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Governmental interest analysis is now the law of choice of law in the District of Columbia.[1] Since 1965, the year of *Tramontana v. S.A. Empresa*

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1. Cases using this approach have been decided by various courts in the District of Columbia. In the United States Court of Appeals for the District of Columbia Circuit the interest analysis cases are: Mazza v. Mazza, 475 F.2d 385 (D.C. Cir. 1973); *In re* Parkwood, 461 F.2d 158 (D.C. Cir. 1971); Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., Inc., 452 F.2d 1346 (D.C. Cir. 1971); Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968); Roscoe v. Roscoe, 379 F.2d 94 (D.C. Cir. 1967); Dovell v. Arundel Supply Corp., 361 F.2d 543 (D.C. Cir. 1966); Williams v. Rawlings Truck Lines, Inc., 357 F.2d 581 (D.C. Cir. 1965); Tramontana v. S.A Empresa de Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C. Cir. 1965). Interest analysis cases in the United States District Court for the District of Columbia are: Cornwell v. C.I.T. Corp., 373 F. Supp. 661 (D.D.C. 1974); Farrier v. May Dep't Stores Co., 357 F. Supp. 190 (D.D.C. 1973); Legg, Mason & Co. v. Mackall & Coe, Inc., 351 F. Supp. 1367 (D.D.C. 1972); Emmert v. United States, 300 F. Supp. 45 (D.D.C. 1969). Only two interest analysis cases have been decided by the District of Columbia Court of Appeals. They are: Fowler v. A & A Co., 262 A.2d 344 (D.C. Ct. App. 1970); McCrossin v. Hicks Chevrolet, Inc., 248 A.2d 917 (D.C. Ct. App. 1969).

In 1971 Congress eliminated the power of the United States Court of Appeals for the District of Columbia Circuit to review judgments of the District of Columbia Court of Appeals, and made the latter the highest court of the District of Columbia. District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. CODE ANN. § 1-1510 (1973), *formerly* Act of Oct. 21, 1968, Pub. L. No. 90-614, § 11, 82 Stat. 1209. Since interest analysis had been adopted and elaborated principally by the United States Court of Appeals for the District of Columbia, *see, e.g.*, Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense, *supra*, there was some question whether this method would continue to be followed by the District of Columbia Court of Appeals.

In M.A.P. v. Ryan, 285 A.2d 310 (D.C. Ct. App. 1971), the District of Columbia Court of Appeals determined the extent to which it was bound by earlier holdings of the United States Court of Appeals for the District of Columbia Circuit. After giving a brief history of the local court, it said:

> [W]e are not bound by the decisions of the United States Court of Appeals rendered after [February 1, 1971, the effective date of the court reorganization Act]. With respect to decisions of the United States Court of Appeals rendered prior to February 1, 1971, we recognize that they, like the decisions of this court, constitute the case law of the District of Columbia. As a matter of internal policy, we have adopted the rule that no division of this court will . . . refuse to follow a decision of the United States Court of Appeals rendered

de Viacao Aerea Rio Grandense,[2] the District of Columbia courts have shown a steady adherence to the new "policy" approach to conflicts problems. It is no longer possible to assume, for example, that tort liability is determined by the place of the injury, that contract rights are determined by the place of contracting, or that issues can be divided into "substance" and "procedure." Gone forever are the territorialist days of the first *Restatement of the Conflict of Laws.*

This article will describe the developments which have occurred in the District thus far and will offer some suggestions for the resolution of future cases. Before taking the cases up, however, a general word should be said about the new method of decision. What are the assumptions behind it, and how have these assumptions been treated in the District's courts?

Simply stated, the objective of governmental interest analysis is (1) to identify the governmental policies underlying each law in conflict, and (2) to decide which state's policy would be advanced by having its law applied to the facts at bar.[3] The classic illustration is the case in which an automo-

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prior to February 1, 1971, and that such result can only be accomplished by this court en banc.

Id. at 312 (footnote omitted). This statement and the pre-1971 decisions of the local court, *see, e.g.*, Fowler v. A & A Co., *supra*, indicate that the District of Columbia Court of Appeals will continue to follow the interest analysis approach set forth in this article.

For detailed accounts of the District of Columbia's court reorganization scheme, see *Symposium—The Modernization of Justice in the District of Columbia*, 20 AM. U.L. REV. 237 (1971); Note, *An Erie Doctrine for the District of Columbia*, 62 GEO. L.J. 963 (1974).

2. 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966), discussed at pp. 465-71 *infra.*

3. Professor Brainerd Currie, the leading scholarly proponent of interest analysis, set forth the general decisional scheme as follows:

> 1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.
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> 2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. . . .
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> 3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.
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> 4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.
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> 5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, *a fortiori*, it should apply the law of the forum if the foreign state has no such interest.

bile driver and passenger who live in a state without an automobile guest statute (state *A*) drive into a state having such a statute (state *B*) and are injured there. Two policies would be identified as underlying state *B*'s statute: that of protecting hosts from "ungrateful" guests, and of protecting insurance companies from collusive suits. Since neither the host nor the insurance company resides in the state having the guest statute (it being assumed that the company resides where it writes the insurance), that state's policies could not be advanced by being applied to the hypothetical facts. The assumption is that the guest statute was enacted with local hosts and local insurance companies in mind. A contrary policy would be found to underlie the law of state *A*; the policy there is one of compensation of those injured by the negligence of auto hosts. This policy would be advanced by applying it to the facts because the plaintiff is a resident of state *A*, and because the welfare burden falls on the plaintiff's domicile if the plaintiff is impoverished by his injuries. In the case posited here, in which the policy of only one state (state *A*) can be advanced by having its law applied to the facts, the policies of the states are not really in conflict: a "false conflict" appears and the court should apply the law of the only interested state.[4] The result, of course, would be contrary to that of the traditional theory, which applied the law of the place of injury.[5]

If the facts in the example are changed so that the driver and the car are from state *B*, the state with the guest statute, but the passenger is still from state *A*, which imposes liability, then a "true conflict" appears when the passenger is taken from his domicile into the guest statute state and injured there. This is because state *B* would now advance the host-protecting and insurer-protecting policies of its own law by shielding the local host who is locally

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Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178, in B. CURRIE, SELECTED ESSAYS ON THE CONFLICTS OF LAWS 183-84 (1963).

4. *See, e.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), in which the court held that Ontario had "no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario . . . ." *Id.* at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750. The Ontario guest statute, designed to protect insurance companies against fraudulent claims by passengers acting in collusion with insured drivers, was not intended to govern when both the driver and the insurance carrier were from New York. New York's policy of compensating its plaintiff did apply, however, and recovery was allowed. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, Illustration 1 (1969). *Babcock* and "false conflicts" are discussed in D. CAVERS, CONTEMPORARY CONFLICTS LAW IN AMERICAN PERSPECTIVE: RECUEIL DES COURS 77-308 (1970); Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, in B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 690 (1963). *See generally* Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972).

5. *See, e.g.*, RESTATEMENT OF CONFLICT OF LAWS § 384 (1934).

insured. State *A*, of course, would still have its policy of compensating its plaintiffs—or at least those injured as a result of trips originating in state *A*—because of the "welfare" interest of the plaintiff's domicile.[6] Thus each state would have an interest in the application of its own law to the facts. In this situation, interest analysis, or at least the version of it favored by one leading scholar, calls for the application of forum law.[7]

The best way to approach the District version of this system is to begin with the case of *Mazza v. Mazza*.[8] A Maryland resident died owning District land held jointly with his sister, who enjoyed the right of survivorship. The decedent's wife, who inherited the balance of the estate under the will, was forced to pay federal estate tax on all the decedent's assets, including the District land. The wife sued the sister in the District for a portion of the tax equal to the sister's percentage of the decedent's taxable estate. Under Maryland law this contribution was required; under District law it perhaps was not.

The court looked to the policies underlying the laws in conflict. It found that the Maryland law of apportionment was "intended to protect residuary beneficiaries from the untoward effects of unforeseen taxes."[9] Since the beneficiary was from Maryland, it would advance this Maryland policy to apply Maryland law to the case:

> Since the residence of the decedent will commonly be the residence of the spouse and dependent children, and since such family members are usually the principal beneficiaries, Maryland, as the decedent's residence, has a dominant interest in protection of the principal beneficiary. . . . Unlike pro rata apportionment, which can at worst reduce by a percentage some assets which the testator expected would be transferred in their entirety, payment of taxes from the residuary estate can consume that estate entirely, perhaps leaving an intended principal beneficiary with nothing at all.[10]

This Maryland interest was then compared to that of the District. The court noted that the District rule of nonapportionment had never been clearly explained in District decisions, that the rule as it developed at common law was based on the presumed intent of the testator, that the planning

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6. *See, e.g.*, Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970). A symposium on *Cipolla* appears in 9 DUQUESNE L. REV. 347 (1971).

7. Currie, *supra* note 3, at 178.

8. 475 F.2d 385 (D.C. Cir. 1973).

9. *Id.* at 389. The court also found that the Maryland policy "may well be premised on the conclusion that residuary beneficiaries are likely to be intended principal beneficiaries, and that a failure to provide for payment of taxes will almost certainly be an oversight." *Id.*

10. *Id.*

and taxation of estates had undergone substantial change, and that it was doubtful whether the same presumption could still be made as to the testator's intent. The courts did not, therefore, "discern a strong . . . [District] policy requiring application of the nonapportionment rule to the facts before us."[11] Maryland law was applied "on balance" because the Maryland interest appeared stronger.[12]

From this brief example one can see how interest analysis works in a local context. The objective is always to identify first the policies which underlie the laws in conflict, and then determine how those policies are affected by the facts at bar. To the extent the policies are uncertain, and to the degree it is unknown to which combinations of facts they apply, interest analysis will be difficult to use. Because the policies inevitably depend upon the particular law, the method requires a separate analysis for each type of law in conflict. A presentation of local law must therefore treat a series of items one by one.

I. INTEREST ANALYSIS APPLIED: TORTS

A. Vicarious Liability

The subject of vicarious liability has produced some of the most doctrinally pure applications of the interest analysis method. In *Gaither v. Meyers*,[13] a Maryland resident was injured on a Maryland road by a thief driving a station wagon stolen from the District of Columbia. The theft occurred in part because the owner, a District of Columbia resident, had left the keys

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11. *Id.* at 292.

12. This result is flatly contrary to the situs reference of the traditional theory. *See* RESTATEMENT OF CONFLICT OF LAWS §§ 214-54 (1934). The court indicated rather specifically why the older theory was not followed:

> Concerns with the stability of use of, and marketability of title to, land were bases of the traditional conflicts rule that the law of the situs governs questions of succession to land, and allocation of the federal estate taxes is at least a related issue.
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> In respect of such considerations, however, it is possible to distinguish between questions of succession to land and those concerning apportionment of estate taxes against the land. The question of apportionment could affect title to the land only indirectly at best, and would in any event affect only a portion of the value. Unlike questions relating to the validity of title, the issue of tax liability is one of short duration. The attenuation of this relationship suggests that a principle reason for the concern with stability of title—the danger of third-party reliance on the law of the situs—is insubstantial with regard to the responsibility for estate taxes. Since it seems that the interests underlying the traditional rule are not involved in this case, that rule casts no weight into the balance.

475 F.2d at 391 (footnotes omitted).

13. 404 F.2d 216 (D.C. Cir. 1968).

to the wagon in its tailgate. The owner's act violated a local motor vehicle regulation,[14] and the District of Columbia courts had held that a violation of this regulation was negligence per se.[15] In Maryland, it was also an offense for an owner to leave the keys in an unattended automobile, but the Maryland courts had ruled that the intervention of the thief broke the chain of proximate cause between the owner's act and the plaintiff's injury. Thus, in Maryland the owner was shielded from liability.[16]

To decide the case, the court said it was necessary first to identify the governmental interest of the District of Columbia. Under the facts at bar, the District's policy consisted of the "key" regulation and the local cases construing it. Those cases had viewed the regulation as a safety measure. The tort liability aided in "discouraging the hazardous conduct which the ordinance forbids."[17] Thus, the District regulation contained a policy of deterrence as well as compensation of injured parties.[18] From this it followed that

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14. District of Columbia Traffic and Motor Vehicle Regulations art. XIV, § 98 (1971) provides:

> No person driving, or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key, and effectively setting the brake thereon and, when standing upon any grade, turning the front wheels to the curb or side of the highway.

