario guest statute in an action arising from a car accident occurring in Minnesota between Ontario residents. 295 Minn. 155, 197, 203 N.W.2d 408, 410 (1973).

102. 295 Minn. at 171, 203 N.W.2d at 417.

103. For a discussion of “better law” analysis, see notes 52-54 and accompanying text *supra*. However, note that the court’s claim that the Uniform Probate Code is the law in a majority of jurisdictions is false. Only 14 states have adopted the U.P.C. *in toto*, and Kentucky has adopted only the code’s trust portions. *See* UNIF. PROB. CODE, 8 U.L.A. 1 (1983). California, New Jersey, and South Dakota have adopted probate codes essentially the same as the U.P.C. *Id.* at 3-4. Virtually every state has a rule similar to U.P.C. § 2-803, prohibiting one who murders a testatrix from taking as a beneficiary under the will, but that rule was not in question in *Congdon*. The court may have intended to indicate that of the states that have adopted the U.P.C., a majority have, unlike Colorado, adopted its language permitting the probate court to determine independently the beneficiary’s responsibility for the death of the testatrix. *See* ALASKA STAT. § 13.11.305 (1979); ARIZ. REV. STAT. ANN. § 14-2803 (1974); HAWAII REV. STAT. § 560.2-803 (1976); ME. REV. STAT. ANN. tit. 18-A, § 2-803 (1981); MICH. COMP. LAWS ANN. § 700.251 (West 1979); MONT. CODE ANN. § 72-2-104 (1974); NEB. REV. STAT. § 30-2354 (1974); N.M. STAT. ANN. § 45-2-803 (1975); N.D. CENT. CODE § 30.1-10-03 (1973); UTAH CODE ANN. § 75-2-804 (1975). *See also* FLA. STAT. ANN. § 732.802 (1976); IDAHO CODE, § 15-2-803 (1971).

104. It is difficult to conceive of what possible interest the state of Colorado might have in the probate of the estate in *Congdon* when the only Colorado contact with the litigation was the domicile of the particular beneficiary. The application of Colorado law arguably might have failed even the lax constitutional due process standard limiting choice of law. *See generally* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

105. 309 N.W.2d at 271 (citing MINN. STAT. § 524.1-302 (1980)).

an acquittal to be pleaded in bar to a civil suit, also would apply.¹⁰⁶ In response to claims that the Colorado statute should apply, the court simply cited *Milkovich* and held Minnesota law applied.¹⁰⁷ The court should simply have said that the plaintiff's choice of law argument was devoid of merit.

In purporting to give a reasoned explanation, by legitimate citations to earlier decisions and to statutes, the court has obscured the grounds for its decision, since the apparent reasons cannot be the actual ones. The apparent reasons are that applying Minnesota law advances Minnesota's governmental interest; that Minnesota's law is better than Colorado's; and that *Milkovich* somehow dictates this choice of Minnesota law. Yet *Milkovich* in the context of *Congdon* at best stands for the proposition that Minnesota makes choice of law decisions using choice-influencing-considerations methodology. However, the *Milkovich* analysis of forum governmental interest and its "better law" analysis, grounded as they are in substantive tort policy, are irrelevant to the estates context of *Congdon*. Further, even if the choice in *Congdon* can be governed by the methodology the court adopted in *Milkovich*, the choice should turn solely on the consideration of advancing forum governmental interest (with adequate estates policy analysis) and not on the betterness of the forum law. The only sense in which Minnesota's law is better is apparently that it is forum law.

Congdon is thus a right-result, wrong-reasons case. Indeed, *Congdon* is a right-result, no-reasons case. Although the court could have articulated reasons for its holding, it instead gave only the illusion of reasons. All things considered, the Minnesota Supreme Court would have given us a better choice of law decision in *Congdon* had it handed down a summary disposition, *thus denominated*. In fact, the *Congdon* decision is no more than a summary disposition misleadingly cloaked in a "better law" explanation.

If the Minnesota Supreme Court did not want to use a summary disposition in *Congdon*, it should have fully explained the choice it made. In rendering plenary opinions, a court should serve the important purposes of educating the legal community and preserving order

106. *Id.*

107. *Id.* The lawyers for the beneficiary in *Congdon* raised a number of additional losing arguments designed to prevent the probate of the will without the participation of the appellant in its benefits. They asserted improper jurisdiction and venue in the county in which the decedent died; undue influence and a lack of testamentary capacity; the res judicata, collateral estoppel and double jeopardy consequences in a civil suit to determine appellant's responsibility for the death of the testatrix; and the denial of a right to a jury trial on the issue of appellant's right to inherit. *Id.* at 265-72. Of these, only the last raised even the slightest hope of success.

in the common law.¹⁰⁸ To the extent that an opinion fails to serve these purposes, a serious question is raised concerning the efficacy of its publication.¹⁰⁹ To accomplish these goals, the court in *Congdon* need only have explained that estates law traditionally belongs to the sovereign and that, over the centuries, expectations have become so settled in this area of the law that there is a policy in favor of applying forum law to forum estates of forum decedents. The *lex loci* rules reflect the sovereign's power and, absent some special circumstances not present in *Congdon*, there has been no reason to abandon the "old, gasp, territorial learning"¹¹⁰ in estates law. The crux of the problem

108. More specifically, appellate opinions serve immediate functions of assuring thoughtful review of the merits of the individual case, ensuring the acceptance of law in society, and giving notice to parties and counsel of what is being done in the case and why. See generally Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 810-12 (1961). Cf. D. Stevenson & J. Zappen, *An Approach to Writing Trial Court Opinions*, 67 JUDICATURE 337 (1984).

109. See Leflar, *supra* note 108, at 814. See also APPELLATE JUDICIAL OPINIONS 309-19 (Leflar ed. 1974). The *Congdon* decision was, in fact, little more than a summary disposition disguised by lengthy statement of the facts to look like an opinion. The *Congdon* decision is unusual in that *none* of the issues on appeal had any merit and summary affirmance was thus entirely justified.

110. Ely, *supra* note 56, at 217. Few policies are as arbitrary as the "settled expectations" policy; hence few rules of law are as arbitrary as ones based on such a policy. Most rules fit within a framework, the whole of which is more arbitrary than any part.

Consider, for example, the rules of contract as a whole and one of its parts, the mailbox rule. Mailed acceptances of offers need to be governed by a settled rule: we could not endure having these acceptances sometimes effective upon mailing but sometimes effective upon receipt, although we could endure uniformly reaching either result. We could choose arbitrarily here, but we need not, for there is an overarching policy in contract rules, taken as a whole, of furthering reasonable marketplace transactions. That policy tips the balance in favor of the effective-upon-mailing rule. Moreover, this result is consonant with another overarching policy of contract law, that of freedom of contract. For any offeror may avoid the mailbox rule simply by specifying in his offer that acceptance will not be effective until the offeror receives it.

