Diagramming Conflicts: A Graphic Understanding of Interest Analysis

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I. INTRODUCTION

A revolution in choice-of-law theory has occurred over the last forty or fifty years. At the urging of conflicts scholars, many courts have abandoned the hard and fast rules of the *First Restatement*[1] in favor of content- and policy-oriented choice-of-law theories.[2] The transition, however, has not been smooth.[3] The uncertainty generated by the change, and the difficulty in applying the new systems, have evoked in some courts and in many law students nostalgia for the certainty supposedly available under the *First Restatement*.[4] Brainerd Currie's system for choice of law—governmental interest analysis—epitomizes the difficulty.[5] While the system has an elegance and power that has won it many converts, it is sufficiently sophisticated to generate confusion among courts and sufficiently difficult to produce resistance from law students.

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1. RESTATEMENT OF CONFLICT OF LAWS (1934). A succinct explanation of the *First Restatement's* choice-of-law system and the vested rights theory that supported it can be found in R. LEFLAR, AMERICAN CONFLICTS LAW § 86 (1977).

2. Some scholars attacked the metaphysical basis of the vested rights theory. *See, e.g.*, Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); de Sloovere, *The Local Law Theory and its Implications in the Conflict of Laws*, 41 HARV. L. REV. 822 (1928). Others focused on alternative methods of attacking the problem of choice of law. *See, e.g.*, D. CAVERS, THE CHOICE-OF-LAW PROCESS 114–38 (1965) (principles of preference); R. LEFLAR, AMERICAN CONFLICTS LAW § 96 (1977) (choice-influencing considerations); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171 (governmental interest analysis).

3. The riot of choice-of-law theory exhibited in the New York guest cases is some indication of the rocky road to conflicts reform. In the space of nine years, the New York Court of Appeals embraced interest analysis (Babcock v. Jackson, 12 N.Y.2d 73, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963)); most significant relationship (Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965)); interest analysis again (Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969)); and then principles of preference (Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972)).

4. In several states the courts have rejected interest analysis and the most significant relationship test on the ground that the traditional rule of *lex loci delecti* of the *First Restatement* is more certain, more easily applied, and less likely to generate a welter of lawsuits. *See, e.g.*, Friday v. Smoot, 58 Del. 488, 211 A.2d 594 (1965); Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d 137 (1969); Winters v. Maxey, 481 S.W.2d 755 (Tenn. 1972). For lists of states that have abandoned the traditional theory and those that have retained it, see R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 242–43 (3d ed. 1981); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 305–09 nn.43 & 54 (2d ed. 1980).

5. Professor Currie expounded the theory in a series of law review articles. *See* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171; Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958); Currie, *Survival of Actions: Adjudication Versus Automation in Conflict of Laws*, 10 STAN. L. REV. 205 (1958). Currie's articles on choice of law are collected in B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

In other areas of the law in which doctrine has proved difficult, scholars have simplified the task of the judge and the student by producing diagrams or charts that visually demonstrate the problem.[6] This Article offers such diagrams for governmental interest analysis. By showing graphically the link between a state's social policy and its factual connection to the dispute, the diagrams illustrate the germ of Currie's insight and thus render interest analysis much more accessible.

II. DIAGRAMMING A CONFLICTS CASE

A. *False Conflicts*

Without regard to choice-of-law strategy, any conflicts case can be diagrammed simply according to its facts. By placing the relevant contacts in the appropriate states, the diagram depicts the problem for decision.[7] Consider *Babcock v. Jackson*.[8] In that case plaintiff and defendant—both citizens of New York—took a weekend trip in the province of Ontario. Defendant lost control of the car and in the resulting collision, plaintiff was injured. She sued defendant in New York.[9] At the time Ontario had a guest statute[10] that would have prohibited plaintiff's recovery; New York had no such statute.

The facts and the conflicting tort rules can be diagrammed as follows:

Diagram 1

	New York	Ontario
Contacts	Forum Plaintiff's domicile Defendant's domicile Car garaged and insured Trip began	Accident Injury
Law	No guest statute	Guest statute

6. *See, e.g.*, 9 J. WIGMORE, EVIDENCE § 2487 at 298 (J. Chadbourn rev. 1981) (diagram explaining the difference between the burden of persuasion and the burden of production); H. HENN, CORPORATIONS: CASES AND MATERIALS 83 (1974) (diagram showing structure of a corporation—flow of power and assets among officers, directors, shareholders, and the corporation); Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 959 (1974) (triangular diagram distinguishing hearsay from nonhearsay, depending upon the chain of inferences that the trier of fact must use).

7. The idea of diagramming a choice-of-law problem by placing the contacts in the two competing jurisdictions (as in Diagram 1) did not originate with me. Professor John Ester of the University of Maryland showed me the technique when I was his student.

8. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

9. *Id.* at 476–77, 191 N.E.2d at 280, 240 N.Y.S.2d at 745.

10. Highway Traffic Act of Province of Ontario, ONT. REV. STAT. ch. 172, § 105(2) (1960).

Under traditional choice-of-law theory this diagram is sufficient, and the only relevant contact is the injury in Ontario.