The court interpreted this language to reach the facts in *Gaither*—in which the driver removed the keys from the ignition but not completely from the car—reasoning that a key left in a tailgate presented at least as great a danger of theft as one left in the ignition. 404 F.2d at 220.

15. *See* Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943).

16. *See* Liberto v. Holfeldt, 221 Md. 62, 155 A.2d 698 (1959).

17. 404 F.2d at 222, *quoting* Ross v. Hartman, 139 F.2d 14, 16 (D.C. Cir. 1943). In the *Ross* decision, holding that the violation of the regulations was negligence per se, the court stated that

> [t]he evident purpose of requiring motor vehicles to be locked is not to prevent theft for the sake of owners or the police, but to promote the safety of the public in the streets. An unlocked motor vehicle . . . creates much more risk that meddling by children, thieves, or others will result in injuries to the public . . . . The rule we are adopting tends to make the streets safer by discouraging the hazardous conduct which the ordinance forbids. It puts the burden of the risk, as far as may be, upon those who create it.

139 F.2d at 15-16. The *Gaither* court also cited a government survey showing the accident rate for stolen cars to be 200 times the normal rate, and another disclosure that keys had been left in the car or in the ignition in 42.3 percent of all stolen cars. 404 F.2d at 222-23.

18. The court admitted that a "compensatory policy has the greatest relevance to cases when the mishap occurs in the District and when District residents are plaintiffs." 404 F.2d at 223. It added, however, the following statement favoring compensation:

> [T]o confine the benefits of the *Ross* rule to the territory ceded by the states of Maryland and Virginia to form the Nation's Capital would be to shun the present reality of the economically and socially integrated greater metropolitan area. It is a commonplace that residents of Maryland are part of the Washington metropolitan trading area, and that District residents and businesses have

when the driver's conduct occurred in the District, the District's deterrence policy would be advanced by applying District law to the case, even though no District citizen or property had actually been harmed. The defendant's act created the precise danger to District life and property which the regulation sought to prevent. Liability would discourage such an act.

It was also necessary to ascertain the interest of Maryland. That interest was expressed by the ruling on proximate cause by Maryland's highest court: car owners were not liable for injuries caused by thieves. Could this defendant-protecting policy be advanced by applying Maryland law to the facts? The court thought not:

> [The] interest of Maryland in curtailing liability of a car owner, would not seem to extend to an owner like our defendant, who is not a citizen of Maryland but rather a resident of the District of Columbia. . . .
>
> Thus, we are not concerned with any real "conflict" between the interests of Maryland and the District in this case. The fact that two states have different rules where all the factors are oriented to one state does not necessarily mean that there is a "conflict" in which one state demands and the other rejects the application of its rule to a situation where the pertinent factors arise in two or more states. Where there is no such conflict of interest in a multi-state situation, as this court and others have noted, there is a "false conflicts" situation.[19]

Gaither thus demonstrates as firm a commitment to interest analysis for torts as *Mazza* demonstrates for estate taxation. The relevance for choice of law for any particular fact is determined only *after* an identification of the policies at issue. The place of injury, for example, is found to be of little relevance for a policy of deterrence. Instead, the crucial fact becomes the place of the defendant's act. The residence of the defendant, in like manner, has little importance unless the policy of some state is activated by it. Here, that was not the case. The assumption always made is that a particular fact has no inherent significance in itself; it only serves as a basis for deciding whether a policy is applicable. The *Gaither* court held that Maryland's defendant-protecting policy was directed principally to Maryland defendants, and the court assumed that Maryland law did not wish to *deny* relief to its

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> an interest in the well-being of these citizens of the Free State. We cannot fairly impute to Congress, or its delegate, the parochial intention to restrict recovery based on violation of the District regulation to District residents, especially taking into account the national constituency of Congress, in the absence of an express disclaimer.

Id. (footnotes omitted).

19. *Id.* at 224 (footnote omitted).

own plaintiffs unless a protected Maryland resident were being sued. Finding no Maryland policy against recovery and thus a false conflict, the court applied the forum's deterrent policy to the forum conduct.

The *Gaither* case states the basic elements of the false conflicts method for torts. To elaborate the method further, however, one might hypothetically alter the facts in *Gaither*. If the same District owner left the same keys in the same car but on a nearby street in Maryland, and if the same thief injured the same Marylander in the District of Columbia, what would the District of Columbia court hold? The hypothetical moves the conduct outside the forum and the injury within it. Does it follow then that the forum's deterrent policy no longer applies? To decide such a question the court would have to define the territorial reach of that policy. Is there still a danger to District residents and property when suburban drivers leave the keys in unattended cars? The hypothetical facts indicate that such a danger exists, since the car did in fact enter the District and injure someone. Of course, a car stolen in Maryland may never in fact enter the District—a possibility which is not present when the District is the site of the theft. However, District residents frequently travel to the Maryland suburbs, and thus a given auto stolen in the Maryland suburbs will inevitably pass through an area where many District residents are present. The same is true of autos stolen in the Virginia suburbs. It is possible, therefore, to argue that the District's deterrent policy should apply throughout the metropolitan area. In the case in which the owner is a District resident and the injury occurs in the District, we still have a false conflict if the court assumes that Maryland law intends to shield only Maryland owners.

Suppose that this same District of Columbia car, causing the same injuries in the District to the same Marylander, had been stolen in Baltimore instead of the District's suburbs. The risk then to District interests is considerably less. The deterrence policy could not be expected to work so far away unless the court believed that District motorists should behave carefully everywhere simply because they live in the District. How likely is it that an auto stolen in Baltimore, Wilmington, or New York City will enter the District of Columbia? Is it likely enough to defeat the owner's purported reliance on the defendant-protecting rule in effect where he acted?[20]

This is a more difficult case. If the court grants recovery it does so because the conduct did in fact create a risk to District interests—albeit not a very foreseeable one—and possibly because the court still finds a false conflict. To find a false conflict Maryland's policy would still have to be

20. Of course, no conflict would arise if the state where the owner acted would impose liability.

construed as shielding only Maryland defendants.[21] On the other hand, if the court denies recovery it is being less generous to Maryland residents than to its own (a District plaintiff injured in the District under these facts would probably recover), and it is giving the plaintiff fewer rights than he might have had under the old "place of injury" rule.[22]

There is language in *Gaither* which suggests that the court would not discriminate among residents of the metropolitan area;[23] if a recovery is granted to a District resident, it would also be granted to a Maryland resident. Since a District resident injured in the District would probably benefit from the compensatory aspect of the regulation, the court's language makes it difficult to turn the Maryland resident away.[24] However it is doubtful that the language can be taken seriously. If the court has a policy of compensating suburbanites because they are part of the District's economy, the court must then be prepared to discriminate among Marylanders by denying to plaintiffs from Annapolis the protection afforded those from the Washington suburbs. Can a court really discriminate according to whether the plaintiff lives on one side or the other of a foreign state? In this situation the policy approach shows strain. To avoid discrimination in the case posed—

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21. Maryland would apply its own law if the injury occurred in Maryland. *See* White v. King, 244 Md. 348, 223 A.2d 763 (1966) (Michigan guest statute applies to Maryland residents injured in Michigan). However, when the conduct occurs in Maryland but the injury takes place in the District, Maryland case law indicates that Maryland would apply District law. *See* Uppgren v. Executive Aviation Servs., Inc., 326 F. Supp. 709 (D. Md. 1971) (Minnesota law applied to crash of helicopter in Minnesota despite allegation that negligence occurred in Maryland); Debbis v. Hertz Corp., 269 F. Supp. 671 (D. Md. 1967) (West Virginia law applied to injuries received by Marylander in West Virginia despite alleged negligence of Virginia defendant in making car rental agreement in Virginia); Herr v. Holohan, 131 F. Supp. 777 (D. Md. 1955) (Pennsylvania owner liability law applied to plaintiff injured in Pennsylvania by son of Maryland defendant driving vehicle with defendant's permission). *See also* McCall v. Susquehanna Elec. Co., 278 F. Supp. 209 (D. Md. 1968) (when alleged negligence of defendant in opening gates of a Maryland dam caused decedent's boat to capsize in Susquehanna River, admiralty jurisdiction was proper because river was where alleged negligence "became operative" on decedent). If the injury in the District resulted in death, a Maryland statute, MD. CTS. & JUD. PRO. CODE ANN. § 3-903(a) (1974), commands that District law be applied. *See* Wilson v. Frazer, 353 F. Supp. 1 (D. Md. 1973).

22. The first *Restatement* is ambiguous on this point. *Compare* RESTATEMENT OF CONFLICT OF LAWS § 379 (1934), *with id.* § 380(2).

23. *See* note 18 *supra.*

24. Charges of discrimination, however, have not deterred the New York Court of Appeals. In Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), an Ontario passenger was killed in Ontario by the alleged negligence of the New York driver of the New York automobile in which the decedent was riding. Although the court denied recovery by applying the Ontario guest statute, it admitted it would have ignored the statute if the passenger had been from New York, as it did in Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

whether in favor of one Maryland resident over another or in favor of District residents over Maryland residents—the Court would have to confess to favoring a compensatory policy for all plaintiffs injured in the District. This, however, would be a territorialist view inconsistent with Maryland's supposed indifference to defendants acting in Maryland. That is, if the District's key regulation expresses an interest in compensating a Maryland plaintiff injured in the District, then Maryland's holding of no proximate cause expresses an interest in protecting a District defendant acting in Maryland. One cannot have a false conflict by assuming that Maryland's interest depends upon domicile rather than presence within the jurisdiction, and yet at the same time suppose that the District has a "true" interest dependent upon presence within the jurisdiction rather than domicile. The only way to handle this as a false conflict, and yet hold for the plaintiff, is to assume that (1) the compensatory aspect of the District's regulation does not apply to *any* Maryland plaintiff; (2) Maryland's denial of proximate cause is not meant to shield District of Columbia defendants; and (3) the District's deterrence policy is advanced because the prohibited conduct produced its effects within the District. If these assumptions are made, then there is a false conflict and District law applies. If the assumptions seem questionable, it is principally because interest analysis itself is questionable in some of its applications. If this case in fact occurs, the court probably would hold for the plaintiff rather than discriminate. The court's language, however, may be expected to stress deterrence in order to keep the logic whole.[25]

25. A New York court did just that in this situation. After Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), *see* note 4 *supra*, was decided, the factual converse of that case arose in Kell v. Henderson, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (Civ. Ct. 1966). In *Kell*, an Ontario passenger was injured in New York by the Ontario driver of an Ontario automobile on a weekend motor trip. The court refused to apply the Ontario guest statute, notwithstanding the *Babcock* holding that Ontario had no interest in protecting a foreign host and his insurer. Since New York by this same reasoning would have no interest in compensating an Ontario plaintiff, the only basis for the plaintiff's recovery could be a New York policy of deterring negligent driving, or possibly a New York interest in providing a fund for New York medical creditors. *Accord*, Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973) (court ignored Ontario guest statute on facts almost identical to those in *Kell*). Moreover, the California Supreme Court's decision in Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974), that the estate of a Mexican national killed in California could recover an amount in excess of the maximum allowed by Mexican law, stated squarely that deterrence was its motive for refusing to limit wrongful death damages. The deterrence rationale was required by the court's previous holding in Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967), that under a compensation theory the court would apply the higher damage rule of Ohio, the decedent's domicile, to a death caused in Missouri by a California defendant.