We can rationalize the mailbox rule to make it fit into contract law as a whole, and it thus is not arbitrary. Contract law taken as a whole is more arbitrary. We could have had policies of *not* furthering marketplace transactions and *not* allowing economic freedom. Our society then would be quite different from what it is, and perhaps people would try to circumvent such policies and their concomittant rules, just as people tried to circumvent the rules disallowing disposition of realty by will or by deathbed gift by creating a use. The latter came to a head in 1536 when the Statute of Uses, by executing the use, vested legal title in the beneficial owner and effectively prevented post-mortum disposition; that in turn led the gentry to demand a means to devise, culminating in the Statute of Wills in 1540. A.W. SCOTT, ABRIDGMENT OF THE LAW OF TRUSTS § 1.2-1.6 (1960); T. ATKINSON, LAW OF WILLS § 3 (2d ed. 1953). Sometimes the courts satisfy such demands of the people, rather than the legislature. Even after the Statute of Uses, people wanted to create uses, and courts allowed them to when the people created a use upon a use; the Statute of Uses executed the first use and left the second one intact, according to the courts. A.W. SCOTT, *supra* § 1.6. Historical developments such as these and the historically most deep-seated notion of property (i.e., real property)—indeed, the very

in *Congdon* was that the Minnesota Supreme Court had committed itself to one apparently all-encompassing theory of how to make choice of law decisions. The court's tendency to limit that theory to a "better law" theory served only to exacerbate the problem at a time when the court ought to have recognized the need for a multiplicity of choice of law methodologies.

The court has begun to recognize this need recently. In *Davis v. Furlong*,¹¹¹ in which the court could have used the choice-influencing-considerations methodology to justify its choice of procedural law, the court eschewed the methodology in favor of a substance-procedure distinction.¹¹² For all that, however, even in *Davis* the court insisted that it would follow the choice-influencing-considerations methodology for substantive choice of law issues.¹¹³ Thus, Minnesota has not yet seen any reason to question the soundness of its approach in *Congdon*.

The issue in *Davis* was whether the plaintiff could bring an action against the defendant's insurer in Minnesota before obtaining a judgment against the defendant.¹¹⁴ Minnesota's common law prohibits direct action against the insurance company.¹¹⁵ Wisconsin's

name of estate law—indicate how closely this body of law is tied to concept of territorial sovereignty. Thus, when I say estates law traditionally has belonged to the sovereign, I mean initially to the crown, but always to the British legal system as opposed to the French or German systems. For estate law, each state in the United States stands to other states as England stands to France.

111. 328 N.W.2d 150 (Minn. 1983).

112. The traditional rule was that conflicts analysis would apply only to substantive issues and the forum, in its role as the forum, would apply its own procedural rules when the issue could be characterized as "procedural." See generally Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333 (1933). But see R. LEFLAR, *supra* note 3, at 240 (choice-influencing methodology applies to all choice of law issues, including procedural issues). The question of characterization presents courts with another "escape" device to avoid an undesirable result under the mandated choice-of-law methodology or rule. See, e.g., *Levy v. Steiger*, 233 Mass. 600, 124 N.E. 477 (1919). See generally, R. WEINTRAUB, *supra* note 6, at 55-67. For a discussion of other ways in which courts might avoid an undesirable choice of law result, see notes 12-13 and accompanying text *supra*.

113. See *Davis*, 328 N.W.2d at 152-53.

114. *Id.* at 151. Plaintiff, injured in a car accident in Wisconsin, sued three defendants in Minnesota: the driver of the car in which she was riding, the driver of a second car, and the owner of the second car. *Id.* The "host" driver was a Minnesota resident; the other two defendants were Wisconsin residents. *Id.* The plaintiff received medical care in Minnesota. *Id.* Subsequent to filing suit, the plaintiff filed a motion to add as another defendant the insurer of the driver in the second car, which was a Wisconsin corporation also doing business in Minnesota. The policy was entered into in Wisconsin, and contained an express "no action" provision prohibiting a direct action against the insurer until judgment was obtained against the insured. *Id.* at 151-52.

115. *Id.* at 152 (citing *Miller v. Market Men's Mut. Ins. Co.*, 262 Minn. 509, 115 N.W.2d 266 (1962)).

direct *liability* statute provides that a liability insurer is directly liable to persons entitled to recover from the insured, even if a judgment has not yet been rendered against the insured.¹¹⁶ Wisconsin's direct *action* statute provides the plaintiff may recover against the insurer of an insured in negligence as long as the insurance policy was "issued or delivered" in Wisconsin, or "the accident, injury or negligence occurred" in Wisconsin.¹¹⁷

These two Wisconsin statutes have had a tortured history,¹¹⁸ and the Minnesota Supreme Court arguably erred in its understanding of the effect of these statutes on a "no action" clause in an insurance contract.¹¹⁹ Instead of facing the issue, the Minnesota court focused on the fact that the direct-action statute is part of the Wisconsin rules of civil procedure.¹²⁰ The statute clearly is a "right of action" statute; however, it is designed to work in tandem with the direct-liability statute, which is a "right" statute. Under Wisconsin law, insurers can avoid being named as party defendants in negligence liability suits only when the insurer issued and delivered the policies outside Wisconsin *and* the accident, injury, or negligence occurred outside Wisconsin.¹²¹ In such a case, there is a right without a right of action.

116. WIS. STAT. ANN. § 632.24 (West 1980).

117. WIS. STAT. ANN. § 803.04(2) (West 1977).

118. As originally enacted, the two statutes contained some discrepancies in language that the Wisconsin court refused to gloss over, insisting on enforcing the statutes as enacted rather than overlook what arguably was legislative slippage. *See, e.g.,* Frye v. Angst, 28 Wis. 2d 575, 137 N.W.2d 430 (1965). In 1971, the Wisconsin legislature amended the liability statute to bring it into conformity with the right of action statute. *See* WIS. STAT. ANN. § 803.04(2) (West 1977).

119. *See* 328 N.W.2d at 152. The Minnesota court stated that under Wisconsin law an express "no action" clause would be enforced whenever the Wisconsin right of action statute was inapplicable. *Id.* (citing Frye v. Angst, 28 Wis. 2d 575, 137 N.W.2d 430 (1965); Morgan v. Hunt, 196 Wis. 298, 220 N.W. 224 (1928)). However, the peculiar facts of the cited cases, and particularly their timing in relation to the enactment and amendment of the Wisconsin statute, raises at least the possibility that the law in Wisconsin may be less settled than the Minnesota court implies.

120. 328 N.W.2d at 152. Section 803.04 provides for the permissive joinder of parties. WIS. STAT. ANN. § 803.04 (1977). As the Minnesota court noted, one Wisconsin decision has characterized this statute as "procedural" in nature. 328 N.W.2d at 152 (citing Miller v. Wadkins, 31 Wis. 2d 281, 142 N.W.2d 855 (1966)). *But see* note 119 and accompanying text *supra*.

121. WIS. STAT. ANN. § 803.04(2) (1977). This is the only circumstance in which a Wisconsin court would enforce an express "no-action" clause in an insurance agreement. A court might, however, recognize a common law cause of action against an insurer and refuse to enforce the "no action" clause, despite the procedural limitation of § 803.04. For example, a Minnesota resident injured in Minnesota and insured under a policy issued in Minnesota might make a bona fide change of residence to Wisconsin and sue the insurer (doing business in Wisconsin and subject to suit there) in Wisconsin. By recognizing a non-statutory rule, the Wisconsin court thus might allow a common law direct action.