Currie's system, however, requires us to look beyond the place of injury and to consider the policies behind the conflicting tort rules. The policy behind the New York rule is the traditional one requiring a tortfeasor to compensate his victim for all injuries actually and proximately caused by his fault.[11] The policy supporting Ontario's statute is "to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers against insurance companies."[12] In Currie's terminology the case is a false conflict—only one state's policy is advanced by application of its law. Ontario's interest in avoiding insurance fraud will not be advanced by the application of its guest statute, since defendant's automobile was garaged and insured in New York. In contrast, New York's interest in compensating victims of automobile negligence will be advanced by applying New York law, since plaintiff is a New Yorker.

With these added considerations, Diagram 1 is now insufficient. What is required is a graphic way of presenting the relevant contacts, the differing tort rules and their supporting policies, *and most importantly, the relationship between the policies and the contacts.* Consider Diagram 2.

Diagram 2

	New York	Ontario
Contacts	Forum Plaintiff's domicile Defendant's domicile Car garaged and insured Trip began	Accident Injury
Law	No guest statute	Guest statute
Policy	Compensate auto accident victims	Avoid insurance fraud

The arrows graphically depict Currie's insight. The arrow from New York's policy (compensate auto accident victims) points toward a New York contact: the New York plaintiff. The arrow from Ontario's policy, however, does not point toward an Ontario contact. Rather, it crosses the center line, indicating

11. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

12. *Id.* at 482–83, 191 N.E.2d at 284, 240 N.Y.S.2d at 750 (quoting *Survey of Canadian Legislation*, 1 U. TORONTO L.J. 358, 366 (1936)).

that Ontario policy has no Ontario referent, and thus, that Ontario's interests will not be advanced by the application of its laws. Since the arrows from both relevant policies point to contacts in New York, the case is a false conflict.[13]

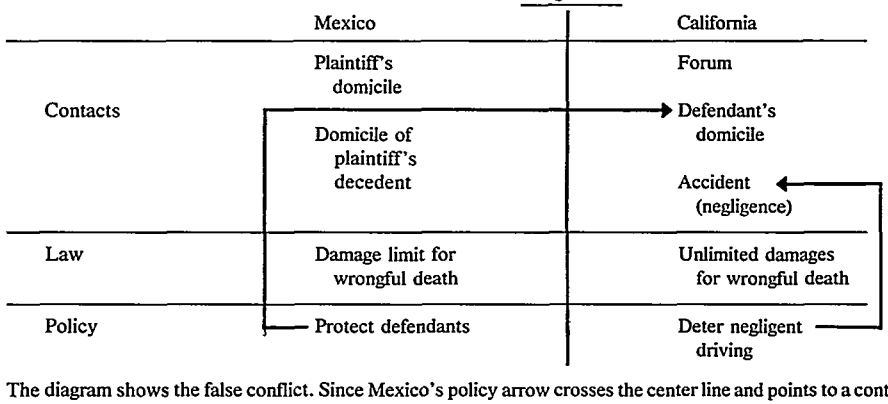
B. *True Conflicts*

A true conflict is a case in which each state's policy would be advanced by the application of its law.[14] In such a case each state has a contact that is relevant to the policy behind its rule.

An example of a true conflict is *Lilienthal v. Kaufman.*[15] Defendant had been declared a spendthrift by an Oregon court and had been placed under a guardianship. He nevertheless contracted with plaintiff, a Californian, in San Francisco to borrow money to finance a joint venture. The guardian declared the obligation void, and plaintiff sued in Oregon.[16] Under Oregon law the obligation was voidable.[17] Under California law, which has no spendthrift statute, the obligation was valid.[18] The Oregon court indicated that the policy behind the Oregon spendthrift statute was to protect the family of the spendthrift and the state treasury, lest the spendthrift or his family require public

13. Another example of a false conflict is Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974), a wrongful death action. Plaintiff and plaintiff's decedent were domiciliaries of Mexico; defendant, of California. The accident took place in California. Mexico had a limit of $1,946.73 on wrongful death recoveries, while in California recovery for wrongful death was unlimited. The court determined that the policy underlying Mexico's damage limitation was to avoid impoverishing tortfeasors and that California's reason for having no such limitation was to deter tortious conduct. The contact relevant to Mexico's policy—the defendant—was in California, as was the contact relevant to California's policy—the accident. The case, a false conflict, diagrams as follows:

Diagram A



The diagram shows the false conflict. Since Mexico's policy arrow crosses the center line and points to a contact in California, Mexico's interest would not be advanced by the application of its law. California's interest, in contrast, would be advanced since its policy arrow points toward a California contact. Both arrows point toward California—a graphic indication that only California's interests are at stake and that the case is a false conflict.

14. See generally Currie, *Notes on Methods and Objectives in the Conflict of Laws,* 1959 DUKE L.J. 171, for Currie's view on what a true conflict is and how it should be "resolved."

15. 239 Or. 1, 395 P.2d 543 (1964).

16. *Id.* at 4, 395 P.2d at 544.

17. OR. REV. STAT. § 126.335 (1953) (repealed 1961); reenacted OR. REV. STAT. § 126.280 (1961) (repealed 1973).

18. 239 Or. 1, 5, 395 P.2d 543, 545 (1964).

assistance.[19] The court suggested that California's interest was in having its citizen paid and in ensuring the security of contracts made in California.[20] The case is a true conflict[21] and can be diagrammed like this:

Diagram 3

	California	Oregon
Contacts	Plaintiff's domicile Contract made & to be performed	Forum Defendant's domicile Defendant's guardian Defendant's family
Law	No spendthrift statute	Spendthrift statute
Policy	Ensure security of contracts	Protect family of spendthrift and public fisc

The diagram helps to show the true conflict. California's policy arrow points toward a California contact, thus indicating that the application of California

19. *Id.* at 14–15, 395 P.2d at 548–49.