One might also ask how the hypothetical case would be decided if the court used the approach of the *Restatement (Second)*. Section 146, which covers personal injuries, would

What, then, are the limits of this deterrence policy? As we have just discovered, it may well protect a Marylander injured in the District against a District of Columbia automobile owner acting outside of the suburbs. We know that *Gaither* protected a Marylander injured in the suburbs against a District of Columbia owner acting within the District. Would it have mattered in *Gaither* if the injured Marylander had resided farther away? Suppose the injury occurred on Maryland's Eastern Shore, or in New York City. If the regulation's object is to deter this conduct within the District, then perhaps the place of injury is irrelevant so long as the conduct is local. The question would come down to a weighing of local interests. Is it wise to make District of Columbia defendants liable for injuries occurring anywhere in order to reduce the risk of local harm which their conduct poses? According

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refer to the place of injury unless some other state had a "more significant relationship . . . to the occurrence and the parties." This latter state would be selected by considering the "contacts" listed in section 145: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile of the parties, and (d) the place where the relationship, if any, between the parties is centered. These contacts, in turn, are only to be taken into account when applying the "principles" listed in section 6:

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

In the hypothetical case, this might be sorted out as follows: contact (a) of section 145 is in the District, contact (b) is in Maryland, contact (c) is divided, and contact (d) is irrelevant because no "relationship" exists. These contacts have significance, however, only in view of the principles of section 6. Principle (a) is inconclusive; principle (b) points to the District because the policy of the District (deterrence) is advanced by applying District law; principle (c) does not point to Maryland because Maryland has no interest in shielding District owners from liability for District harm; principle (d) is of little weight because "[t]here are occasions, particularly in the area of negligence, when the parties act without giving thought to the legal consequences of their conduct. . . . In such situations, the parties have no justified expectations to protect. . . ." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, comment *g* (1969); principle (e) speaks to validation policies associated with consensual transactions, *id.*, comment h; principle (f) applies to problems such as title to land and moveables where certainty is paramount; principle (g) is a "goal for which to strive" but "should not be overemphasized," *id.*, comment *j*.

One concludes that principle (b) is the only one which clearly applies and thus sections 6 and 146 point to District law. This is supported by the words of comment *f*: "In general, it is fitting that the state whose interests are the most deeply affected should have its local law applied." One now sees that it was really contact (a) of section 145 which was the most important after all.

to a recent holding by the United States Court of Appeals for the District of Columbia, the balance tips toward liability.[26]

A similar analysis would apply to the case in which the injury and conduct occur outside the forum, but the conduct is still within the area of likely harm to forum interests. This would occur when, for example, a suburban resident is injured in the suburbs by a car stolen in the suburbs from a District owner. Again, the District's deterrence policy would have to be matched against the burden on District owners. The court may find the danger to District interests less in this case than in *Gaither*, but, as mentioned above, the court could hardly find the danger negligible. The prediction again is that District law would be applied. If the court adheres to interest analysis, the interest of other states would be found irrelevant; one still assumes the suburban jurisdiction has no interest in shielding District owners from liability.[27]

When the District owner acts outside the suburbs—but the injury is within the District suburbs to a suburban resident—one might expect the balance

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26. Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C. Cir. 1965) (New York's stricter owner liability law applies to New York owner whose car caused injury in the District), *see* pp. 464-65 *infra*. *See also* Zucker v. Vogt, 200 F. Supp. 340 (D. Conn. 1961) (Connecticut "dram shop" act applies to Connecticut barkeeper who sold liquor to driver causing injury in New York); Schmidt v. Driscoll Hotel, 249 Minn. 376, 82 N.W.2d 365 (1957) (Minnesota "dram shop" act applied to Minnesota barkeeper who sold liquor to driver whose passengers were injured in Wisconsin). *But cf.* Eldridge v. Don Beachcomber, Inc., 342 Ill. App. 151, 95 N.E.2d 512 (1950) (Illinois act did not apply to nonresident injured outside the state).

Under the *Restatement (Second)*'s approach, *see* note 25 *supra*, the reference would probably be to District law. The section 145 contacts are again divided, and principle (c) would still not point to Maryland for the reasons stated above. *See* note 25 *supra*. Principle (b) would still point to the District, and the application of the other principles would remain the same.

When the theft in the District occurs on private property, the "key" regulation, *see* note 14 *supra*, does not apply and the case is decided according to negligence principles. *See* Casey v. Corson & Gruman Co., 221 F.2d 51 (D.C. Cir. 1955) (leaving keys in unattended truck was not proximate cause of plaintiff's injury fifteen miles south of Petersburg, Virginia, since act was too remote in time, place, and circumstance from collision).

27. This is a difficult case under the *Restatement (Second)*. *See* note 25 *supra*. It would seem that an analysis of the principles of section 6 would still yield a false conflict, with principle (b) pointing to the District and principle (c) not pointing to Maryland. However, comment (b) to section 145 declares that "subject only to rare exceptions, the local law of the state where conduct and injury occurred will be applied to determine whether the actor satisfied minimum standards of applicable conduct. . . ." Comment (e) to section 146 states that "[o]n rare occasions when conduct and injury occur in different states, a state which is neither the state of conduct nor of injury may nevertheless be that of the most significant relationship . . . ." The example is a case in which a forum resident buys a ticket from a local airline for a flight which takes off and lands in the forum but crosses en route a portion of another state. Though the negligence and injury occur in the other state, forum law applies.

to tip in the owner's favor though some local risk does occur. When both the injury and the conduct occur beyond the suburbs, the District's deterrence policy surely becomes de minimus and the court should not hold the District owner liable.

The only remaining problem of deterrence is the one posed by the motorist who is not a District resident. Would any of the above analyses change if the motorist were a Marylander? When the car is stolen in the District, one would not expect a District court to exempt foreign defendants from the burdens it imposes upon its own defendants for local conduct. When the theft is in the suburbs, however, the risk to District interests remains, though the transaction is wholly foreign. Should the District allow recovery by a Marylander injured in Maryland after a theft in Maryland from a Maryland motorist when the Maryland courts would not?[28] The Maryland interest in protecting its own motorist acting at home would probably outweigh the District's interest in suburban deterrence.[29]

This is surely enough discussion of deterrence. One can see that for interest analysis to work, there must be agreement on which facts bring a given policy into play. The assumption here was that the factual proximity to local lives and property should be the test for the District's policy of deterrence. Since there was also a Maryland policy at issue, it was likewise necessary to decide which facts were relevant for it. A false conflict was found by assuming that Maryland's policy of denying liability was not intended to benefit a District motorist acting within the District. When the conduct shifted to Maryland, this assumption was more difficult, but was nevertheless made.

Similar problems arise when the relevant policy is compensation. If in *Gaither* a District resident—instead of a Maryland resident—had been injured in Maryland after the theft in the District, the question would have been whether the key regulation also expressed a policy of compensation. The *Gaither* court held that the regulation did intend to compensate injured plaintiffs.[30] The task, then, becomes one of identifying the plaintiffs to whom the policy applies. Does the fact of District residence bring a plantiff within the protected class? Since the District bears the welfare costs when

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28. *See* note 21 *supra.*

29. The *Restatement (Second), see* note 25 *supra,* is unaffected by the residence of the owner insofar as sections 145 and 146 are concerned, because those sections are principally geared to places. At least that is true when no prior relationship exists between the parties. However, section 6 would change because principle (c) would now point strongly to Maryland. This would be balanced against principle (b) which still points (but more weakly) to the District.

30. "[T]ort liability also has the purpose of shifting the loss from the injured victim and his creditors to the vehicle operator who, in turn . . . may procure insurance." 404 F.2d at 223.

its residents are disabled, the answer seems to be that it does. Or at least it seems so when, as in *Gaither*, the defendant is also a District resident who has acted in the District. By applying District law, the court fulfills the regulation's dual policies of compensation and deterrence.

The compensation policy may be less clear on different facts, however. Let us suppose a District plaintiff has been injured in the District by a Maryland owner's auto stolen in Maryland. The owner-protecting policy in Maryland clearly applies to Marylanders acting at home, or at least that would be the case if Maryland used interest analysis.[31] Thus we have a true conflict: each state's policy would be advanced by the application of its law. It would be necessary now to balance the District policy of compensating District residents against the Maryland policy of shielding Maryland owners. How would this be done? Professor Currie would have the forum apply its own law unless there were some persuasive reason for sacrificing forum policy.[32] A well-known California decision indicates that the expectation of the Maryland owner might be relevant, since he did act at home and could expect his own law to apply.[33] However, when the theft occurs within the District suburbs, the owner could neither deny the danger to District interests nor view that danger as unforeseeable. By allowing recovery for the District plaintiff, the court would advance the local "welfare" interest in compensation and also whatever local deterrence interest might exist in suburban conduct. Other states under similar facts have applied local law on behalf of the local resident.[34]

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31. According to Herr v. Holohan, 131 F. Supp. 777 (D. Md. 1955), Maryland might also apply District law in these circumstances. *See* note 21 *supra*.

32. Currie, *supra* note 3, at 178.

33. People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480 (1957). California sought to forfeit an automobile for unlawful transportation of marijuana within its jurisdiction pursuant to a state statute that forfeited the interest of the chattel mortgage unless it were shown that the mortgagee made a reasonable investigation of the mortgagor's character. Texas, where the sale took place and the mortgage was filed, had no similar requirement. The court said that the mortgagee "cannot reasonably be expected to familiarize himself with and comply in Texas with the statutes of the 48 or more jurisdictions into which the automobile could possibly be taken without his consent." *Id.* at 599, 311 P.2d at 482. *But cf.* Lilienthal v. Kaufman, 239 Ore. 1, 395 P.2d 543 (1964) (forum fails to protect Californian acting at home by applying its "spendthrift" law to contract made and to be performed in California between California plaintiff and Oregon spendthrift).

34. *See, e.g.*, Young v. Masci, 289 U.S. 253 (1933) (New Jersey decision upheld in applying New York's vicarious liability law to New York plaintiff injured in New York by person to whom New Jersey defendant had lent his car in New Jersey); Venuto v. Robinson, 118 F.2d 679 (3d Cir. 1941) (New Jersey law determines whether truck driver-truck owner relationship was master-servant or independent-contractor when truck leased in North Carolina caused death in New Jersey). *But see* Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934) (New York owner not liable for bailee's neg-

If the Maryland owner's conduct occurs beyond the suburbs, the deterrence interest disappears and the compensation interest stands alone. Against this interest is the Maryland refusal to impose liability and the Maryland owner's expectation of being protected by his own law for acts committed at home. Would District law nevertheless apply? Under interest analysis it may well apply unless some "multistate" policy resolves the true conflict in the owner's favor.[35] The Maryland owner can assert his expectations; so, too, can the District plaintiff, since he was injured at home and could not expect his own law to protect him less from strangers than from his fellow District residents. However the expectations may be weighed, and it is perhaps fanciful even to speak of expectations in auto tort cases, there remains the clear local interest in compensation. In this day of insurance the court might find it hard to deny the benefit of local law for local injuries to local plaintiffs.[36]

If both the conduct and the injury to the District resident occur outside the District, the compensation policy must be stretched beyond its previous applications. The conduct and injury could still fall within the suburbs, of course, and the deterrence argument would still exist. The plaintiff's District residence, however, now adds the compensation argument to the deterrence argument. So in the suburban theft from the Maryland motorist, we have the "welfare" interest of the District in its plaintiff, plus the diluted but still visible deterrence interest of the District in suburban conduct pitted against the declared policy of Maryland that its drivers are not liable for this type of Maryland conduct. In which direction does the balance tip? Should the liability of the Maryland owner acting in Maryland be made to depend upon whether the Maryland thief injures someone from the District? Or should the protection of District citizens by the District's courts be made to depend upon whether the thief hits these citizens on the District or Maryland side of an urban street? No answer to this question will please everyone. If a prediction is necessary, it would be that the court, finding itself at trail's end in

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ligence in Ontario unless owner authorized trip).

Under the *Restatement (Second)*, *see* note 25 *supra*, the reference would also be to the District. The section 145 contacts are divided—the injury is in the District, the conduct in Maryland, the domicile is divided, and no prior relationship exists. The principles of section 6 are divided also, with (b) pointing to the District and (c) pointing to Maryland. Comment (e) to section 146, however, states that in cases where conduct and injury occur in different states, "persons who cause injury in a state should not ordinarily escape liability imposed by the local law of that state. . . ." In addition, illustration 1 to section 157 indicates that when the state of injury imposes a higher standard of care than that of the state of the conduct, the law of the state of injury applies.

35. *See, e.g.*, D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965); Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18-19 (1963).