Otherwise, there is a legislatively created right of action tailor-made for a legislatively created right.

This should have suggested to the Minnesota Supreme Court that the direct action statute is a “substantive procedural” statute—a statute that would apply in federal court on *Erie* grounds.¹²²

Rather than analyzing its choice under its choice-influencing-considerations methodology, the Minnesota court applied the very general rule that the law of the forum governs procedural matters.¹²³ The court called this a *lex fori* rule; but a *lex fori* rule about procedural rules is really a *lex loci* rule in that locus and the forum are identical, differing only in the sort of ways ‘the morning star’ and ‘the evening star’ differ as names for Venus. Although there is nothing wrong with accepting this rule in connection with procedural issues, failing to provide some analysis of why this should be the choice of law rule is wrong. Moreover, the court needs to explain how to distinguish procedural rules from substantive ones.¹²⁴ That Minnesota failed in *Davis* on each of these counts is only compounded by the fact that the

122. See *Utz v. Nationwide Mut. Ins. Co.*, 619 F.2d 7, 9 n.1 (7th Cir. 1980) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (recognizing the applicability of § 803.04(2) in a federal court diversity action). The Seventh Circuit in *Utz* asserted that under Wisconsin conflicts law, § 803.04(2) would be considered procedural and would be applied by Wisconsin court regardless of the substantive law governing the case. *Utz*, 619 F.2d at 9 n.1 (citing *Oertel v. Williams*, 214 Wis. 68, 251 N.W. 465 (1933)).

123. See *Davis*, 328 N.W.2d at 153. The court paused to consider whether to apply the choice-influencing-considerations methodology to issues characterized as “procedural,” but rejected the notion on the ground that a requirement of duplicating non-forum procedure rules would interfere with judicial efficiency in the forum. *Id.* (citing R. LEFLAR, *supra* note 3, § 121 at 239). One justice, however, would have extended the choice-of-law methodology to procedural rules. See 328 N.W.2d at 153-54 (Todd, J. dissenting).

124. See generally R. WEINTRAUB, *supra* note 6, at 55-59. Consider a slightly more difficult case in which the plaintiff brings a cause of action in quasi-contract to recover the unjust profits earned by the defendant in publishing a libelous book in a jurisdiction in which the *tort* statute of limitations has run but the contract statute has not. Moreover, consider that there is an available non-forum tort statute of limitations that has not run. Further suppose the contract statutes of limitations have not run in either jurisdiction. Should the forum allow the plaintiff to use the nonforum tort statute of limitations? Of course not, and for similar reasons, the forum should not allow the plaintiff to use the forum contract statute of limitations. The plaintiff’s action should be dismissed with prejudice in the forum as being time-barred—that is the penalty for choosing the wrong forum, and there is nothing improper in such a result. The plaintiff had his choice and his day in court, and the defendant is entitled not to be haled into court repeatedly. In reaching this result, however, the court should not simply say “*lex fori* for procedure,” nor should the court simply say “greater relationship/weightier contacts with the forum.” Rather, the court should think through the policies bound up with its statute of limitations for libel and the relation of the assumpsit action to the underlying substantive tort wrong. For a consideration of a factually similar (but not identical) case, see *Hart v. E. P. Dutton & Co.*, 197 Misc. 274, 93 N.Y.S.2d 871 (Sup. Ct. 1949).

Wisconsin direct action statute may well not be a purely procedural statute and that Minnesota wholly failed to address this issue. What the Minnesota court essentially did was to fortify its decision by issuing an arbitrary procedural characterization, and thereby avoid applying the choice-influencing methodology to the difficult direct action issues.

In reaching this decision in *Davis*, the court purported to distinguish one of its earlier cases, *Meyers v. Government Employees Insurance Co.*¹²⁵ *Meyers* involved an accident that had occurred in Louisiana.¹²⁶ Applying the choice-influencing methodology to resolve two choice of law issues, the *Meyers* court first allowed the Minnesota plaintiff to use a Louisiana "direct action" statute.¹²⁷ It then determined that Minnesota's tort statute of limitations, rather than Louisiana's shorter statute, applied to the action.¹²⁸

In *Davis*, the court claimed that *Meyers* was distinguishable because the *Meyers* "direct action" was a substantive right. The *Meyers* court therefore "did not have reason to extend the [choice-influencing methodology of the] *Milkovich* analysis into the realm of procedural rules."¹²⁹ That is, the court claimed in *Davis* that the issue of whether its choice of law methodology applied to procedural rules was a question of first impression.¹³⁰ The *Davis* court thus blithely ignored the *Meyers* court's rejection of the traditional substantive/procedural dichotomy implicit in the latter's use of the choice-influencing methodology on the statute of limitations question.

Moreover, there is serious reason to question the difference between the *Meyers* "direct action" statute and the *Davis* direct action statute. The Louisiana statute applied in *Meyers* provided that a direct action lay in Louisiana courts for anyone who was injured in Louisiana.¹³¹ The relevant portion of the court's quotation of that statute provides as follows:

The injured person . . . shall have a right of direct action against the insurer . . . ; and such action may be brought

125. See *Davis*, 328 N.W.2d at 152 n.2 (distinguishing *Meyers v. Government Emp. Ins. Co.*, 302 Minn. 359, 225 N.W.2d 238 (1974)).

126. 225 N.W.2d at 242, 244.

127. *Id.* at 239 (court's syllabus note 4), 242-43. See also Justice Kelly's specially concurring opinion, in which he goes on to discuss the better law consideration on the statute of limitations issue. *Id.* at 244-45 (Kelly, J., concurring). He concluded that Minnesota's six-year statute was better than Louisiana's one-year statute. *Id.* at 245 (Kelly, J., concurring).

128. *Id.* at 240.

129. *Davis*, 328 N.W.2d at 152 n.2.

130. See *id.* at 152-53.

131. *Meyers*, 225 N.W.2d at 240 n.3.

. . . in the parish in which the accident or injury occurred or in the parish in which an action could be brought . . . under the general rules of venue. . . . This right of direct action shall exist whether the policy . . . was written or delivered in . . . Louisiana . . . and whether . . . such policy contains [a “no action” clause], provided the accident or injury occurred within . . . Louisiana.¹³²

The *Davis* court ignored the fact that the Louisiana statute combined both a right and a right of action in *one* statute, whereas Wisconsin divides its right and right of action into *two* statutes, the latter of which (the direct-action statute) Wisconsin puts in its rules of civil procedure. The statutes of these two states otherwise are *not distinguishable on their faces*. But the *Meyers* court relied upon the fact that Louisiana courts treat the “direct action” statute as creating substantive rights,¹³³ and the *Davis* court relied upon the fact that Wisconsin courts treat the direct-action statute as procedural.¹³⁴ And, just as the *Meyers* court ignored that the Louisiana “direct-action” statute contained detailed venue provisions, so too the *Davis* court ignored that the Wisconsin direct-action statute applied anytime the accident occurred in Wisconsin, even if the policy had not been issued or delivered in Wisconsin.¹³⁵ The *Meyers* court arguably erred with respect to whether the Louisiana statute is purely substantive; the *Davis* court arguably erred not only with respect to whether Wisconsin’s statute is solely procedural, but also with respect to whether *Meyers* is distinguishable on the issue of the nature of the direct-action statute. In any case, the *Davis* court overruled an aspect of *Meyers sub-silentio*; for *Meyers* used a choice-influencing methodology on the statute of limitations questions which, under traditional choice of law theories, are procedural.¹³⁶ Thus, by distinguishing between substantive and procedural rules, the *Davis* court reintroduced the old choice of law characterization evils which the *Meyers* court had rejected. Moreover, *Davis* simply is not instructive on how to distinguish between substantive and procedural rules.