20. *Id.* at 15, 395 P.2d at 549.

21. Another true conflict is Bernhard v. Harrah's Club, 16 Cal. 3d 318, 546 P.2d 719, 128 Cal. Rptr. 215 (1976). Plaintiff, a citizen of California, was injured when his motorcycle collided in California with a car driven by a Californian. The driver and passenger of the car were intoxicated after a visit to defendant's drinking and gambling club in Nevada. California imposed civil liability on tavern keepers for injuries caused by patrons served alcohol when they are past the point of obvious intoxication; Nevada did not. California's interest was the protection of California citizens upon its highways from drunk drivers. Nevada's interest was the protection of its gambling and tavern industry. Each of these policies has a relevant contact in the appropriate state, as the diagram shows:

Diagram B

	California	Nevada
Contacts	Forum Plaintiff's domicile Car driver's domicile Collision	Defendant tavern Drinking and tortious offering
Law	Tavern keeper liability	No tavern keeper liability
Policy	Protect citizens on highways	Protect gambling and tavern industry

law would advance its policy interests. Similarly, Oregon's policy refers to an Oregon contact; that state's interests would also be advanced by the application of its law. The court, following Currie's program for resolving true conflicts, applied the law of Oregon.[22]

C. *The "Unprovided-for Case"*

An "unprovided-for case" is a case in which neither state has an interest. In other words, because of the relevant state policies and the location of the contacts, neither state's policy interests would be advanced by the application of its law.[23]

In *Erwin v. Thomas*[24] plaintiff's husband, a Washington domiciliary, was injured in Oregon as a result of an Oregon defendant's negligence. Plaintiff sued defendant in Oregon for loss of consortium.[25] The law of Oregon permitted a wife to recover damages from a tortfeasor for loss of consortium, while the law of Washington did not.[26] The court made passing reference to the most significant relationship test,[27] but relied principally upon interest analysis. It found that the policy behind the Oregon law was solicitude for the rights of married women. Washington's policy, said the Oregon court, was to protect defendants.[28] The case is displayed below:

The arrows show that the case is a true conflict. Each arrow connects a state policy with a contact within that state. Thus, the diagram shows that each state's interest would be advanced by the application of its law. Parenthetically, the court resolved the true conflict by using Professor Baxter's doctrine of "comparative impairment." *See* Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

22. Currie's notion, of course, is that the forum court should apply forum law in the case of a true conflict. *See* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176–77; Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958). The Oregon court was obviously influenced by Currie's view:

> We have, then, two jurisdictions, each with several close connections with the transaction, and each with a substantial interest, which will be served or thwarted, depending upon which law is applied. The interests of neither jurisdiction are clearly more important than those of the other. We are of the opinion that in such a case the public policy of Oregon should prevail and the law of Oregon should be applied; we should apply that choice-of-law rule which will "advance the policies and interests of" Oregon.

239 Or. 1, 16, 395 P.2d 543, 549 (1964).

23. The "unprovided-for case" has been the subject of some rather spirited discussion. Currie discovered the unprovided-for case in the early stages of his work. *See* Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958). He suggested that it should be resolved simply—in the same fashion as the true conflict—by applying forum law. Others have seen the unprovided-for case as an embarrassment to the entire program of interest analysis. *See, e.g.*, Twerski, Neumeier v. Kuehner: *Where are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 107–08 (1973).

24. 264 Or. 454, 506 P.2d 494 (1973).

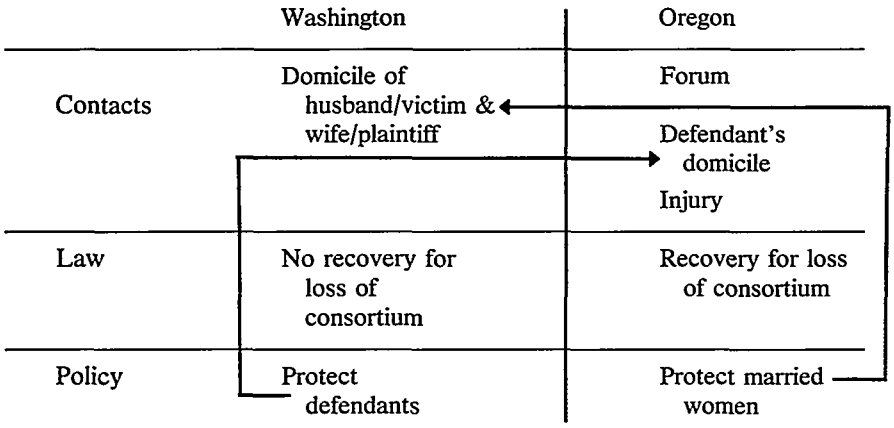
25. *Id.* at 455, 506 P.2d at 495.

26. *Id.*

27. *Id.* at 456, 506 P.2d at 495. The most significant relationship test as applied to torts is explained in RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 145 (1971).

28. 264 Or. 454, 458–59, 506 P.2d 494, 496 (1973).