36. The *Restatement (Second)*, *see* note 25 *supra*, would probably follow the analysis indicated above, *see* note 21 *supra*, and apply District law.

a new land, might well return to the old "territorial residue;" it might apply Maryland law simply to avoid discriminating on the basis of residency in cases in which the entire transaction is foreign.[37] This prediction would apply a fortiori to the case in which a District resident is injured beyond the suburbs by a car stolen from a Maryland owner acting beyond the suburbs.[38]

Thus far, the illustrations of the District's compensatory interest have presumed a Maryland driver. How does the analysis change when the driver is from the District? In the first case, when the theft is in the suburbs and the injury is in the District to a District resident, the District driver could not escape under any version of interest analysis. Consequently, a false conflict exists, and both the deterrence and compensatory interests of the District are advanced by applying District law. For conduct beyond the suburbs, a false conflict still exists—though mainly with the District's compensatory interest—since one still assumes there is no Maryland interest in protecting District drivers. If the District resident is injured beyond the suburbs by a theft beyond the suburbs from a District driver, there will still be a false conflict if the court follows the celebrated New York precedent of *Tooker v. Lopez*,[39] in which a New York court applied New York law to the claim of a New York passenger against a New York driver for injuries received in Michigan. *Tooker* has been criticized on the ground that it contemplates turning away a Michigan plaintiff injured in the same circumstances.[40] If the District adopted *Tooker*, it would no doubt be forced to discriminate in the same way, unless the District were prepared to allow a recovery under District law to anyone injured anywhere by a theft anywhere from a District driver who violated the key regulation. As indicated above in the discussion on deterrence, such a burden on District drivers is hardly justified by the local risk. The prediction, then, is that the District would follow *Tooker* and accept the discriminatory consequences. The District should not be discouraged from protect-

37. The Second Circuit has predicted that New York would engage in this type of discrimination. *See* Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973). *But see* Pryor v. Swarner, 445 F.2d 1272 (2d Cir. 1971); Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

The *Restatement (Second)*, see note 25 *supra*, would probably apply Maryland law on these facts. The place of injury and place of conduct (contacts (a) and (b) of section 145) lie in Maryland, and the domicile (contract (c)) is divided. Principle (b) still points to the District but principle (c) points to Maryland. And comment *b* to section 145 states that where the injury and conduct occur in the same state, that state's law applies "subject only to rare exceptions."

38. *But see* Tramontana v. S.A. Empresa de Viacao Aera Rio Grandense, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966); pp. 465-71 *infra*.

39. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); *see* note 24 *supra*.

40. *See* Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

ing District citizens against District defendants under District law simply because other courts will not do the same for their citizens.[41]

Before leaving the subject of vicarious liability, it would be useful to add a few remarks about the District of Columbia Financial Responsibility Law, which is limited to vehicles "operated upon the public highways of the District of Columbia."[42] Because of this language, no recovery can be had under this act for injuries received elsewhere.[43] There is, however, a common law rule in the District creating a rebuttable presumption that an auto involved in an accident was operated either by the owner or with his consent.[44] This common law rule, unlike the statute, is not by its terms limited to District accidents; at least arguments to this effect can be based upon the holding in *Williams v. Rawlings Truck Line, Inc.*[45]

In *Williams*, a New Yorker sold his auto in New York to one Rivera, who then drove the car to the District and injured his New Jersey passenger, Williams, in a District collision. Rivera disappeared and Williams sued the New York owner in the District under New York's owner liability statute. The New York decisions had construed the statute as estopping the owner from disproving ownership when his license plates were left on the car,[46] the case in *Williams*. The District decisions, however, had allowed the registered owner to avoid liability by proving the passage of equitable title.[47] The Dis-

41. The *Restatement (Second)*'s approach, *see* note 25 *supra*, is somewhat confusing when applied to these facts. The contacts of place of injury and place of conduct under section 145 are in Maryland but the domicile of the parties (contact (c)) is in the District. Principle (b) of section 6 refers to the District and principle (c) does not refer to Maryland. We have the statement in comment *b* to section 145 that when the injury and conduct are in the same state that state's law applies almost without exception, and yet comment *d* to section 145 states that "the local law of the state where the parties are domiciled, rather than the local law of the state of conduct and injury, may be applied to determine whether . . . one party owes the other a higher standard of care than would be required . . . by the local law of the state where conduct and injury occurred." In this case as in the others, it seems that interest analysis is a sharper tool than the *Restatement (Second)*.

42. D.C. CODE ANN. § 40-424 (1973).

43. *See* Gaither v. Myers, 404 F.2d 216, 219 (D.C. Cir. 1968). *But cf.* Farber v. Smolack, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967), in which New York applied its owner liability statute to a foreign accident despite language limiting it to a "vehicle used or operated in this state." N.Y. VEHICLE AND TRAFFIC LAW § 388 (McKinney 1970).

44. *See, e.g.*, Gaither v. Myers, 404 F.2d 216, 219 (D.C. Cir. 1968).

45. 357 F.2d 581 (D.C. Cir. 1965).

46. *See, e.g.*, Phoenix Ins. Co. v. Guthiel, 2 N.Y.2d 584, 141 N.E.2d 909, 161 N.Y.S. 2d 874 (1957); Switzer v. Aldrich, 307 N.Y. 56, 120 N.E.2d 159 (1954); Reese v. Reamore, 292 N.Y. 292, 55 N.E.2d 35 (1944); Shuba v. Greendonner, 271 N.Y. 189, 2 N.E.2d 536 (1936).

47. *See* Mason v. Automobile Fin. Co., 121 F.2d 32 (D.C. Cir. 1941); Burt v. Cordover, 117 A.2d 116 (D.C. Mun. Ct. App. 1955); Gasque v. Saidman, 44 A.2d 537

trict of Columbia Circuit, finding a false conflict, applied New York law. The District's defendant-protecting policy, the court noted, was not applicable because the defendant and the transaction were both foreign.[48] New York policy, on the other hand, was "designed to enforce by its *in terrorem* effect the vehicle registration laws of the state [and] . . . fulfillment of this basic goal would require extra-territorial application . . . ."[49]

In *Williams*, therefore, the District's courts were willing to enforce a New York deterrence policy by applying it to a New York automobile owner whose car injured someone outside New York. It would follow that the District should also be willing to enforce a District deterrence policy when a District owner's car injures someone outside the District. Does the District's common law presumption express a deterrence policy? Language in *Williams* and *Gaither* indicates that it does. *Williams* held that the purpose of the Financial Responsibility Law "was to control the giving of consent to irresponsible drivers by the one having that power"[50] and thus to "protect the persons and property of District residents by encouraging safe driving . . . ."[51] *Gaither* held that the Financial Responsibility Law "alters the common law rule only by converting the rebuttable presumption of an agency into a conclusive one where a single ingredient of actual agency, consent, is present."[52] If the deterrence policy is strong and clear where the presumption is conclusive, is it likely that the policy did not exist at all when the presumption was only rebuttable? Policies such as this are rarely born fully clothed through interstitial legislation. The District's common law presumption contains a deterrence policy which, under the view of the New York policy taken in *Williams*, has extraterritorial effect, and it should therefore apply in favor of nonresidents injured outside the District by the autos of District owners.

B. Wrongful Death

The District's leading wrongful death case is *Tramontana v. S.A. Em-*

(D.C. Mun. Ct. App. 1945); *cf.* Rosenberg v. Murray, 116 F.2d 552, 553 (D.C. Cir. 1940).

48. 357 F.2d at 585. The analysis in *Williams* might well be different if the facts were reversed, *i.e.*, if a District transferor were sued for an accident in New York. In that situation a true conflict would exist between the plaintiff-protecting law of New York and the defendant-protecting law of the District. Presumably, the District would apply its own defendant-protecting law. *See* p. 463 *supra*. Needless to say, no reasonable lawyer would sue in the District.

49. *Id.*

50. *Id.*

51. *Id.*

52. 404 F.2d at 219 n.9.

presa De Viacao Aerea Rio Grandense,[53] which arose from a mid-air collision over Rio de Janeiro, Brazil between a United States Navy aircraft and a Brazilian airliner. The decedent, a Hyattsville, Maryland resident who was riding in the Navy plane, was a member of the United States Navy Band on a tour of South America. The airliner was on a regularly scheduled commercial flight from Campos, Brazil to Rio. The surviving spouse based her claim on Brazilian law, but argued that the $170 limitation on recovery allowed by that law should be ignored and that the forum's law permitting unlimited recovery should be substituted.

In its first application of interest analysis, the District of Columbia Circuit held that the Brazilian damage limit applied. The court accepted the plaintiff's argument that the reasoning of *Babcock v. Jackson*[54] and *Kilberg v. Northeast Airlines, Inc.*,[55] should replace the territorial view of its older precedents. But in identifying the interests it found that Brazil's policy would clearly be advanced by applying Brazilian law:

> Not only is Brazil the scene of the fatal collision, but Varig is a Brazilian corporation which, as a national airline, is an object of concern in terms of national policy. To Brazil, the success of this enterprise is a matter not only of pride and commercial well-being, but perhaps even of national security. The limitation on recovery against airlines operating in Brazil was enacted in the early days of commercial aviation, no doubt with a view toward protecting what was then, and still is, an infant industry of extraordinary public and national importance. . . . The focus of Brazilian concern could hardly be clearer.[56]

The District of Columbia, on the other hand, had no interest at all since "neither appellant, her children, nor her husband were or are resident or domiciled in the District of Columbia."[57] However this lack of forum interest was not sufficient to resolve the case. Maryland, the decedent's domicile, was also considered. The court found that as the state of the plaintiff's residence, its interest in her recovery was "not insignificant," for Maryland would be forced to support her if she were otherwise unable to support herself.[58]

There thus existed a true conflict in that the interest of more than one

53. 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966).

54. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

55. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). In *Kilberg*, New York refused to apply the Massachusetts damage limit for wrongful death to the case of a New Yorker killed in Massachusetts by the crash of a flight from New York City to Nantucket.

56. 350 F.2d at 471.

57. *Id.* at 472.

58. *Id.* at 473.

state could be advanced by applying its law to the case. The court concluded that under the facts Brazil's interest outweighed that of the District, and that Maryland's law should not be applied by the District when Maryland's choice of law rule would have applied Brazilian law if the case had been filed in Maryland. The obvious question is whether the District would have applied Brazilian law if Maryland's choice of law rule had been different. Other passengers on the same Navy plane, alleging that the courts of their domiciles would have ignored the Brazilian limit, later asked the District of Columbia Circuit to do so. The court refused, saying the interests of Brazil still outweighed those of the parties' domiciles.[59]

Several observations can be gleaned from these opinions. First, the District will actively "weigh the interests" in a true conflict case. Second, the District will assign a "welfare" interest to the plaintiff's domicile. Third, the District may look to the choice of law rule of a foreign state in order to ascertain the interest of that state in the application of that state's law to the facts at bar.[60] Finally, a plaintiff may not be allowed to carry the higher protection of his domicile's law with him when he is injured in a low protection zone by a resident of that zone.[61]

The latter point could be important in some of the key regulation cases discussed above. *Tramontana* would be authority for denying recovery to a District citizen injured in Maryland by a Maryland car stolen beyond the suburbs. The Maryland driver acting at home would be protected by his own law against the higher liability of the plaintiff's domicile, just as the Brazilian airline was in *Tramontana*. If, however, the car in such a case were stolen in the District, *Tramontana* would not apply, and the District's interest in deterring the owner's conduct would become paramount. This latter case

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59. Armiger v. Real S.A. Transportes Aereos, 377 F.2d 943 (D.C. Cir. 1967).

60. This reference in *Tramontana* to Maryland's choice of law rules does not seem to have committed the District to *renvoi*. The cases following *Tramontana* have not considered the choice of law rules of other states. For a discussion of the extent to which a court using interest analysis should consult the choice of law rules of another state, see von Mehren, *The Renvoi and its Relation to Various Approaches to the Choice of Law Problem*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 380, 394 (1961); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 53-58 (H. Nadelmann, A. von Mehren, J. Hazard, eds. 1971).

61. This is consistent with dictum of the New York Court of Appeals in a well known guest statute case:

> When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile.

Neumeier v. Kuehner, 31 N.Y.2d 121, 128, 286 N.E.2d 454, 457-58, 335 N.Y.S.2d 64, 70 (1972). *See also* D. CAVERS, THE CHOICE OF LAW PROCESS 146 (1965).

would be analogous to one in which a District resident is injured abroad on a flight to or from a local airport. If the airline sells tickets to District residents for flights to and from an airport serving the District area, the airline has clearly removed itself from the purely foreign status Varig enjoyed on its domestic flight in *Tramontana.* It has now engaged in a pattern of conduct which, if negligent, poses a recurring threat to District citizens. If a District citizen should in fact be injured, the result is likely to be the same as in *Kilberg*: District law would be applied if it granted a higher degree of protection to the plaintiff than the law at the place of injury. Similarly, the Marylander who leaves the keys in an unattended auto in the District or its suburbs also poses a recurrent danger to District residents; if a District citizen is injured because of this conduct the District should apply its own more protective law.