V. CHOICE OF LAW FOR CONTRACTS CASES

Predicting what the Minnesota court will do with choice of law

132. *Id.*

133. *Id.* at 241 (citing *West v. Monroe Bakery*, 217 La. 189, 46 So. 2d 122 (1950)).

134. *See* note 117 *supra*.

135. *See* notes 111-18 and accompanying text *supra*.

136. *See, e.g.*, E.F. SCOLES & P. HAY, *supra* note 2, §§ 3.9-3.12.

issues arising in contract claims is difficult.¹³⁷ The court has given full effect to a contract choice of *forum* clause when that choice was reasonable and fair.¹³⁸ The court probably will treat equally favorably negotiated choice of *law* clauses.¹³⁹ However, there are few recent cases upon which to base a prediction about the direction the court will take in contract choice of law cases. Further, there is little reason to believe that the choice-influencing-considerations methodology will be of much help to the court in this area.

Under the Leflar methodology, the consideration of predictability of results supposedly has greater bearing on consensual transactions choice of law issues than in, for example, torts choice issues.¹⁴⁰ At its most general level, the predictability consideration is just a principle of fairness pervading our entire jurisprudence and thus is of no special help in making any choice of law decisions. On a more narrow level, the Leflar predictability consideration suggests that a contract choice of law issue, for example, should be resolved in favor of the law the parties *expected* would apply to their contract.¹⁴¹ When parties express their expectation on this point, as in a choice of law clause, the court faces a question of basic contract interpretation, not a choice of law problem.

When parties have not expressed their expectations, however, the court still faces a contract interpretation¹⁴² problem that only appears to be a conflicts issue. In deciding such a case, the court should pro-

137. Traditionally, the favored rule was that the law of the place of the making of the contract, referred to as *lex loci contractus*, governed all issues of validity and formation of the contract, and the law of the place of performance governed questions of contract performance and breach. *See generally*, RESTATEMENT OF THE LAW OF CONFLICT OF LAWS §§ 311-376 (1934); J. BEALE, THE CONFLICT OF LAWS §§ 311-375 (1935).

138. *See Hauenstein & Bermeister, Inc. v. Met-Fab Indus.*, 320 N.W.2d 886 (Minn. 1982). Specifically the court in *Hauenstein* enumerated three factors to be considered in determining the validity of a choice of forum clause: 1) the relative convenience of the forum; 2) the relative bargaining power of the parties; and 3) the reasonableness of the other parts of the agreement. *Id.* at 890-92 (citing *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

139. The contract in *Hauenstein* did contain a choice of law provision. *See* 320 N.W.2d at 887. However, the court's decision to dismiss the action in Minnesota, in conformity with the choice of *forum* clause, precluded its determination of the validity of the choice of law provision.

140. *See generally*, R. LEFLAR, *supra* note 3, § 103, at 205-06.

141. *See* R. LEFLAR, *supra* note 3, § 103, at 205-06; Leflar, *Conflicts Law, More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1586 (1966).

142. For purposes of this article, the term "interpretation" is used in a broader sense than that usually meant in contract law. *See* RESTATEMENT (SECOND) OF CONTRACTS § 213 comment a (1981) (distinguishing between a parol evidence issue and an interpretation issue). As used here, the term refers to any question of the meaning of terms of a particular contract.

ceed on the most basic assumption that the parties expected the contract would be valid¹⁴³ and, if the law of only one of the two jurisdictions would validate the transaction, the court should allow evidence that the parties intended that state's law would apply.¹⁴⁴ This is consonant with substantive contract doctrine that favors a validating interpretation over an invalidating one.¹⁴⁵ All courts agree that constructions upholding validity are in general preferred over ones that invalidate; similar traditional contract doctrines do more to dictate a sound "choice of law" decision here than does the choice-influencing methodology. This eventually should suggest that the methodology essentially is devoid of helpful conceptual content for most contract choice of law issues.

Contract performance choice of law issues are relatively few, in part because few courts have had the opportunity to establish contract performance rules peculiar to their own jurisdictions. Questions regarding remedies for breach of contract ought to be similarly difficult to raise, again because there is a near unanimity on what the rules are. With a few exceptions, the disputes in contract cases are not over what the rules are, but how the rules apply to the facts. These exceptions are contract formation issues (such as capacity to contract), statute of frauds issues, and subject-matter illegality questions. Here there can be contract disputes that raise choice of law issues.¹⁴⁶

When a court faces a contract formation problem, it should base its decision on substantive contract grounds, including considerations of public policy, just as if the parties had expressly provided that the law of a validating jurisdiction would govern the contract. If the court would enforce such an express provision, it should choose the validating law even when there is no such express provision. And the reasons should be the same in either case—substantive contract doctrine.

For example, suppose A and B enter a contract in which a clause provides that all issues of formation, interpretation, and performance

143. *See generally*, R. WEINTRAUB, *supra* note 6, at 354-55 & 372-73. *See also* A. EHRENZWEIG, *supra* note 24, at 458-65.

144. This is the "rule of validation" or "presumption of validation." *See* A. EHRENZWEIG, *supra* note 24, at 458, 65. *See also* Pritchard v. Norton, 108 U.S. 124 (1882); Kossick v. United Fruit Co., 365 U.S. 731 (1961); Teas v. Kimball, 257 F.2d 817 (5th Cir. 1958); *In re* Knippel's Estate, 7 Wis. 2d 335, 96 N.W.2d 514 (1954).

145. *See* A. CORBIN, CORBIN ON CONTRACTS § 546 n.9 (Supp. 1971).

146. As an example, the classic contract choice of law case involved the capacity of a married woman to contract. *See, e.g.*, Milliken v. Pratt, 125 Mass. 374 (1878). *See generally* B. Currie, *Married Women's Contracts: A Study in Conflict of Laws Method*, 25 U. CHI. L. REV. 227 (1958), *reprinted in* B. CURRIE, *supra* note 14.

shall be governed by the law of Oregon, but there is no choice of forum clause. Further suppose that A sues B in New York and that there is a parol evidence issue. If the New York court enforces this express provision for Oregon law, it will employ Oregon's wide-open, all-the-circumstances approach to the parol evidence issues.¹⁴⁷ If the court does not enforce the law-selection clause, it will employ its own more restrictive approach to the parol evidence issues.¹⁴⁸ On either of these resolutions, the court must resolve an issue of basic substantive contract law, not a choice of law issue. The effect of that determination will be to foreclose a choice of law issue.