Diagram 4

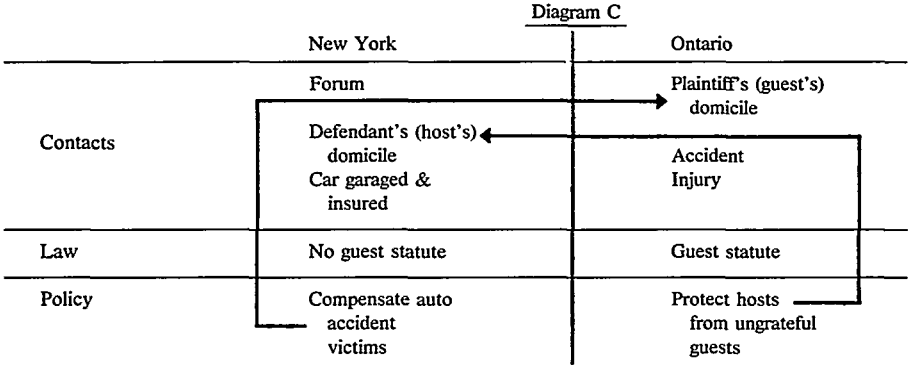


As Diagram 4 shows, Washington's policy of protecting defendants is not actuated because defendant is domiciled in Oregon, not Washington. Similarly, Oregon's policy interest would not be advanced by the application of its law since plaintiff/wife (the object of Oregon's policy concern) is a Washingtonian. The case, then, is an unprovided-for case: as the arrows demonstrate, neither state's policy refers to an in-state contact. Accordingly, neither state's interest would be advanced by the application of its law.[29]

29. The Oregon Supreme Court adopted Currie's strategy for dealing with the unprovided-for case and applied the law of the forum. *See supra* note 23. "It is apparent, therefore, that neither state has a vital interest in the outcome of this litigation and there can be no conceivable material conflict if an Oregon court does what comes naturally and applies Oregon law." 264 Or. 454, 459–60, 506 P.2d 494, 496–97 (1973).

Another, more famous example of an unprovided-for case is Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). *Neumeier* is one in a long line of New York guest statute cases. *See supra* note 3. Defendant's intestate, a New York domiciliary, drove his car (insured and garaged in New York) to Ontario. There he picked up plaintiff's decedent, an Ontario domiciliary. Both were killed instantly when their car was struck by a train in Ontario. Ontario had a guest statue that prohibited recovery by a guest against a host absent gross negligence; New York had no such statute. The policy behind New York's common-law rule was the compensation of collision victims. The court stated that the policy behind the Ontario statute was a desire to protect defendants from suits by ungrateful guests. The case is depicted below in Diagram C.

Diagram C



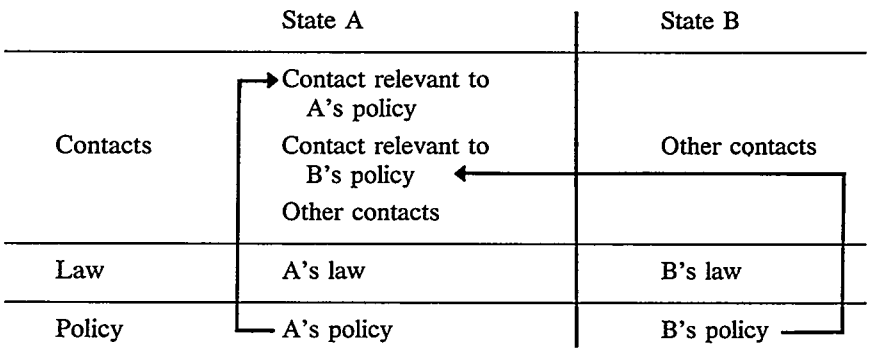
This is an unprovided-for case because both arrows cross the center line. The Ontario policy (protect hosts from ungrateful guests) refers to a New York contact, and the New York policy (compensate auto accident victims)

D. *The Value of the Technique*

There are three basic benefits to the diagram technique. The first and most obvious is that it permits classification of a case simply by its shape.[30] Consider the following skeletal conflicts cases.

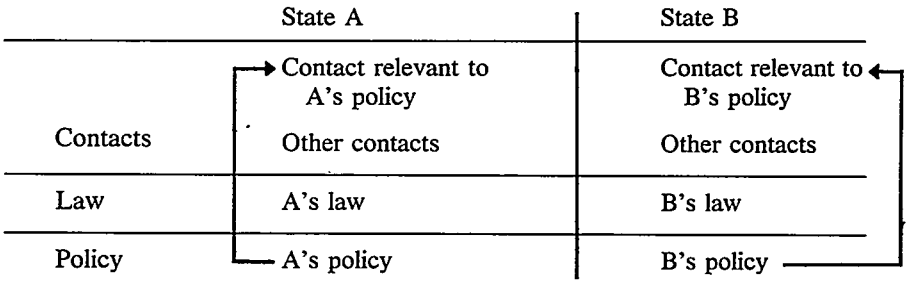
False Conflict[31]

Diagram 5



True Conflict[32]

Diagram 6



refers to an Ontario contact. Thus, *Neumeier* is a case in which neither state's interest would be advanced by application of its law.

The case was decided in favor of the New York defendant based upon three rules formulated by Judge Fuld to govern guest-host cases. *Neumeier* generated substantial controversy. Much of it is contained in Neumeier v. Kuehner: *A Conflicts Conflict*, 1 HOFSTRA L. REV. 93 (1973) (comments on the case by Professors Baade, King, Sedler, Shapira, and Twerski).