This analysis would seem valid for personal injury cases. In wrongful death actions, however, the problem is complicated by the wording of the District's wrongful death act, which refers to an "injury done or happening within the limits of the District . . . ."[62] Whether this language would prevent the District from applying its own higher measure of damages if, for example, a District resident were killed abroad on a flight originating at a local airport, is a difficult question. In a similar situation in *Kilberg v. Northeast Airlines, Inc.*,[63] the New York Court of Appeals refused to apply the lower damage limit of Massachusetts to an action by the spouse of a New Yorker killed in Massachusetts while on a flight he boarded in New York. The New York court reached this result by applying the Massachusetts wrongful death act minus its limitation on recovery; the limitation was said to violate New York's public policy. A District of Columbia court could achieve the same result in the hypothetical case by adopting the public policy approach; the limiting language of the District's statute would be irrelevant, since recovery would be "on" the foreign act, though minus its damage limit. Although the desired result would be reached, this approach is logically weak. To say a foreign wrongful death act applies, but without an important limiting factor, is not really to "apply" the foreign act. The court in fact is applying its own act to the foreign accident.[64] Since the public policy language in *Kil-*

62. D.C. CODE ANN. § 16-2701 (1973).

63. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

64. New York abandoned the public policy theory in later cases and frankly admitted that it was giving extraterritorial effect to its wrongful death act. In Farber v. Smolack, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967), New York applied both its wrongful death act and its owner liability statute to a North Carolina accident involving an automobile owned by a New Yorker who loaned it to his brother's family, also from New York, for a trip to Florida and back. In a suit for the wrongful death of the brother's wife, the court overruled its earlier decisions to the "extent that [they] declined

berg cannot be taken seriously, the question still remains whether the limiting language in the District's statute prevents the District from reaching the same result as New York on a District version of the *Kilberg* facts.

Since New York's wrongful death act does not contain the same limiting language as the District's, New York was not confronted with this problem in *Kilberg*. However the New York owner liability statute is limited to the use and operation of vehicles "in this state."[65] That language, however, did not prevent New York from applying its act to a North Carolina accident in *Farber v. Smolack*.[66] The New York court said that "since the present litigation is concerned with New York residents, [and] aris[es] from New York relationships, the rule apportioning liability from these relationships ought to be governed by New York law."[67]

For the District to take this same approach—ignoring the territorially limiting language of its statute—would require it to disavow language in *Gaither v. Myers*,[68] which construed literally the similar language of the District's owner liability act. But the court might well be persuaded to do so if a literal reading of the wrongful death act produced an absurd result. If, for example, during a weekend auto trip to the seashore, a District driver injured his District guest in Rehoboth, Delaware, application of interest analysis would not lead the District to apply Delaware's guest statute. Would it make sense, then, after using interest analysis to decide that Delaware had no interest in the case, to apply Delaware's wrongful death act if the guest died? It seems absurd to grant the District plaintiff the benefit of District law in the case of injury but withhold it in the case of death, particularly if the only basis for doing so is language unthinkingly placed in the District's wrongful death act at a time when territorialism was in vogue. By far the sounder approach would be to follow New York's lead in *Farber* and ignore the limiting language.

Another question raised by *Tramontana* is whether it changes the traditional rule that any person injured in the District may recover the damages provided by District law. In light of the District's lack of interest in applying its law in behalf of a Marylander killed in Brazil, would it follow that when

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to give extraterritorial effect to the [wrongful death] statute." *Id.* at 204, 229 N.E.2d at 40, 282 N.Y.S.2d at 253. *Cf.* Long v. Pan Am. World Airways, Inc., 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965) (New York applied Pennsylvania's wrongful death act to cases arising from explosion over Maryland of airliner en route from Philadelphia to Puerto Rico).

65. N.Y. VEHICLE AND TRAFFIC LAW § 388 (McKinney 1970).

66. 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967); *see* note 64 *supra*.

67. *Id.* at 203, 229 N.E.2d at 39, 282 N.Y.S.2d at 252.

68. 404 F.2d 216 (D.C. Cir. 1968), discussed at pp. 452-65 *supra*.

a domiciliary of a jurisdiction which limits wrongful death damages is killed in the District, his estate should be held to the lower limits the domicile imposes? It appears not, for the District can surely be counted upon to apply its own law under a deterrence theory, as well as under the language of the District's Act. There would be no District interest in protecting the defendant, of course, because the District's more plaintiff-protecting law—unlike Brazil's defendant-protecting law in *Tramontana*—would express none. Moreover, the lower limit of the plaintiff's domicile would express no interest in protecting the defendant unless the defendant also happened to reside in that state. Finally, there would be no District interest in compensating the foreign plaintiff since local medical creditors would probably not participate in the proceeds. One is left with the District policy of deterrence, a policy which the California Supreme Court recently found sufficient to invoke forum law on similar facts. Survivors of a Mexican national were allowed to recover full damages from a California defendant who wrongfully killed the decedent in California. The California court held that California's higher measure of damages expressed a deterrence policy, and that this policy was advanced by applying California's measure instead of the lower limit of Mexico.[69] A false conflict existed because the lower limit of the plaintiff's domicile was not intended to "punish" the plaintiff; it merely intended to protect the defendant against too large a recovery. Since the defendant did not reside in Mexico, the policy was not advanced by applying it to him. In effect, this argument is similar to the one made earlier in the variation of *Gaither* in which a Maryland resident is killed in the District by a District car stolen in Maryland.[70] Generally speaking, the various analyses made in *Gaither* would apply as well to wrongful death.

Before leaving this subject, it should be noted that both Maryland and Virginia now have more liberal regimes on wrongful death than does the District.[71] For example, if the recent air disaster near Dulles International Air-

69. Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974); *see* note 25 *supra.*

70. *See* p. 455 *supra.*

71. Virginia repealed its damage limitation on July 1, 1974. The new provision, VA. CODE ANN. § 8-636.1 (Supp. 1974), provides:

> The jury in any such action may award such damages as to it may seem fair and just, and may direct in what proportion they shall be distributed to the surviving spouse, children, and grandchildren of the deceased, or if there be none such, then to the parents, brothers and sisters of the deceased. As to members of the same class, the jury shall have discretion as to who shall receive the whole or any part of the recovery.
>
> The verdict of the jury shall include, but may not be limited to, damages for the following: (a) sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advise of the de-

port[72] had caused the death of a minor child domiciled in the District, his survivors would be wise to sue in Virginia since District law does not provide recovery for mental anguish.[73] Virginia would apply the *lex loci* rule and award damages for mental anguish under its own law.[74] If the flight had proceeded on toward National Airport and had crashed on the Maryland side of the Potomac River, the surviving District parent could recover for mental anguish by suing in Maryland.[75] Thus, a District citizen on these facts would be treated more favorably by either adjoining state than by his own.[76]

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cedent; (b) compensation for reasonably expected loss of (i) income of the decedent, and (ii) services, protection, care and assistance provided by the decedent; (c) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and (d) reasonable funeral expenses.

Damages recoverable under (c) and (d) above shall be apportioned pro rata among the creditors who rendered such services, as their respective interests may appear . . . .

Maryland's wrongful death act, MD. CTS. & JUD. PRO. CODE ANN. § 3-904(d) (1974), provides:

Damages if spouse or minor child dies.—For the death of a spouse or minor child, the damages awarded under subsection (c) are not limited or restricted by the "pecuniary loss" or "pecuniary benefit" rule but may include damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education where applicable.

72. Ninety-two persons were killed on December 1, 1974 when a Trans World Airlines flight from Indianapolis crashed into a mountaintop on its landing approach to Dulles International Airport after being redirected from National Airport. *See* Washington Post, Dec. 2, 1974, § A, at 1, col. 1.

73. *See* Runyon v. District of Columbia, 463 F.2d 1319 (D.C. Cir. 1972); Bunyea v. Metropolitan R.R., 19 D.C. (8 Mackey) 76 (1890). In the District, damages for the death of a child are calculated by considering the likely earnings of the child until majority, the possible contributions of the child to the support of its parents after majority, and the cost of rearing the child. *See* Hord v. National Homeopathic Hosp., 102 F. Supp. 792 (D.D.C. 1952), *aff'd*, 204 F.2d 397 (D.C. Cir. 1953). Even without recovery for mental anguish, however, damages can be substantial. *See id.* ($17,000 damages for death of a newborn infant). *See generally* W. PROSSER, THE LAW OF TORTS § 127 (4th ed. 1971).

74. VA. CODE ANN. § 8-636.1 (Supp. 1974), *quoted* at note 71 *supra*, would apply to cases where the injuries were received in Virginia. *Cf.* Dickenson v. Tabb, 208 Va. 184, 156 S.E.2d 795 (1967) (West Virginia law applied to collision in West Virginia involving parties from Virginia and West Virginia). *See also* Taylor v. Taylor, 189 Va. 753, 53 S.E.2d 820 (1949); Sutton v. Bland, 166 Va. 132, 184 S.E. 231 (1936); Baise v. Hollifield, 158 Va. 498, 164 S.E. 657 (1932).

75. *See* MD. CTS. & JUD. PRO. CODE ANN. § 3-904(d) (1974) (allowing recovery for mental anguish from death of a child); *id.* § 3-903(a) (1974) (law of place of injury applies to wrongful death).

76. He would also have a longer time to bring suit in the adjoining states. District law imposes a one-year limit on actions for wrongful death, D.C. CODE ANN. § 16-2702

C. Immunity

On the subject of tort immunities, the District's choice of law rules suffer from uncertainty in the municipal law. Recent developments have been in three areas: interspousal immunity, intrafamily (parent-child) immunity, and contribution among joint tortfeasors.

Roscoe v. Roscoe[77] is the leading case in interspousal immunity. A District wife sued her District husband in the District for injuries sustained in a North Carolina automobile accident. North Carolina law permitted the action; District law did not.[78] The United States Court of Appeals for the District of Columbia Circuit applied North Carolina law in a strange opinion which contradicted District precedent, ran counter to interest analysis, and ignored the weight of enlightened authority from other states. The court said:

> Measured in terms simply of "significant relationships" as bearing

(1973), whereas Virginia allows two years, VA. CODE ANN. § 8-634 (Supp. 1975), and Maryland allows three. MD. CTS. & JUD. PRO. CODE ANN. § 3-904(f) (1974).

There has also been a movement in the District toward applying interest analysis to the statute of limitations. The first case was Farrier v. May Dep't Stores Co., 357 F. Supp. 190 (D.D.C. 1973), in which the court refused to apply the District's longer limitation period to a claim for personal injuries sustained in a Virginia department store. The court said the District had no interest in giving relief to a Virginia resident injured in Virginia after Virginia's shorter period had expired. The second case was Cornwell v. C.I.T. Corp., 373 F. Supp. 661 (D.D.C. 1974), in which a Virginia citizen was injured in Anchorage, Alaska while riding in an airplane belonging to a New York defendant. The court again used interest analysis, refusing to apply the longer District period in the absence of any District interest in the case. The court in *Cornwell* was faced, however, with a holding in Fox-Greenwald Sheet Metal Co. v. Markowitz, 452 F.2d 1346 (D.C. Cir. 1971), that limitations are "procedural" and hence goverened by forum law. The *Cornwell* court ruled that the holding in *Fox-Greenwald* on limitations had been superseded by the more recent case of Nyhus v. Travel Management Corp., 466 F.2d 440 (D.C. Cir. 1972). *Nyhus* had stated in a footnote that the limitations issue was only governed by forum law because "[t]he record does not disclose where the . . . contract was made or . . . performed." *Id.* at 443 n.11. Unfortunately, the whole question is complicated still further by the language used by the District of Columbia Court of Appeals—now the highest court in the District of Columbia, *see* note 1 *supra*—in the later case of May Dep't Stores Co. v. Devercelli, 314 A.2d 767 (D.C. Ct. App. 1973). There, the court applied the District period, saying "[t]his issue being procedural is governed by the statute of limitations of the forum." *Id.* at 773. *See also* Fowler v. A & A Co., 262 A.2d 344 (D.C. Ct. App. 1970) (using similar language). Neither *Farrier* nor *Nyhus* was cited in *Devercelli*, and *Devercelli* was not cited in *Cornwell*. If a resourceful lawyer can persuade either the federal or local courts to read each other's opinions, an eventual resolution may emerge.