When the parties have not made an express provision for the law that is to apply to this contract, the court still only appears to face a choice of law issue. That appearance is a function of how choice of law issues arise and of certain assumptions that are built into the place focus of the *lex loci* rules. If A wants the New York court to use Oregon's approach to contract, A will have to suggest reasons for bringing the possibility of applying Oregon law into the picture. Historically, parties have done this by pointing to geographical or "place factors" that connect the parties or the contract or the litigation with different jurisdictions. That, historically, has been the function of place factors—to *raise* the choice of law issue.¹⁴⁹ Under the *lex loci* system, the issue then would be resolved on the basis of those factors, but that clearly always was a second and independent use of the place factors. If A tells the court that, although A and B negotiated and signed the contract in New York, both A and B were Oregon businesspersons, should the court apply Oregon's parol evidence rule or should the court insist on using New York's rule?

If the New York court would not have applied Oregon law had there been an express law-selection clause, it should not apply Oregon law to the lawsuit absent such a provision. If the court would have enforced the express provision for Oregon law, the court should make a factual inquiry about expectations when there is no such provision. Contracts courts are intention-enforcing and expectation-protecting courts.¹⁵⁰ All the "place of making the contract" rule ever did was to

147. See *Hatley v. Stafford*, 284 Ore. 523, 588 P.2d 603 (1978).

148. See *Mitchill v. Lath*, 247 N.Y. 377, 160 N.E. 646 (1928). For purposes of this hypothetical, the difference between the approaches of Oregon and New York to parol evidence problems is exaggerated.

149. For example, in determining whether there is a constitutional impediment to a particular choice of law, the Supreme Court has directed that there be an examination of the relevant contacts between the state whose law has been chosen and the facts underlying the litigation. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion); *id.* at 333 (Powell, J., dissenting).

150. To say that courts are "intention-enforcing" in the context of an interpre-

allow courts to shortcircuit the intention-expectation inquiry. That rule had the assumption built into it that the parties expected the law of the place of contracting to govern their contract. But that assumption is a special version of the basic theory of contract that parties expect that their contracts are valid and that their contractual intentions will be given effect in the event of litigation. The problem with the *lex loci contractus* rule is that the shortcircuit it provides sometimes results in the frustration of the parties' most basic contractual expectations and thus frustrates a policy central to the law of contract.¹⁵¹

Similarly, then, suppose the buyer is seventeen years old and has a voidable capacity to contract in jurisdiction X, but cannot avoid for lack of capacity in jurisdiction Y. Further suppose the seller's contract expressly provides that the law of jurisdiction Y applies to issues of capacity. If an X court would not enforce the express provision, then it will allow the buyer to avoid the contract under X-law and should reach this result even absent the express provision. If the court would enforce an express provision, then even absent such a provision, and assuming the existence of jurisdiction contacts sufficient to raise a choice of law question, the court should still apply Y-law.¹⁵² Moreover, all these issues should be resolved without reference to where the parties entered the contract or where the parties reside. The *ratio decidendi* should be substantive contract doctrine: If an X-court will not say an X-buyer under 17 has capacity to agree in X to a law-selection clause of Y-law, then the fact that X-buyer entered the contract in Y is irrelevant. Conversely, that the buyer is from Y but entered the contract in X is irrelevant. The only hard case for an X-court is that of a contract executed in Y when buyer was from Y, but

tation issue may be different from saying that in the context of a formation issue. Theories of intention involve questions of the role of the parties' intentions and the methods by which those intentions might be proved; these will differ when the context of the dispute changes. See Morrison, *I Imply What You Infer Unless You are a Court*, 35 OKLA. L. REV. 707 (1982). In "interpreting" a contract—discerning its meaning and terms—a court can only rely on inferences from the parties' acts and words; when that process is insufficient in divining the "true intent," a court may have to throw up its hands and "remake" the contract. See *Parev Prods. Co. v. I. Rokeach & Sons*, 124 F.2d 147 (2d Cir. 1941); *Jacob & Youngs v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921).

151. This concern has led many courts to abandon the old rules in favor of more modern rules. One approach is the "center of gravity" test adopted by New York. See, e.g., *Haag v. Barnes*, 9 N.Y.2d 554, 216 N.Y.S.2d 65, 175 N.E.2d 441 (1961); *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954). Another is the "most significant relationship" approach. See, e.g., *Johnson v. Spider Staging Corp.*, 87 Wash. 2d 577, 555 P.2d 997 (1976). See also RESTATEMENT (SECOND), *supra* note 19, § 188.

152. See *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115 (2d Cir. 1931). In *Gerli*, Judge Learned Hand stated that it is the law which imposes obligations; the parties are not free to decide what the law is by substituting "the law of another place." *Id.* at 117.

has moved to X by the time of litigation. Irrespective of why buyer moved, however, the court should ask itself whether here it would enforce a Y-selection clause and, if it would, it should apply Y-law even in the absence of such a clause.

The point is that rather than treating these issues as if they were choice of law issues, the court should treat them as contract issues. This may be easier to say than to do, but the aim of choice of law is to give effect to the policies of the underlying substantive law. The choice-influencing-considerations methodology seems to offer no better promise in this regard, however, than any of the other rules or analytic methods, for, in their welter of details, those approaches all lose sight of the essential and central role which substantive policies play in choice of law.

VI. *HAGUE V. ALLSTATE INSURANCE CO.*

*Hague v. Allstate Insurance Co.*¹⁵³ presents difficulties for a rational reconstruction of Minnesota's cases. If *Hague* states Minnesota's tort policy, then Minnesota's tort choice of law rule is not the one previously suggested, namely, "choose the law that favors liability, but not the law that enlarges recovery."¹⁵⁴ Rather, Minnesota's tort policy is one of the fullest compensation, and its tort choice of law rule should be a fullest compensation rule.¹⁵⁵

One apparently easy solution to the difficulties *Hague* presents is to say the tort choice of law rule is fullest compensation for personal injury, but more limited compensation for other injuries. This would allow Minnesota to put the guest statute,¹⁵⁶ survival of cause of ac-

153. 289 N.W.2d 43 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981). *Hague* involved the question of whether Minnesota law (allowing the "stacking" of uninsured motorist coverage) or Wisconsin law (arguably forbidding it) should be applied in a suit against an insurer arising from an accident occurring in Wisconsin between Wisconsin residents, but when the beneficiary subsequently moved to Minnesota and filed suit there. *Id.* at 44-45.

154. *See* notes 79-94 and accompanying text *supra*.

155. The issue in *Hague* was not whether the insured could recover at all, but rather concerned the extent of the insurer's coverage. 289 N.W.2d at 45. As an example of the court's indication of a "fullest" compensation policy in tort, the court in *Hague* noted that "Minnesota has an interest in maximizing the tort recovery of plaintiffs who are involved in accidents with uninsured motorists." *Id.* at 47. Further, the court noted that "[t]he stated governmental interest is grounded in a policy of compensating injured plaintiffs to the maximum extent of their injuries even where the recovery is greater than minimum requirements." *Id.* In contrast, the court stated that Wisconsin had a policy "of insuring *minimum* recovery on the part of victims of uninsured motorists." *Id.* (emphasis in original) (citing *Nelson v. Employers Mut. Cas. Co.*, 63 Wis. 2d 670 (1972)).