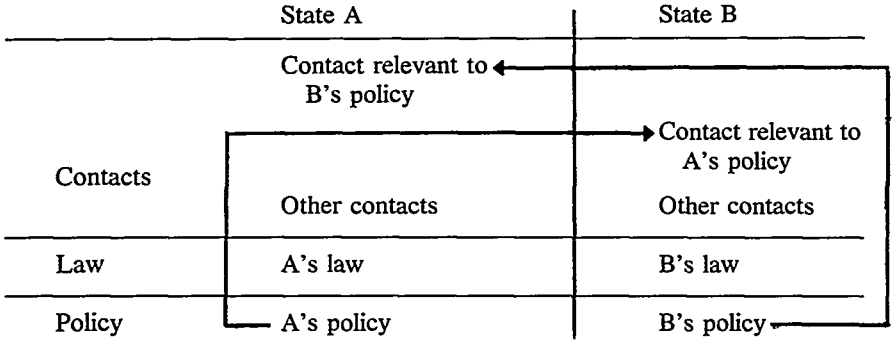
30. The diagram, of course, is no substitute for the analysis required to determine the policy behind a substantive rule or the contacts relevant to that policy. Indeed, that analysis is a precondition for constructing a diagram. See *infra* text accompanying note 58 for a more complete discussion of this point.

31. *See supra* notes 7–13 and accompanying text.

32. *See supra* notes 14–22 and accompanying text.

Unprovided-for Case[33]

Diagram 7



The key to understanding the skeletal diagrams is to note the significance of the arrow's crossing the center line. The arrow, after all, is a policy-contact connector; it shows the relationship between a policy and a contact. When the arrow stays on one side of the center line, it shows that the state's policy refers to an in-state contact and thus that the state's interest will be advanced by application of its law. On the other hand, when the arrow crosses the center line it shows that the state's policy refers to an out-of-state contact and thus that the state's interest will not be advanced by the application of its law.

A false conflict, then, is one (as in Diagram 5) in which one arrow crosses the line and one does not; only one state's policy will be advanced by applying its law. In a true conflict (Diagram 6) neither arrow crosses the center line; each state's policy will be advanced by application of its law. In an unprovided-for case (Diagram 7) both arrows cross the line, thus indicating that neither state's policy will be advanced by application of its law.

The second advantage of the diagrams is that they forcefully highlight Currie's major insight. Currie was not the first to suggest that policy is important in choice-of-law cases; even under the *First Restatement* courts refused to apply foreign law upon the ground that it violated the forum's public policy.[34] Nor was Currie the first to suggest that contacts are important in choice of law. The *First Restatement* emphasized contacts, albeit only one at a time.[35] The center-of-gravity theory required consideration of all the contacts between a dispute and the several states whose law might govern.[36] Currie's contribution was to point out that what is crucial to the choice-of-law

33. *See supra* notes 23–29 and accompanying text.

34. *See, e.g.*, Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); Loucks v. Standard Oil, 224 N.Y. 99, 120 N.E. 198 (1918). For a good general discussion of the "public policy exception," see H. GOODRICH & E. SCOLES, HANDBOOK OF THE CONFLICT OF LAWS § 11 (1964).

35. *See* RESTATEMENT OF CONFLICT OF LAWS (1934).

36. *See, e.g.*, Haag v. Barnes, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961); Auten v. Auten, 308 N.Y.2d 155, 124 N.E.2d 99 (1954).

decision is the relationship between a state's contacts with a dispute and the policy behind its law;[37] this is the relationship that is graphically represented in the diagrams.

Finally, the diagrams help make complicated cases more understandable. When a case involves only one choice-of-law problem and only two competing policies, it is relatively easy to keep the various facts and policies in mind. When, however, additional policies are considered or when there is more than one choice-of-law problem, the diagrams make the added complexity more manageable. The next section applies the diagram technique to two more complex choice-of-law problems.

III. DIAGRAMMING ADDED COMPLEXITIES

A. *Manipulating the System—Picking Policies*

The goal of the *First Restatement* was to provide certainty and forum neutrality through mechanical, easily applied rules.[38] Reflective scholars noted early on, however, that courts were not always controlled by these hard and fast rules.[39] When faced with a rule that required the choice of *X*'s law when justice and common sense favored the law of *Y*, the courts found ways to avoid the rule. Thus, they escaped rigid conceptualism by recharacterizing the issue for decision,[40] by appealing to the forum's public policy,[41] and by applying the doctrine of *renvoi*.[42]

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37. The germ of Currie's thought appears forcefully in this summary passage:

> [T]he court should first of all determine the governmental policy . . . which is expressed by the law of the forum. The court should then inquire whether the relationship of the forum state to the case at bar—that is, to the parties, to the transaction, to the subject matter, to the litigation—is such as to bring the case within the scope of the state's governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance.

Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 9–10 (1958). In addition, see the longer treatment of the same theme in Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958); Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958).

38. See R. LEFLAR, AMERICAN CONFLICTS LAW § 86 (1977), for a succinct explanation of the goals of the vested rights theory and the *First Restatement*.

39. *See* Ehrenzweig, *Characterization in the Conflict of Laws: An Unwelcome Addition to American Doctrine*, in TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 395 (K. Nadelmann *et al.* eds. 1961); Hancock, *Three Approaches to the Choice of Law Problem: The Classificatory, the Functional, and the Result Selective*, *id.* at 365; Morse, *Characterization: Shadow or Substance*, 49 COLUM. L. REV. 1026, 1029 (1949).