77. 379 F.2d 94 (D.C. Cir. 1967).

78. Interspousal immunity in the District of Columbia was established in Thompson v. Thompson, 218 U.S. 611 (1910). The *Roscoe* court noted the criticism to which *Thompson* had been subjected, 379 F.2d at 98, but avoided ruling whether it should continue to be followed. For a general discussion of the obsolescence of the immunity doctrine, see W. PROSSER, *supra* note 73, at § 122.

> upon the choice of law here to be applied, North Carolina would seem to have no interest in this litigation beyond its entitlement to our respectful deference to its law, as we conceive it to be. But under the usual rule of comity we would normally accord recognition to such rights as had there accrued . . . .[79]

After noting that the immunity rule had been criticized and that the plaintiff's husband had died after the action was filed, the court continued:

> We deem it sufficient to note that this appellant wife had gained a right of action under the law of North Carolina; that right followed her here; the husband died, and upon his death the basis of the doctrine disappeared . . . . Balancing the respective interests in such circumstances . . . we may apply the law of North Carolina.[80]

A court using this language is obviously not following the method of interest analysis used in *Tramontana, Williams,* and *Gaither.* On these facts the wife has not "gained a right of action" unless one assumes that North Carolina law applies to the case. Of course, to assume North Carolina law applies one must assume the point in question—that of which jurisdiction's law applies. No right exists if one assumes that District law applies. The true problem is to decide *why* one law or the other *should* apply. But the court's language is a classical statement of the circular reasoning of the territorial theory, which assumed that rights "vest" at the place of the wrong and "follow" the plaintiff to other jurisdictions. It ignores completely the policies underlying the laws in conflict.

The method in interest analysis would be wholly different. The District's immunity rule would be found to express only two possible policies: preservation of family harmony and the protection of insurers from collusive suits. Both policies have been cited in the District's decisions stating the local rule;[81] both would have been advanced in *Roscoe* by applying the District's immunity law to the District spouses driving an auto insured in the District. The contrary rule of North Carolina also expresses two policies: a welfare interest in compensating the injured plaintiff, and the creation of a fund for payments of persons rendering medical services to the plaintiff.[82] Because

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79. 379 F.2d at 97.

80. *Id.* at 99.

81. *See* Yellow Cab Co. v. Dreslin, 181 F.2d 626, 627 (D.C. Cir. 1950) ("preservation of domestic peace and felicity is the policy upon which the rule of immunity between husband and wife is based"); Dennis v. Walker, 284 F. Supp. 413, 417 (D.D.C. 1968) ("insurance . . . may lead to fraud, or at least collusive, or at best friendly suits.").

82. The Supreme Court, in Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939), cited the medical creditor interest as a reason for allow-

the plaintiff was from the District the compensatory interest of North Carolina could not be advanced by applying North Carolina law in *Roscoe*. The only possible reason for applying North Carolina law would be to reimburse medical creditors rendering aid in North Carolina, the site of the injury. Thus the District's interest in preserving the harmony of a District marriage and the District's interest in preventing collusive suits against the District insurer would have to be balanced against North Carolina's interest in creating a fund for its medical creditors. In similar conflicts, most recent cases have applied the law of the spouses' domicile.[83] Indeed, even before *Roscoe*, the District precedent indicated that the reference in the District would be to District law under the *Roscoe* facts. In *Baker v. Gaffney*[84] the court applied the District's immunity law to bar the claim of a District wife against a person who loaned his car to her District husband. Although the injury was in New York, a state allowing interspousal suits, the court held the auto owner was not vicariously liable to the wife because she had no claim against her husband under District law. Was *Baker*, unmentioned in *Roscoe*, overruled by that case?

The best approach to *Roscoe* is to view the choice of law language as unfortunate dicta in a case which really held the District's immunity rule inapplicable when a spouse has died, and which, therefore, involved no question of family harmony. This interpretation reconciles *Roscoe* with the later District precedents,[85] and recognizes the obvious fact that death nullifies the policy behind the immunity rule. Otherwise it is impossible to reconcile

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ing the state of injury to apply its own law to foreign plaintiffs injured within its borders.

83. *See* Armstrong v. Armstrong, 441 P.2d 699 (Alaska 1968); Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); Koplik v. C.P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958); Mertz v. Mertz, 271 N.Y. 466, 3 N.E. 2d 597 (1936); McSwain v. McSwain, 420 Pa. 86, 215 A.2d 677 (1966); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

84. 141 F. Supp. 602 (D.D.C. 1956). The *Baker* court applied forum (District) law by characterizing the immunity issue as "procedural." It relied upon the New York case of Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936), which had utilized a similar characterization to apply New York's immunity law to an action by a New York wife against her New York husband for injuries sustained in Connecticut. New York repudiated the procedural views of *Mertz* in Intercontinental Hotels Corp. v. Golden, 15 N.Y.2d 9, 203 N.E.2d 210, 254 N.Y.S.2d 527 (1964), in which the court stated that the real basis for choosing New York law in *Mertz* was that "all the significant contacts of the case were with New York." *Id.* at 16, 203 N.E.2d at 213, 254 N.Y.S.2d at 532. It follows that *Baker*, too, should now be viewed as having referred to District law because the domicile of the spouses made the District's interest predominant.

85. *See* Emmert v. United States, 300 F. Supp. 45 (D.D.C. 1969).

either the analysis or the result of *Roscoe* with the balance of District conflicts law.

We return to more consistent theory with the latest case on intrafamily (parent-child) immunity. *Emmert v. United States*[86] was a suit against the United States under the Federal Tort Claims Act for injuries sustained in a District collision between the auto of a Tennessee family and a vehicle owned by the federal government. When the minor daughter of the family sued the government for negligence, the government sought contribution from the father.

The court's first task was to ascertain District law. Until the 1968 decision in *Dennis v. Walker*,[87] the courts had never squarely decided whether parent-child immunity existed in the District. In *Dennis*, relying on cases from foreign jurisdictions, the court held parent-child immunity applicable to District residents. Unlike interspousal immunity, which followed from the common law concept of the "oneness" of spouses, parent-child immunity was developed in fairly recent judicial decisions based solely upon public policy, although interspousal cases were used as a guide.[88] Thus the existence of parent-child immunity depends far more upon judicial willingness to preserve it than does the immunity of spouses. The court in *Emmert* noted the trend of modern cases in favor of abolishing the doctrine and pointed out that New York had overruled the case upon which the *Dennis* court relied.[89] Since it was therefore doubtful whether immunity existed in the District, the court had to choose between District law and that of Tennessee, where the doctrine was still in force.

To solve the problem through interest analysis, the relevant policies would be the same for parent-child immunity as for interspousal immunity. The domicile's interest in preserving family harmony and preventing collusive suits is advanced by having its immunity law applied. This is to be weighed against the place of injury's interest in protecting its medical creditors, an interest advanced by applying its law imposing liability. When, as in *Emmert*, the place of injury is the forum, the court could properly find the domicile's interest stronger and defer to domicile law.[90] This was the result in *Emmert*,

86. *Id.*

87. 284 F. Supp. 413 (D.D.C. 1968).

88. *See* W. PROSSER, *supra* note 73, at 865. Prosser traces the first parent-child immunity case to Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891), an action for false imprisonment.

89. *See* Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969), *overruling* Badigian v. Badigian, 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961).

90. This occurred in Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966), a case in which a New Hampshire court used interest analysis to apply Massachusetts law

although the court's opinion did little more than list the "contacts," cite the latest *Restatement* (which refers intrafamily immunity to the domicile),[91] and then declare that domicile law applied. Since the court mentioned that its approach was "issue oriented," and spoke of the "respective relationships of the competing jurisdictions," the result must be taken to mean that it found the domicile's interest heavier.

Thus far, the District's immunity cases have been confined to those in which the family members and spouses have been domiciliaries of the state granting immunity. *Roscoe* considered the application of the District's immunity law to District spouses; *Emmert* considered the application of Tennessee's immunity law to a Tennessee family. What of the case involving spouses domiciled in a liability state who are injured in an immunity state, such as the District? In such a case the policies expressed by the immunity law—preserving family harmony and preventing collusive suits—could not be advanced by being applied to families not domiciled in the state having the policy. The District presumably has no greater interest in preserving the harmony of a North Carolina family than North Carolina, which has decided that liability should exist. Since the liability state's policy of compensating the injured plaintiff is clear, that state's law should be applied under a false conflict rationale. Normally, of course, this case would not arise because the action would be filed in the liability state.

D. Contribution

The *Emmert* case also poses the issue of contribution. The government sought to compel the father—whose negligence allegedly contributed to causing the harm—to provide the contribution admittedly due under District law from a joint tortfeasor.[92] The court, by applying the District rule on contribution in immunity cases, under which contribution is not allowed when the party from whom contribution is sought has a complete defense against the original party plaintiff, refused to give contribution.[93]

It is not at all clear why District law should be applied to these facts. Contribution is denied under District law in immunity cases because the immune spouse would otherwise be forced to take a position hostile to the spouse who is the original plaintiff—a subversion of the policy of family harmony upon which the immunity doctrine is based.[94] It would advance this "no contribu-

to the claim of a Massachusetts wife against her husband for injuries sustained in New Hampshire.

91. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 169 (1969).

92. *See* Yellow Cab Co. v. Dreslin, 181 F.2d 626 (D.C. Cir. 1950).

93. *See id.*

94. *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 169 (1969).

tion" policy to apply it to cases such as *Roscoe* and *Baker,* in which the District has a policy of interspousal immunity and the spouses are from the District. In *Emmert,* however, the District did not have a policy of parent-child immunity. Moreover, the family was from Tennessee. If one assumes—as the court did in *Emmert*—that immunity no longer exists in the District, that means that it is now the District's policy to impose liability on parents for harm to their children. The District would have decided to sacrifice whatever benefit in family harmony there may have been from immunity in favor of the presumably greater benefits to be derived from the minor child's recovery. The father would therefore be liable under District law for contribution because he would share the other joint tortfeasor's liability to the child. There would be no reason to *deny* contribution because there would—by hypothesis—no longer be the policy of family harmony upon which a denial of contribution could be based. It would seem that if the District has a policy of liability and contribution, it now conflicts with Tennessee's policy of immunity. The District's policy of contribution would be designed to prevent the unjust enrichment of one joint tortfeasor through a shift of the whole expense to the other, and that policy would be advanced when the party seeking contribution was based in the District and acted there. Tennessee's policy would still be to deny contribution in order to protect its resident family. In such a case the District could recognize the immunity insofar as it affected merely the rights of the family members among themselves—as it did in *Emmert*—but decline to recognize it to the extent of depriving the local joint tortfeasor of his remedy in restitution. This has been the approach of the *Restatement (Second)*[95] and of courts using interest analysis.[96] It seems more sensible because, under the rule set down in *Emmert,* the local defendant (here the federal government) would bear the entire cost when the family is from Tennessee but only half when the family is from the District. Why should District defendants be made to pay more when the family is from some other state? And why should District families recover less than others from a local defendant?[97]

It is also possible that a contribution issue might arise in a case in which spouses from a liability state were injured in the District. It would seem absurd for the District—by applying its immunity law—to protect the marital

95. *Id.*

96. *See, e.g.,* La Chance v. Service Trucking Co., 215 F. Supp. 162 (D. Md. 1963); Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1968); Health v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

97. The same reasoning would be applied by the courts of a liability state in which District spouses might be injured. That state could be expected to allow contribution at the request of a local defendant acting at home.

harmony of these spouses more than would their domicile. And there is no reason for the District to give the defendant seeking contribution fewer rights than would the domicile of the marriage whose supposed protection is the reason for denying contribution. In such a case a false conflict would exist and the District should apply the law of the liability state.