156. *See* note 60 *supra*.

tion,¹⁵⁷ family immunity,¹⁵⁸ and dramshop¹⁵⁹ cases together with *Hague*, but still distinguish future cases concerning punitive damages,¹⁶⁰ conversion,¹⁶¹ and fraud.¹⁶² The only two problems with this solution are the hypothetical sovereign immunity case and its probable result¹⁶³ and a recent no-fault insurance case which did involve personal injury but in which the court was content with a minimum recovery.¹⁶⁴ These problems do not seem surmountable and therefore reconstruction along these lines probably would break down eventually.

One deceptively easy solution is to say, as the *Hague* court did, that "contracts of insurance on motor vehicles are in a class by themselves and must be so treated . . ." ¹⁶⁵ That is, we could say the insurance contract in *Hague* raised a choice of law issue that was neither a contract issue nor a tort issue. Hence, *Hague* would not have to fit the tort choice of law cases, but at a minimum it would need to fit other Minnesota non-choice of law "stacking" cases. And *Hague* does fit Minnesota's other stacking cases.¹⁶⁶

This solution, however, should make us feel uneasy. For it is altogether too much like the old "characterization" problems.¹⁶⁷ The

157. See notes 60-76 and accompanying text *supra*.

158. See note 60 *supra*.

159. See note 57 *supra*.

160. See notes 85-87 and accompanying text *supra*.

161. See notes 90-91 and accompanying text *supra*.

162. See notes 92-93 and accompanying text *supra*.

163. See notes 78-80 and accompanying text *supra*.

164. *Rademacher v. Insurance Co. of N. Am.*, 330 N.W.2d 858 (Minn. 1983). In *Rademacher*, the court held that a nun, struck by a car while a pedestrian, was not an "insured" within the meaning of the state no-fault insurance act and was not entitled to recover on any of the convent's 53 motor vehicle insurance policies. *Id.* at 862-63. The trial court had not only found her to be covered, but additionally allowed her to "stack" all the policies. *Id.* at 861. Because the supreme court found the plaintiff not to be an "insured," it did not reach the issue of her right to "stack" the policies. *Id.* at 863. The plaintiff in *Rademacher* had settled her claims against the driver and owner of the car that hit her for \$75,000. *Id.* at 859. The Minnesota No-Fault Automobile Insurance Act was designed to ensure that no injured person would fall through its "safety net" and provides coverage for a pedestrian who does not even own a car. See MINN. STAT. § 65B.46(1) (1982). However, an additional purpose of the Act is to prevent over-compensation and duplicative recovery; because the plaintiff in *Rademacher* had recovered some money, there was little pressure for the Minnesota court to maximize that recovery. See MINN. STAT. § 65B.42(2) (1982).

165. *Hague*, 289 N.W.2d at 50.

166. See, e.g., *Van Tassel v. Horace Mann Mut. Ins. Co.*, 296 Minn. 181, 207 N.W.2d 348 (1973) (allowing injured insured to stack uninsured motorist coverage for several automobiles on the ground that such a rule better affords the insured the coverage for which he paid).

167. See notes 12-13 and accompanying text *supra*. To the extent that choice of law rules depend upon the characterization of the action, manipulation will always be possible. However, such manipulation should be remote when the conflicts meth-

court in effect bootstrapped *Hague* out of contract into tort in order to use tort choice of law contacts and to use tort policies in analyzing the forum governmental interest consideration.¹⁶⁸ To say that this did not make *Hague* fully a tort choice of law case is to ignore that insurance forms part of the background of a very large number of tort issues.

There is nothing objectionable about treating tort indemnity insurance contracts consistently with straightforward tort cases. Indeed, this may be preferable, insofar as loss-spreading is central to the law of tort,¹⁶⁹ and insurance is a rational and common method of coping with loss by private loss-spreading. Further, courts should encourage the practice of insuring against tort losses. But then courts should also give due regard to the contractual aspects of this practice: the planned allocation of risks between the insurer and the insured. On this point, the Minnesota Supreme Court fell far short of being evenhanded when it said, "[t]he fact that one cannot predict automobile accidents because they are unplanned makes [the consideration of] predictability of results less important in automobile liability insurance cases than in other contract cases."¹⁷⁰

That is not fair; insurance is *planning for the unplanned*, thereby shifting risks of loss from the insured to the insurer. But the difference between a commercial contract and an insurance contract is not a difference of risk-shifting. Each shifts risks. A contract shifts risks to the promisor in exchange for consideration from the promisee,¹⁷¹ and those risks stay with the promisor absent some statute that reshifts the risk to the promisee¹⁷² or some mutually agreed reshift to the promisee.¹⁷³

odologies and rules are grounded in the same substantive laws and policies that would be brought to bear in a wholly domestic case, and *vice versa*.

168. For example, the court noted that because the contract was "one of indemnity for tort recovery, the kinds of contacts relevant to tort cases may be considered." *Hague*, 289 N.W.2d at 47.

169. For example, among the traditional interests advanced in tort cases for favoring the state of the place of injury are an interest in keeping tort victims off the local welfare rolls (and thus spreading the loss among the taxpayers) and an interest in ensuring payment to local medical providers (who otherwise would spread the loss among other users of medical services). See R. WEINTRAUB, *supra* note 6, at 287-89. For a discussion of this in the context of the interests of the forum state, see notes 54-60 and accompanying text *supra*.

170. *Hague*, 289 N.W.2d at 48.

171. See A. CORBIN, CORBIN ON CONTRACTS §§ 3-4 & 10 (1960 & Supp. 1980).

172. See, e.g., UNIFORM COMMERCIAL CODE § 2-510 (1976) (re-shifting risk of loss to seller where delivered goods non-conforming).

173. This usually appears in contract in a form known as "allocation of risks between the parties;" but conceptually what has happened is that the risks are put on the promisor upon entering the contract and then shifted away, perhaps in exchange

Nor is the difference between commercial contracts and insurance contracts one of planning or one of unplanned events. Of course, the average auto accident is unplanned; so is the average crop failure or war or fire or loss-during-transit. Contracts enable people to plan *for* the unplanned, and in this regard insurance contracts are exactly like commercial contracts. Insurance contracts differ from commercial contracts in that commercial contracts generally concern goods, land, or services, but include considerations of risks and risk-shifting. Insurance contracts, on the other hand, exclusively concern risks and risk-shifting. Auto insurance contracts shift risks associated with autos; home fire insurance contracts shift particular risks associated with owning a home; health insurance contracts shift the risks associated with being a biological entity subject to disease and injury; and so forth. They are nonetheless contracts, the purpose of which is to shift a risk from the premium-paying insured to the premium-collecting insurance company.

But the central difference between an ordinary commercial contract and an automobile accident insurance contract is that legislatures and courts have particular policy interests in the latter which they do not have in the former—tort policy interests.¹⁷⁴ Accident insurance contracts are contracts about torts: tort liability, tort injury, tort loss—even when the coverage is on a no-fault basis. The Minnesota Supreme Court seems to believe that an insurance contract must be a contract for torts in order to be treated as a contract for choice of law purposes. This approach shows the court does not know what a contract is.