40. For instance, by characterizing an issue as procedural rather than substantive, a court could escape the law of the place of injury in favor of the law of the forum. *See* Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953). By characterizing an issue as a tort problem or a property problem, a court could choose between the law of the place of injury and the law of the situs. *Compare* Irving Trust Co. v. Maryland Casualty Co., 83 F.2d 168 (2d Cir. 1936), *with* James v. Powell, 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S.2d 10 (1967). The foregoing are only a few examples of the use of characterization as an "escape device"; *see* additionally authorities cited *supra* note 39.

41. *See* Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 120 N.E. 198 (1918).

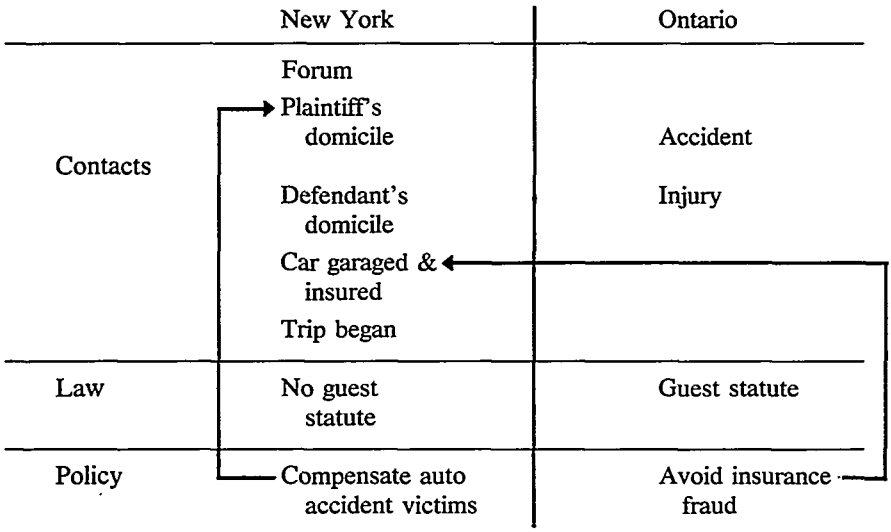
42. A court desiring to escape a rigid choice-of-law rule—say, choose the law of the situs—might, for example, read that rule to refer to the whole law of the situs rather than its substantive law, with the result that the whole law (including the situs' choice-of-law rule) would refer back to the forum's substantive law. *See In re* Schneider's Estate, 198 Misc. 1017, 96 N.Y.S.2d 652 (Sup. Ct. 1950); University of Chicago v. Dater, 277 Mich. 658, 270 N.W. 175 (1936). For a general discussion of *renvoi*, see H. GOODRICH & E. SCOLES, HANDBOOK OF THE CONFLICT OF LAWS § 10 (1964).

Part of the hope of the revolution in choice of law was that some of this fictional and sometimes cynical manipulation could be avoided. By doing away with the mechanical rules and substituting the actual considerations that prompted the judges' choices, the theoretical tensions and the manipulations could be eliminated.[43] Needless to say, it has not always worked; many of the new systems have proved as manipulable as the old rules.

Since Currie's system involves looking beyond the conflicting rules to the policies behind those rules, the way to manipulate his system is to find new or different policies. A comparison of *Babcock v. Jackson*[44] and *Kell v. Henderson*[45] provides an excellent example of how this can be done, and once again, the diagrams help make the point.

Recall that *Babcock*[46] is an archetypical false conflict since the policies behind the different tort rules both refer to New York contacts.

Diagram 8



Kell v. Henderson[47] is the mirror image of *Babcock*. In *Kell* the plaintiff and defendant, both domiciliaries of Ontario, took a trip from Ontario into New York. When defendant lost control of the car, it left the road and struck a bridge, and plaintiff was injured in the collision. The car was garaged and insured in Ontario.[48] If it is assumed that the operative policies here are identical to those identified in *Babcock*, then the case can be diagrammed as follows:

43. Professor Leflar, among others, has suggested just this sort of maneuver. R. LEFLAR, AMERICAN CONFLICTS LAW § 96 (1977).

44. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

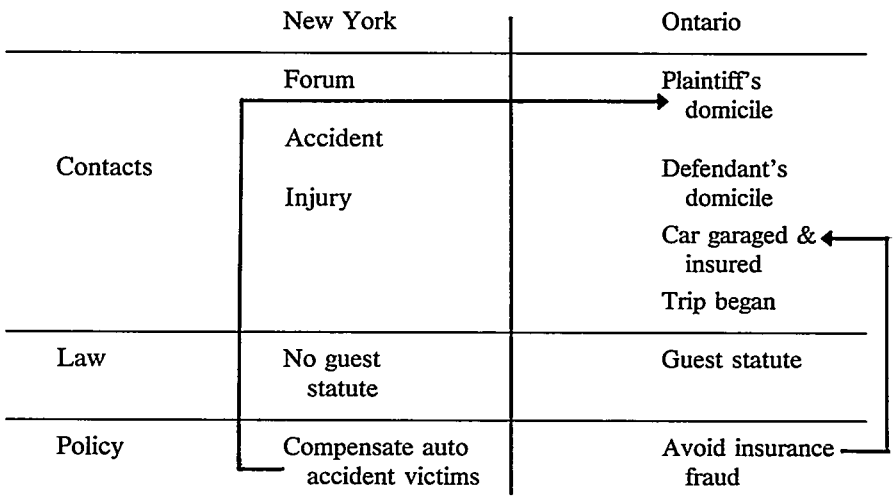
45. 47 Misc. 2d 992, 263 N.Y.S.2d 647 (1965), *aff'd*, 26 A.D.2d 595, 270 N.Y.S.2d 552 (1966).