II. CONTRACTS

The District's choice of law approach for contracts is mainly set out in one case, and that case is wholly dominated by the approach of the *Restatement (Second)*. *In re Parkwood, Inc.*[98] presented the question whether District or Maryland law applied to three mortgage loan transactions secured by Maryland land. In the first, a lender incorporated in the District and having its sole office there loaned $375,000 at 6¼% to a Maryland borrower. The loan was negotiated in the District, the note and deed of trust were executed in the District, and repayment was to be made in the District. The court held that the District's loan shark law[99] applied to these facts. In the second transaction, the lender also had its principal office in the District, repayment also was to be made in the District, but the negotiations with the Maryland borrower took place in both the District and Maryland, and the note and deed of trust were executed in Maryland. The court applied District law to these facts also, voiding the loan of $100,000 at 6½%. In the third transaction, a Canadian lender with its headquarters in Toronto had been placed in touch with a Maryland borrower through a mortgage broker having its sole office in the District. The loan was negotiated and executed outside the District and repayment was made in Toronto. The court sustained this loan of $545,000 at 6¼% by applying Maryland law.

To evaluate these transactions for choice of law purposes, and to distinguish the first two from the third, the court decided to plunge rather deeply into the *Restatement (Second)*. Section 188, upon which the court relied,[100] provides as follows:

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98. 461 F.2d 158 (D.C. Cir. 1971).

99. D.C. CODE ANN. §§ 26-601 to -611 (1967). This law voided loans made at more than six percent interest if made by lenders subject to its provisions who had not obtained a license. After the instant loans were made—but before the case was decided—the Act was amended to exclude the lenders in *Parkwood* from its provisions. D.C. CODE ANN. § 26-610 (1973). The loan shark law has since been further amended by the District of Columbia Consumer Credit Protection Act of 1971. *See id.* § 26-612 (1973).

100. The court did not apply the *Restatement*'s usury section, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971), because the loan shark law is drafted as a licensing statute. 461 F.2d at 194 n.78. Section 203 reads as follows:

> The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the con-

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
> (2) . . . the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied. . . .

This, of course, is a rather loose guide. The several "contacts" are all to be "taken into account," but their "importance" depends upon the "particular issue." This can be read to sound like governmental interest analysis: one would first identify the policies ("issues") underlying the laws in conflict and then determine, in view of the facts at bar (the "contacts"), which policy would be advanced by applying it to the case. However, the *Restatement (Second)* does not speak in terms of policies being advanced; it speaks only of "contacts" being "evaluated." One can agree, of course, that a given contact (fact) will vary in importance according to the choice of law issue, but the problem of what to do after this truth has been acknowledged still remains. To say simply that a "contact" is to be "evaluated" doesn't take one very far. It was, no doubt, for this reason that the final draft of the *Restatement (Second)* provided a separate set of "factors" in section 6—incorporated by reference into section 188—which are relevant to the choice of the applicable rule of law:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,

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tract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.

Application of this section would probably have sustained all the *Parkwood* transactions because Maryland, under whose law the transactions would have been valid, was the state of the borrower's domicile and the situs of the encumbered land. According to comment (c) to section 203, these contacts are sufficient to form a "substantial relationship" to the contract.

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

It would be possible, again, to read this language as requiring interest analysis; one would emphasize factors (b) and (c) of section 6 and the "particular issue" language of section 188. By emphasizing other factors, of course, the section could be read so as not to require interest analysis. Finally, by emphasizing the contacts of section 188, and deemphasizing the principles of section 6, one could revert to a numerical sort of counting: a totaling of the contacts pointing in one direction or the other with little concern for policy. In *Parkwood*, the majority opinion followed the latter course while the dissent struggled with the factors of section 6.

The first and third transactions in *Parkwood* presented no controversy under the *Restatement*. In the first, the negotiation, execution, and repayment were in the District; so was the lender. The court said that the domicile of the Maryland borrower and the situs of the Maryland land were insufficient to displace District law.[101] In the third, neither the borrower nor the lender was from the District, and the negotiation, execution, and repayment of the loan was outside the District. The only District contact was the domicile of the mortgage broker, which the majority and the dissent agreed was not enough to displace Maryland law.

It was on the second transaction that the majority and the dissent could not agree. With the lender from the District, the borrower from Maryland, the loan negotiated in both the District and Maryland, repayment in the District, and execution in Maryland, things were not clear. Each side took a different view of how the facts should be used in the "contacts" approach. The majority, going down the list in section 188, agreed that contact (1) (place of contracting) was in Maryland, but said that contacts (2) (place of negotiation) and (3) (place of performance) were in the District, and that contacts (4) (location of the subject matter) and (5) (domicile of the parties) were divided between the District and Maryland.[102] Contact 4 was divided, the majority said, because the loan proceeds were advanced from the District and the mortgaged realty was in Maryland. The result was that District law applied. The dissent, going down the same list, said contacts (1)

101. 461 F.2d at 199.
102. *Id.* at 195-96.

(place of contracting), (3) (place of performance), and (4) (location of the subject matter) were in Maryland, and that contacts (2) (place of negotiation) and (5) (domicile of parties) were divided.[103] The dissent managed to disagree about the place of performance because it thought the performance was the *receipt* of the loan proceeds in Maryland (not the advancing or repaying of it in the District), and it managed to disagree about the location of the subject matter because it felt the only subject matter was the realty, which was in Maryland. To complicate the differences further, the dissent also relied upon the "factors" of section 6, saying that while factor (b) (the relevant policies of the forum) called for the application of District law, factor (c) (the relevant policies of other interested states) called for Maryland law, as did factors (d), (e), (f), and (g). The majority could only respond that loan activity in the District was conduct "which the District of Columbia does have a definite interest in regulating."[104]

If this case is the leading example of choice of law for contracts, what then is the "law" in the District? Are we left with the "rule" that factors (a) through (g) of section 6 of the *Restatement (Second)* will be applied by taking into account contacts (a) through (e) of section 188? This does not inspire much confidence. The sort of variable juggling found in the two *Parkwood* opinions contributes little to the security of transactions. How does one predict what the next appellate panel will think is the proper mix of these ingredients? Though its uncertainty is bad enough, there is, however, an even more serious objection to the method of *Parkwood*. The court in that case did not really explore the purpose to be achieved by the law which it construed. Just which persons and transactions were meant to be protected by the District of Columbia's loan shark law?

It would seem that District citizens were intended to be the primary beneficiaries of this law.[105] The Act operates as a consumer protection device by shielding borrowers from exploitation. Does it advance this protective purpose to void loans made to Maryland borrowers on the security of Maryland land at rates which are legal in Maryland? If Maryland has not thought it necessary to protect its citizens from this type of loan, why should the District protect them?

In *Parkwood* the court thought the answer depended upon where the loan was negotiated, executed, and repaid. If, as in the second transaction, these

103. *Id.* at 202-03 (Van Pelt, J., dissenting).

104. *Id.* at 199.

105. The *Parkwood* court was unable to find in the legislative history of the loan shark law any indication of its territorial scope. The court did acknowledge, however, that the purpose of the law was "the protection of the residents of Washington from excessive interest . . . ." *Id.* at 173.

contacts are evenly distributed, one decides that a certain combination of them on one side or the other tips the scale. This cannot work, of course, because it cannot resolve the case in which the "contacts" have been manipulated by the lender to take place outside the District, and it does not explain why one combination or another of contacts is important.

In *Horning v. District of Columbia*,[106] a pawnbroker lending money from an office in the District took his District of Columbia clients across a bridge into Virginia so the documents could be executed there. The Court had no difficulty applying District law. The question, then, is whether the result should change if the pawnbroker moves his office across the bridge. Does the District interest evaporate because the District borrower is forced to ride the bus for an extra stop? The problem is to define the scope of the District interest in the application of its own law. If District citizens have easy access to prohibited loans, the District's protective policy is wholly frustrated by enforcing these loans in the District's courts.[107] It is uncharitable to think the drafters of the loan shark law intended such an easy nullification of its terms.[108] From this hypothetical case it is clear that one cannot measure the scope of the District's policy simply by looking at "contacts." To make sense out of District law one must apply it in the hypothetical case where the loan is negotiated, executed, and repaid outside the District's borders and where the lender is not a District lender.

How does *Parkwood* look in light of this view of the District interest? The sole reason for voiding a loan on Maryland land to a Maryland borrower would be to advance some policy of deterrence. No protective interest of

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106. 254 U.S. 135 (1920).

107. For a treatment of this exact problem, see Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 12-15 (1963). Baxter analyzes the situation as follows:

> A choice rule based on the lender's knowledge of the borrower's residence and of other characteristics of membership in the protected class affords maximum implementation of the policies of both states. Consensual expectations of the lender would be protected except when he had reason to know the transaction was forbidden by [the borrower's domicile]. And the objectives of . . . the borrower's state . . . would be shielded from wholesale evasion: the nature of the transaction assures that prior to extending credit the lender will discover in most cases the borrower's residence . . . .

Id. at 15. For another example of the false conflict approach in contracts, see Lester v. Aetna Life Ins. Co., 433 F.2d 884 (5th Cir. 1970), *discussed in* Prebble, *Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws*, 58 CORNELL L. REV. 433 (1973).

108. *Cf.* Lanham v. Lanham, 136 Wis. 360, 117 N.W. 787, 789 (1908), in which the court stated, "To say that the Legislature intended such a law to apply only while the parties are within the boundaries of the state, and that it contemplated that by crossing the state line its citizens could successfully nullify its terms, is to make the act essentially useless and impotent, and ascribe practical imbecility to the lawmaking power."

Maryland would be involved because Maryland considers the loan to be valid. So the question comes down to the importance of deterring District lenders from making prohibited loans. I would suggest that in cases in which it is not clear that the loan is covered by District law, the lender's expectation should be protected. Little deterrence is lost in such a marginal case. In the second transaction, for example, in which the loan on Maryland land to a Maryland borrower was executed in Maryland, the lender could reasonably suppose that the *Restatement (Second)*'s formula of factors and contacts (if that is District "law") would point to the law of Maryland. The borrower, after all, was not in the class which normally forms the object of District concerns.

In the first transaction, in which everything was in the District except the land and the borrower, the lender, of course, has a weaker case, though the borrower is still not in the protected class. By placing these two transactions on a scale of interest in deterrence, one could rationally decide to mark a boundary at the point at which this interest becomes too weak for further protection. This is not possible, of course, with the "contacts" approach.[109] It would seem that in order to maintain some minimum rationality from one decision to the next, the court must attempt to define just what the District's interest is. Only then can one predict to which possible combinations of facts it might be thought to apply.

Although *Parkwood* does contain the most complete discussion of local choice of law for contracts, there are other recent cases which also should be noted. In *Legg, Mason & Co. v. Mackall & Co, Inc.*,[110] the law of New York was applied to determine whether a dispute between two District businesses was subject to arbitration under the constitution and rules of the New York Stock Exchange. The court found that New York "has many, if not the most significant contacts with parties who are members . . . of . . . the New York Stock Exchange,"[111] and that the constitution and rules of the Exchange—requiring arbitration—formed a binding contract between its mem-

109. Congress seems to have agreed with the "interest" approach and to have disagreed with the *Parkwood* result; shortly after the *Parkwood* decision the District law was amended to exclude cases in which the borrower is not a District resident and in which the land lies outside the District's boundaries. District of Columbia Consumer Credit Protection Act of 1971, D.C. CODE ANN. § 26-612 (1973). *See also* Montgomery Fed. Sav. & Loan Ass'n v. Baer, 308 A.2d 768 (D.C. Ct. App. 1973) (when secured land and loan settlement were both in the District the parties agreed that District law governed loan by Maryland lender to District borrower); D.C. CODE ANN. § 28-3303 (1973) (applies the District's usury law "[i]f a person or corporation contracts in the District . . . .")

110. 351 F. Supp. 1367 (D.D.C. 1972).