Nonetheless, automobile insurance contracts are special. The court attributes the “peculiar hybrid nature of the problems involved in automobile liability insurance cases”¹⁷⁵ to their being contracts about tort risks, hence “both tort and contract considerations”¹⁷⁶ should determine a choice of law issue involving the stacking of uninsured motorist policies.¹⁷⁷ In this sense, *Hague* does appear to create a class of its own and, thus, would not affect the two-fold tort choice of law rule suggested.¹⁷⁸ The problem is that the court’s stated reasons

for the promisor’s taking on certain other risks that never would otherwise have fallen on him.

174. See *Hague*, 289 N.W.2d at 47-48.

175. *Id.* at 48.

176. *Id.*

177. The insured in *Hague* had only one overall auto insurance policy but it included three sub-policies of uninsured motorist coverage. *Id.* at 45.

178. For a discussion of the two-fold tort policy analysis, see notes 77-94 and accompanying text *supra*.

in *Hague* for choosing Minnesota law were *exactly because* it gave *greater* compensation than Wisconsin law,¹⁷⁹ suggesting that Minnesota has a “fullest compensation” policy in tort. That simply is not true.¹⁸⁰

The court should have stuck to contract analysis and interpretation.¹⁸¹ Because the insurance company collected three uninsured-motorist coverage premiums, all three policies should have been triggered by one uninsured motorist accident. Otherwise, the insurance company received something for nothing. Although uninsured-motorist coverage may be funded on a per car basis, there is no similar way to calculate the risks. The coverage follows the person. An insured who has two cars and two policies will contribute twice to the insurance company’s funds out of which to pay uninsured-motorist recoveries. If the insured is not allowed to stack here, the insurance company collects premiums for which it incurs no obligation.¹⁸²

Traditional contract doctrines and rules about consideration and interpretation are designed to prevent this something-for-nothing result. All the Minnesota Supreme Court had to do was scrutinize the no stacking clause in the same way as an “other insurance” clause, and then explain why it would not enforce a no stacking clause in a Minnesota contract.¹⁸³ That Wisconsin might have different theories about contract should be irrelevant; if Minnesota can rest its view on

179. The court noted, in analyzing the problem under the “better law” prong of its analysis, that “[w]e believe that it is preferable to compensate victims of accidents to the full extent of their injuries.” *Id.* at 49. Moreover, in analyzing the relative governmental interests of Minnesota and Wisconsin, the court noted that “[t]he advancement of Minnesota’s interest [in fully compensating the plaintiff] is only partially inconsistent with the advancement of Wisconsin’s in that Wisconsin is interested in giving the plaintiff some recovery but at minimum limits.” *Id.*

180. See notes 77-94 and accompanying text *supra*.

181. The Minnesota Court did undertake some contract analysis in order to determine whether a conflict existed. The court presented the issue in the case as one involving the construction of the insurance policy’s “excess insurance clause” prohibiting stacking, and assumed that Wisconsin would enforce such a clause. 289 N.W.2d at 48 (citing *Nelson v. Employers Mut. Cas. Co.*, 63 Wis. 2d 558, 217 N.W.2d 670 (1974)). *But see* Weintraub, *Who’s Afraid of Constitutional Limitations on Choice of Law*, 10 HOFSTRA L. REV. 17, 20-23 (1981). Professor Weintraub has argued that the conflict in *Hague* was a false one in that Wisconsin would have reached the same result as Minnesota by invalidating the “excess insurance” clause. *Id.* The proper result in *Hague* was that the plaintiff should have been allowed to stack the policies and no one should care whether the result stems from Wisconsin or Minnesota law.

182. See *American Motorist Ins. Co. v. Sarvela*, 327 N.W.2d 77, 79 (Minn. 1982); *Van Tassel v. Horace Mann Ins. Co.*, 296 Minn. 181, 207 N.W.2d 348 (1973). See also *Bradley v. Mid-Century Ins. Co.*, 409 Mich. 1, 294 N.W.2d 141 (1980).

183. See D. DOBBS, *supra* note 91, at 307 (noting that most courts will not enforce “other insurance” clauses that will eliminate a proportionate share of liability even if the insured is unable to collect on his other insurance).

On the other hand, “excess insurance” clauses are much more likely to be upheld where the policy provides that the insurer will provide coverage only after the insured has exhausted his other insurance; for then, the insurer has accepted only a

solid contract analysis, Wisconsin's *possible* inability to handle contract law or its different theory of contract doctrine would be no bar.¹⁸⁴

Of course, one of the substantial problems with *Hague* is that it involves insurance. Courts—and the rest of us—have trouble understanding the insurance industry, insurance contracts, and regulations concerning insurance. In the rehearing opinion, the court did come to the nub of the matter, however. The court essentially said it was treating the insurance company and the insurance contract as if all the litigational contacts were with Minnesota. The court justified its approach by reminding the insurance company that two of the foreseeable risks the company took were that litigation over this contract would arise in a state other than Wisconsin and that the foreign state would allow the policies to be stacked.¹⁸⁵ The result is that the court treated the case as if there were no choice of law issue presented, but only contract interpretation issues. That is, the *Hague* court ul-

risk that the insured will incur losses greater than existing coverage. *See, e.g.*, *Citizens Mut. Auto. Ins. Co. v. Liberty Mut. Ins. Co.*, 273 F.2d 189 (6th Cir. 1959).

184. The Wisconsin Supreme Court has described uninsured motorist coverage as "backstop or last resort" coverage. *Drake v. Milwaukee Mut. Ins. Co.*, 70 Wis. 2d 977, 982, 236 N.W.2d 204, 207 (1975) (citing *Leatherman v. American Family Mut. Ins. Co.*, 52 Wis. 2d 644, 651, 190 N.W.2d 904, 907 (1971)). Additionally, Wisconsin insists, in interpreting uninsured motorist policies, that the insurance contract meet at least the statutorily mandated minimum level of coverage. *See Siegel v. American Interstate Ins. Corp.*, 72 Wis. 2d 522, 241 N.W.2d 178 (1976).

Despite the Minnesota court's unqualified statement that Wisconsin would enforce an "excess insurance" clause prohibiting suit against the insurer when other coverage is available, Wisconsin case law indicates that Wisconsin will enforce such a clause only when the other available insurance *exceeds* the required minimum coverage. *See Drake*, 70 Wis. 2d at 982, 236 N.W.2d at 207. Thus, the *Hague* court's statement that it is Wisconsin's policy to *minimize* such recovery is questionable. More correctly, Wisconsin's policy seems to be one that ensures *at least* the minimum recovery. In *Hague*, there was no other available insurer from whom the plaintiff could recover. *See Hague*, 289 N.W.2d at 45. The precise issue in *Hague*, whether an insured may "stack" three policies providing uninsured motorist coverage in an action against the *only* available insurer, has never been faced by the Wisconsin court.

Indeed, a recent Minnesota decision seems to indicate a policy similar to that of Wisconsin when the issue is one of stacking *sources* of recovery rather than policies from the same source. *See Rademacher v. Insurance Co. of N. Am.*, 330 N.W.2d 858 (Minn. 1983). For a discussion of *Rademacher*, see note 164 *supra*. Moreover, in another recent decision, the Minnesota court ruled that an insured could not reap the benefits of a statutory increase of uninsured motorist coverage minimum benefits under a policy issued prior to the statutory change. *Owens v. Federated Mut. Implement & Hardware Ins. Co.*, 328 N.W.2d 162 (Minn. 1983). In *Owens*, the court noted that "[t]here is no suggestion in the record . . . that a higher premium was required of or paid by [the insured]. . . . It does not seem fair to us to permit [the insured] to benefit from an increased coverage which he had not expected and for which he had not paid." *Id.* at 164-65. One would hope that the Minnesota court and all other courts used such substantive law analysis in choice of law decisions as well.