46. *See supra* notes 8–13 and accompanying text.

47. 47 Misc. 2d 992, 263 N.Y.S.2d 647 (1965), *aff'd*, 26 A.D.2d 595, 270 N.Y.S.2d 552 (1966).

48. 47 Misc. 2d 992, 993, 263 N.Y.S.2d 647, 648 (1965).

Diagram 9



The case appears to be a false conflict. The arrow from New York's policy (compensate auto accident victims) crosses the center line and points toward an Ontario plaintiff; New York's interest, therefore, would not be advanced by the application of its law. Ontario's policy arrow has an Ontario referent, so Ontario's interest would be advanced by the application of its law. If these are the relevant policies, then the arrows show a false conflict.

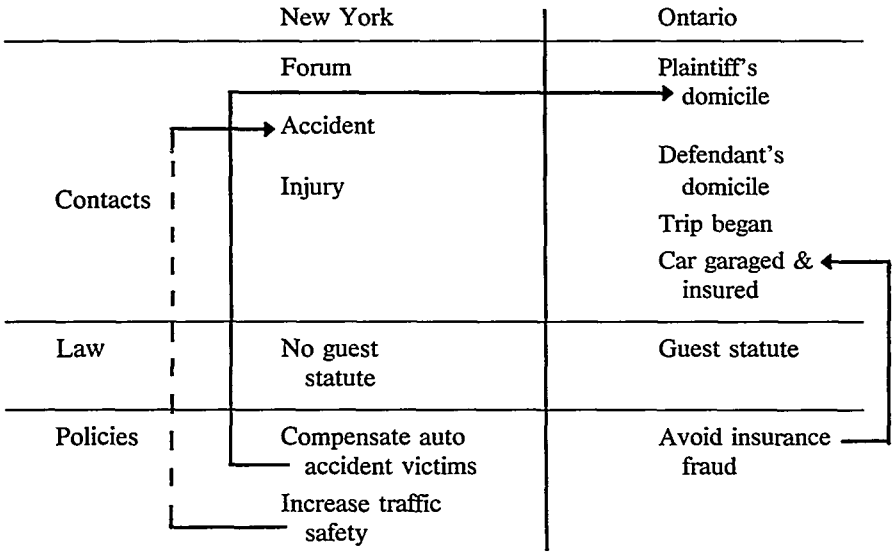
Now recall that Currie's system requires the use of the forum's law in a true conflict.[49] In order to shift the choice from Ontario to New York, all that is required is a policy behind New York's common-law rule that refers to a New York contact. Such policies were not hard to find. Professor Trautman, for instance, commenting on *Kell*, suggested that New York's reason for not having a guest statute was its desire to deter negligence on the highways.[50]

With this additional policy *Kell* may be diagrammed like this:

49. *See* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171 (proposition five of Currie's summary). The summary is also contained in Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

50. Trautman, Kell v. Henderson, *A Comment*, 67 COLUM. L. REV. 465, 467 (1967). See also Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958), in which Professor Currie suggests that the state in which injury occurs will often have an interest in the compensation of the nondomiciliary victim. In Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973), the court was faced with the same fact pattern as in *Kell*. While the court decided the case based upon Professor Leflar's

Diagram 10



Now *Kell* appears to be a true conflict. The arrow from the Ontario policy still points toward an Ontario contact, but now one arrow points from a New York

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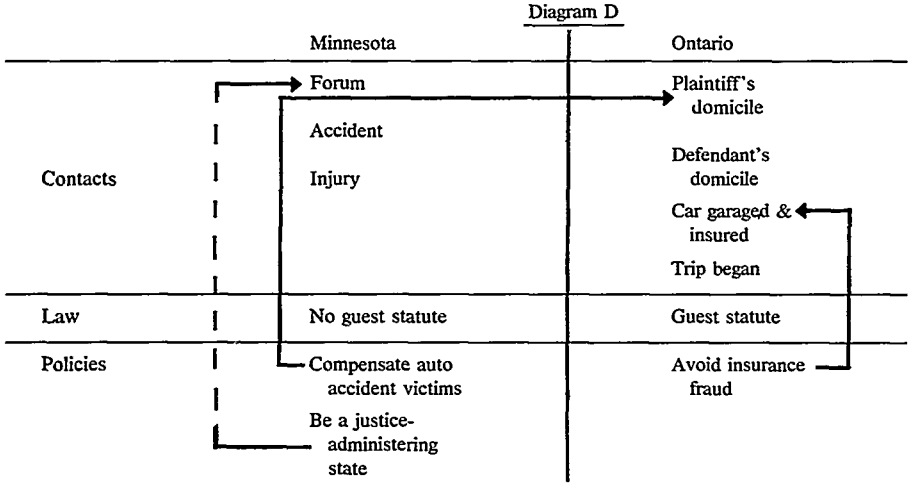
choice-influencing considerations, it also identified a policy interest (the interest in being a "justice-administering state") that would make either *Milkovich* or *Kell* a true conflict. With that policy added, *Milkovich* looks like this:

Diagram D



The diagram of *Milkovich* provides an added insight. It shows that "justice administration" is not the sort of policy that can be used in the initial determination of whether a case presents a true or a false conflict. If it is used in that way, Currie's system is subverted.