111. *Id.* at 1369.

bers under New York law. *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., Inc.*[112] involved the interpretation of a nonassignment provision in a construction contract. A Maryland subcontractor, Fox-Greenwald, had promised its prime contractor not to assign its rights under their agreement. Fox-Greenwald did so nonetheless, and the court held the assignment valid as between the assignor and the assignee. Maryland had the "more essential contacts" because Maryland was the place of performance and the record did not show where either the contract or the assignment was made.[113] Finally, in *McCrossin v. Hicks Chevrolet, Inc.*,[114] a Maryland resident claimed the benefit of District law in a warranty suit against the seller and manufacturer of an auto destroyed in Maryland by a fire allegedly due to defects in the carburetor. The court applied District law because the auto was purchased in the District.[115]

It is doubtful whether, from the cases decided thus far, rules of much certainty can be stated in contract cases. The most one can do is describe a method taking shape. Since the method is "issue oriented," one can predict (or hope) that it will develop in a way which makes it possible to determine the multistate scope of District law on some rationally consistent basis. I would suggest that the most fruitful line of development would be to follow the "pure" interest analysis model of *Gaither*, rather than the looser "contacts" approach of *Parkwood*. After the decision in *Gaither*, we know that the District's key regulation contains a deterrence policy, that this policy extends to conduct within the District, and that the domicile of the injured plaintiff is not controlling. After *Williams*, we know this deterrence policy also applies to injuries occurring beyond the District suburbs. And after *Tramontana*, we know that the compensatory aspect of the regulation would not extend to injuries received by District citizens outside the suburbs by a theft occurring beyond the suburbs. After the "contacts" decisions in *Parkwood*, *Legg, Mason*, and *Fox-Greenwald*, what do we know? Can we really predict what the result will be in the next contract case in which the "contacts" are divided?

To see how the "pure" interest analysis of *Gaither* might apply in contracts, let us consider a common problem in consumer protection. Congress in 1971

112. 452 F.2d 1346 (D.C. Cir. 1971).

113. *Id.* at 1353-55. The court again placed heavy reliance upon the *Restatement (Second)*. It cited section 208 for the proposition that the effect of an assignment is determined by the state which has the most significant relationship to the original contract, rather than to the assignment itself. It then looked to section 196 to conclude that because the contract was for services rendered in Maryland, Maryland was the state with the most significant relationship to the contract.

114. 248 A.2d 917 (D.C. Ct. App. 1969).

115. *Id.* at 921.

gave the District one of the most advanced consumer protection regimes in the United States.[116] The Commonwealth of Virginia, in which change has been slower,[117] is a common place for District residents to shop. Suppose a District resident buys a washer-dryer combination from a suburban Virginia store on credit, signing the usual conditional sales contract and promissory note. After delivery of the appliances in the District, what rights does the consumer have if the appliances prove defective, or if he defaults on a payment? Under the law of Virginia the bank or finance company holding the note could avoid the consumer's defenses against the seller by meeting the requirements of a holder in due course.[118] Holder in due course doctrine has been banished from consumer sales in the District.[119] Upon a default in payment the seller under Virginia law can accelerate the balance due and repossess after ten days have passed.[120] Under District law the seller must wait thirty days.[121] In Virginia the consumer's right to redeem the collateral is measured only by the state's adoption of the Uniform Commercial Code;[122] in the District the consumer has a minimum of fifteen days after the creditor repossesses in which to redeem.[123] Should the District apply its own law to all of these issues?

The protective policies of the District seem clearly advanced by doing so. As the court noted in *Gaither v. Myers*, the District's choice of law rules should not "shun the present reality of the economically and socially integrated greater metropolitan area."[124] Surely the protection of District consumers should not be made to depend upon whether a particular item was in the stock of the District or suburban branch of a local department store, or whether at the time the item was needed a suburban store was having a sale. If only District merchants were covered, the effect would be to put these merchants at a disadvantage by making it less expensive for their suburban

116. District of Columbia Consumer Protection Act of 1971, D.C. CODE ANN. §§ 28-3801 to -3816 (1973).

117. Virginia has, however, made some significant strides in the consumer protection field. *See, e.g.*, VA. CODE ANN. § 6.1-362.1 (Supp. 1974) (abolishing the time-price doctrine); *id.* § 11-4.2 (limiting seller's right to enforce balloon payments); *id.* § 11-4.3 (granting consumer ten-day grace period after default during which seller may neither repossess goods nor accelerate payments).

118. *See* VA. CODE ANN. §§ 8.3-302 to 305 (1965).

119. *See* D.C. CODE ANN. §§ 28-3807 to -3808 (1973). These sections have been modeled after the UNIFORM CONSUMER CREDIT CODE §§ 3.307, 404. The drafters' comment to § 3.307 flatly states that the "holder in due course doctrine should be abrogated in consumer cases."

120. VA. CODE ANN. § 11-4.3 (Cum. Supp. 1974).

121. D.C. CODE ANN. § 28-3812(b)(1) (1973).

122. *See* VA. CODE ANN. § 8.9-506 (1965).

123. *See* D.C. CODE ANN. § 28-3812(c)(1)(A) (1973).

124. 404 F.2d 216, 223 (D.C. Cir. 1968).

competitors to operate. It would seem that the District should follow the approach of *Horning v. District of Columbia*[125] and apply District law to to any creditor who uses the District's courts against District citizens in consumer credit transactions. This is the position of the 1969 and 1974 Uniform Consumer Credit Code[126] and the weight of authority in other states.[127] Any reliance arguments by the creditor, of course, are defeated by his obvious knowledge of the buyer's residence.

A different problem is posed by the converse of these facts. What of the Virginian who buys his appliances in the District, signing similar documents? Can he rely upon District law as a defense to an action brought in Virginia? Can he bring an action in the District for damages if the seller violates District law? The answer to the first question will depend upon Virginia's choice of law rules. For small loans at least, the Virginia policy is clear: no loan may be collected in Virginia which carries interest at a rate higher than that

125. 254 U.S. 135 (1920).

126. The UNIFORM CONSUMER CREDIT CODE § 1.201(4) limits the right of creditors to proceed against forum residents in the forum courts even on contracts made outside the forum. The creditor in such cases may not assert the rights of a holder in due course, and may not accelerate the balance due or repossess within the grace period. Under section 1.201(3), the creditor is denied the use of the forum's courts to pursue any of the creditor's remedies prohibited by the Code. In addition, the Code voids any choice of law or choice of forum provision referring to another state when a forum resident is the buyer. *Id.* § 1.201(8). Unfortunately, these choice of law sections do not seem to have been enacted in the District; perhaps it was thought unnecessary in view of the District's enlighted approach to choice of law. *See generally* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958).

The particular issues posed here have been somewhat confused by the choice of law sections of the U.C.C. D.C. CODE ANN. § 28:9-102(1)(a) (1973) provides that "this article applies so far as concerns any personal property . . . within the jurisdiction of the District . . . to any transaction . . . which is intended to create a security interest in personal property . . . ." To say that "this article applies," of course, is not to say very much when article 9 is not the source of the rights in question. Moreover, the 1972 amendments to the U.C.C. proposed a modification of section 9-102 by deleting the words "so far as concerns any personal property . . . within the jurisdiction of this state . . . ." The purpose of this change is to make it clear that, except for questions of *perfection* of security interests, "problems of choice of law in this Article as to the validity of security agreements are governed by Section 1-105." UNIFORM COMMERCIAL CODE § 9-102, Comment 3. This more general provision, section 1-105, (D.C. CODE ANN. § 28:1-105 (1973)) provides that choice of law thereunder is "left to judicial decision" whenever the "transaction has significant contacts . . . with other jurisdictions." UNIFORM COMMERCIAL CODE § 1-105, Comment 3. A conflict of laws case applying this more general section to a secured transaction is Skinner v. Tober Foreign Motors, Inc., 345 Mass. 429, 187 N.E.2d 669 (1963). *But cf.* Associates Discount Corp. v. Cary, 47 Misc. 2d 369, 262 N.Y.S.2d 646 (Civ. Ct. 1965).

127. The cases are collected in F. SCOLES & R. WEINTRAUB, CONFLICT OF LAWS 606-07 (1972).

allowed by the state where made.[128] This statute shows a clear public policy of giving Virginia consumers the benefit of the more protective laws of other states in which they contract. In addition, Virginia still adheres to the traditional practice of referring contract questions to the place of making.[129] The prediction therefore is that a Virginia court would apply District law on the hypothetical facts: it would find that the relation of holder in due course never came into being (not having been created by the law governing the contract), and that the seller's rights in general would derive from, and be limited by, the more protective District law.

The other question is whether the District should apply its own law on behalf of this Virginia consumer if he comes to its courts for relief. This could occur if the District seller refused, for example, to allow the consumer the fifteen days required by District law in which to redeem the goods after repossession.[130] If the secured party disposes of the collateral, as would have been his right under the Uniform Commercial Code,[131] the consumer will suffer a loss for which District law gives him a remedy, one sufficient to "put [him] in at least as good a position as if the creditor had fully complied. . . ."[132] By giving him this remedy under its own law, the District would not frustrate any strong policy of Virginia; the more defendant-protecting policy of Virginia could not be advanced by shielding District defendants making contracts in the District. Virginia, moreover, would probably apply District law if the case were brought in Virginia, as stated above. Would the District, then, advance its own policies by applying them on behalf of someone from outside the District? It would do so if there is a deterrence value in preventing District sellers from making the prohibited agreements at all. It would also do so under the policy announced in *Gaither* of uniform treatment for all residents of the greater metropolitan area. This seems to be the approach taken by the court in *McCrossin v. Hicks Chevrolet, Inc.*,[133] in which the Maryland resident, who sustained a loss in Maryland on an auto purchased in the District, was given the benefit of the District's more protective law:

> The rule in the District, dispensing with the requirements of privity in implied warranty cases, is for the benefit and protection of all who buy in the District, not for residents of the District alone;

128. *See* VA. CODE ANN. § 6.1-291 (Supp. 1974).

129. *See, e.g.*, Woodson v. Celina Mut. Ins. Co., 211 Va. 423, 177 S.E.2d 610 (1970); C.I.T. Corp. v. Guy, 170 Va. 16, 195 S.E. 659 (1938); Arkla Lumber & Mfg. Co. v. West Virginia Timber Co., 146 Va. 641, 132 S.E. 840 (1926).

130. D.C. CODE ANN. § 28-3812(c) (1973).

131. *Id.* § 28:9-505, 506; VA. CODE ANN. § 8.9-505, 506 (1965).

132. D.C. CODE ANN. § 28-3813(a) (1973).

133. 248 A.2d 917 (D.C. Ct. App. 1969).

> and affording that protection to a Maryland resident who buys here would surely not violate any Maryland policy.[134]

It should be noted that this result—application of District law to suburban consumers making contracts in the District—is wholly consistent under interest analysis with the application of District law to District consumers making contracts in the suburbs. The first is a false conflict with only the District policy being advanced, and the second is a true conflict with the District policy being preferred to that of the suburban jurisdiction. In both instances the District is advancing its own policy by applying its own law to cases which that law should logically cover. If the court were to follow a "contacts" approach instead, it would be difficult to arrive at this result by any means other than manipulation. Since the various places of making, negotiating, and performing these contracts have no significance apart from the relevant state interests, the process of "grouping" them is merely confusing. In sum, the interest analysis method of *Gaither* should be applied as well to contracts cases and should replace the more confusing and less logical method of the *Parkwood* case.

III. Conclusion

Wherever traditional theory has been abandoned, there has been a period of confusion. For a time at least, it is difficult to state what the law presently is or soon will be. Though this is no doubt necessary, one should nevertheless hope for an early agreement on basic principle, so that further development can be cumulative and rational.

In the District this could be achieved by recognizing that the new method of decision is essentially an elaboration of the policies behind District law. That is, choice of law decisions should now be viewed as the successive building up of an ever more complete definition of the territorial scope of District policy. In this way, for example, one can see in the *Gaither*, *Williams*, and *Tramontana* cases a coherent statement that the policies behind District tort law require that it apply to certain factual situations but not to others. The policies of compensation and deterrence begin to receive a boundary. This could happen, of course, only because the court in those cases was willing to identify the policies explicitly and apply them in a consistent way to the

134. *Id.* at 921, *citing* Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968). This result also could have been reached by applying District law on a "residual" basis. Since no Maryland policy could be advanced by applying Maryland law, and no very strong District policy favors applying District law, the law of the place of contracting could be given its presumptive sway simply because there would be no reason to displace it. Apparently this is the position of the U.C.C.C. *See* Uniform Consumer Credit Code § 1.201(1).

factual patterns which arose. The court thus provided a body of reasoning definite enough to be criticized, refined, and developed. Without this consistency the court cannot avoid lapses such as *Roscoe*, or the seemingly ad hoc manipulations of *Parkwood*. If, therefore, the District's courts will simply remember that they are elaborating policy and that each case presents an opportunity to build upon its predecessor, there is a good chance that as the body of local predecent builds, so will reliability in the method of decision.