185. *Hague*, 289 N.W.2d at 50 (opinion on rehearing).

mately dealt with the substantive law itself—contract law, or insurance contract law—instead of getting lost in a web of choice of law “methodologies.”

VII. FORUM SHOPPING

If courts decide which law to apply on the basis of an analysis of the substantive law itself, rather than on the basis of the old or new choice of law rules or methods, will this lead to forum shopping? One of the pervasive concerns in choice of law has been whether applying the law sought by a forum-shopping plaintiff will defeat the expectations of the defendant or will upset the policies of the state in which the defendant acted (or from which the defendant hails). As Justice Stevens pointed out in *Hague*, the latter concern stems from our desire for interstate harmony and national unity.¹⁸⁶ Today, these forum shopping concerns can appear even greater because the constitutional limitations on choice of law are so lax.¹⁸⁷ But, primarily because the constitutional limitations on jurisdiction are so high,¹⁸⁸ the approach I have suggested in this article generally will *not* lead to any form of forum shopping *that should concern us*.¹⁸⁹

When the plaintiff sues at home, there is no reason to be concerned about forum shopping because there is nothing suspicious about the plaintiff's choice of forum.¹⁹⁰ We expect plaintiffs to avail themselves of the economies of time, money, and convenience that suits at home afford. We particularly expect this when the plaintiff is injured in his or her home state.

When the plaintiff forgoes the economies afforded by bringing suit at home, however, we may begin to be suspicious about whether the plaintiff has sued elsewhere primarily in order to obtain the application of a particular law and thus whether the plaintiff has attempted to “buy” a particular result. Yet, there *are* other more “legitimate” reasons for plaintiffs to sue elsewhere than at home, most notably to obtain jurisdiction over the defendant. This jurisdiction in turn usually should keep courts from wondering too deeply about

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

187. *Id.*

188. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Schaffer v. Heitner*, 433 U.S. 186, 212 (1977) (“all assertions of” jurisdiction require fair play and substantial justice).

189. Moreover, the Supreme Court recently has noted the legitimacy of forum shopping. *See Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984).

190. *See McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (plaintiff has freedom of choice of forum). *But see Kulko v. Superior Court*, 436 U.S. 84 (1978) (forum must have jurisdiction over defendant).

whether the plaintiff is a forum shopper because the jurisdictional prerequisites will mitigate the dangers we usually fear will result from forum shopping.

The court will have to have either general or specific jurisdiction over the defendant.¹⁹¹ The assertion of general jurisdiction will be permissible only if the defendant is a resident of the forum or has major continuous connections with the forum.¹⁹² Such a defendant's expectations theoretically will have been framed with a view towards the possible application of forum law to his activities; hence, the defeating-the-defendant's-expectations reason for objecting to a possible forum-shopping plaintiff does not exist. Further, interstate harmony is not disrupted by a forum's applying its own law to a forum defendant. That, at a minimum, is a lesson of *Hague*.

The assertion of specific jurisdiction also will usually mitigate the dangers courts traditionally have feared would result from forum shopping. Specific jurisdiction will be based on factual contacts between the defendant and the forum and between the forum and the litigation¹⁹³—*i.e.*, the defendant will have done an act that is the source of the claim in the forum. These jurisdictional contacts between the forum and the litigation clearly insulate interstate harmony because the policies of the state in which the defendant acted are furthered, not upset, by applying forum law when that state *is* the forum. The jurisdictional contacts of the forum with the defendant similarly obviate worries about the defendant's expectations. This defendant will have acted in the forum purposefully, in a jurisdictional sense, and did expect or should have expected forum law to apply.

Thus neither of the primary evils thought to result from forum shopping exists in the usual case in which a plaintiff sues away from home, and the court usually should not worry about whether the

191. See *Donahue v. Far E. Air Transp.*, 652 F.2d 1032 (D.C. Cir. 1981) (discussing general and specific jurisdiction).

192. See, *e.g.*, *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 438 (1952) (neither party was resident of forum, and subject matter of cause of action had no relation to forum, but defendant had been carrying on in the forum "a continuous and systematic, but limited part of its general business"). See also *Keeton*, 104 S. Ct. at 1481, (citing *Perkins*, 342 U.S. at 438).

193. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1980). See also *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). See, *e.g.*, *Gray v. American Radiator & Standard Sanitary Co.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (defendant had less significant and purposeful contacts with the forum than do residents but those contacts were connected to the litigation). Cf. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (no jurisdiction because the defendants had only minor connections with the forum and these were not related to the litigation).

plaintiff chose this forum in order to obtain a particular result. But when a court really believes that a plaintiff has shopped and that interstate harmony would be disrupted by a choice of forum law or that a defendant's legitimate expectations will be defeated, the court will have the choice of departing from its normal approach to choice of law or dismissing the suit on the grounds of *forum non conveniens* and letting another state handle the suit.¹⁹⁴ Interstate harmony or defendant's expectations should not require a court to change its constitutionally sound approach to choice of law, and the court should use the *forum non conveniens* alternative for the rare plaintiffs the court is convinced are shopping impermissibly.

VIII. CONCLUSION

Once we break away from the confines of geographically-focused choice of law theories, we will see that true choice of law issues raise the same problems the courts deal with every day. Courts must shape the law from policy using the analytical tools available in the *whole* of the law, not just a corner of conflicts theory, or a section of tort laws, or a hectare of contract and tort law.

There is nothing impermissible about one court's reaching a choice of law result that is different from the results other courts might reach, as long as the result the court reaches comports with the court's own well-developed view of the underlying substantive law. Indeed, we should welcome a multiplicity of views about substantive law. The only conflicts problem worth talking about in choice of law is the conflict between a result in a case and the policies of the substantive law that give rise to the choice of law issue. *That* conflict is not being addressed sufficiently by our courts because courts consistently lose sight of the substantive policies of the underlying law. When courts focus on the law and its policies directly, however, conflicts will die, although there will remain conflicting visions of the law from one jurisdiction to the next. But the law will thrive in an environment in which there are developed, articulate, and different visions of substantive law.

The only reason to be afraid to let courts resolve choice of law issues on only a substantive law policy basis is that we fear the courts will not do, or are not capable of doing, the hard work substantive

194. Moreover, assuming that the court is faced with a forum shopping plaintiff and that the court is convinced this is a serious matter, the court should consider a *forum non conveniens* dismissal even when, by the time the court comes to the issue, there no longer is another forum in which the plaintiff can sue unless the defendant voluntarily agrees not to raise a statute of limitations defense.

analysis requires. All of the choice of law methodologies have attempted to protect us from unjust, slipshod courts by weaving arbitrary geographic factors into choice of law. This cure is worse than the illness and treats only the symptoms anyway. Everyone always has something to fear from unjust courts. No one has anything to fear in justice justly given.