Recall that in the diagrams each policy arrow points toward a contact in one state or the other. Where should the arrow for the "justice-administering" policy point? The only plausible contact for this policy to point toward is the forum. The result is that in every case in which the "justice-administering" policy is considered in the true-false conflict determination, at least one arrow will always point toward the forum. If one arrow always points toward the forum, the case can only be either a false conflict (with all policies pointing to the forum) or a

policy (increase traffic safety) toward a New York contact (the accident). Thus each state has an interest in the application of its law. In such a situation Currie's system requires application of the forum's law.

A comparison of Diagram 9 with Diagram 10 helps to show how choice of law under interest analysis may be manipulated. By adding a new policy—and a new arrow—a false conflict becomes a true conflict, and the system dictates the choice of New York's law rather than Ontario's. The diagrams are as useful for understanding the manipulation of interest analysis as they are for comprehending the system itself.

B. *Increasing the Number of Issues*—Dépeçage

Applying interest analysis becomes proportionately more difficult as the number of issues increases.[51] The competing states will have substantive rules

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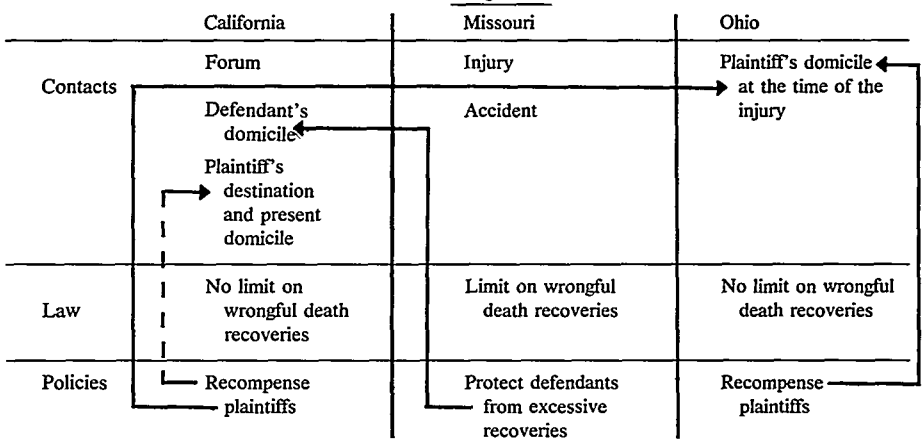
true conflict. In either case Currie's system requires choice of the forum's law. Thus, in every case in which the "justice-administering" policy is used to determine the existence of a true or a false conflict, the forum's law will be chosen, and Currie's system will become a simple forum preference system.

The diagram helps to show that considerations of justice, while they may be used at some point in the choice-of-law process as a sort of moral trump card to overrule any system or rule, cannot be plugged into Currie's system for distinguishing false conflicts from true conflicts.

51. Another way to generate complexity is to increase the number of states that have contacts with the dispute. Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967), involved three states—California, Ohio, and Missouri. Plaintiffs and their decedents were Ohio domiciliaries who were traveling through Missouri on their way to California, where they contemplated settling. (They, in fact, became domiciliaries of California after the accident.) Their car was struck head-on in Missouri by an automobile operated by defendant, a resident of California on a vacation trip to Illinois. *Id.* at 552, 432 P.2d at 728, 63 Cal. Rptr. at 32. Neither California nor Ohio had a limit on wrongful death recoveries. Missouri, however, had such a limit. *Id.* The court determined that Missouri's wrongful death limitation expressed a policy that defendants ought not be impoverished by wrongful death recoveries. *Id.* at 556, 432 P.2d at 731, 63 Cal. Rptr. at 35. The court seemed to assume that the policy behind both the California and Ohio statutes was to recompense plaintiffs for the death of family members. The case can be diagrammed as follows:

Diagram E



The diagram can be used to make two basic points. First, the solid arrows show that only Ohio has an interest in the application of its law to the dispute. The arrow from California's policy points to an out-of-state contact—the Ohio plaintiffs. Missouri's policy arrow also points out of state—toward the California defendant.

and motivating policies applicable to each issue and, therefore, each issue will be separately classified as a false conflict, a true conflict, or an unprovided-for case. This separate treatment of issues may result in the phenomenon of *dépeçage*[52]—using the rules of two different states to decide two different issues in a single case. The diagram technique is especially useful in dealing with this added complexity.

Among the most controversial *dépeçage* cases is a hypothetical posed by David Cavers in *The Choice-of-Law Process*.[53] The fictional case, *Adams v. Knickerbocker Nature Study Society, Inc.*,[54] pits a New York charitable corporation against one of its members. Adams, a New York domiciliary, journeyed into Massachusetts as a passenger in a truck owned by the Society. When the truck broke down, the driver, an employee of the Society, was able to rent an unlicensed truck from a local farmer. The driver started the truck and backed over Adams, but there was no indication that the driver was negligent.

The relevant rules of substantive law are as follows.[55] Massachusetts has a rule that makes the driver of an unregistered vehicle an outlaw on the highways, liable for whatever injuries he causes without regard to negligence. The policy behind such a rule is to encourage registration of motor vehicles. New York has no such rule; its policy is to regulate conduct on the highways by the fault standard. Massachusetts, solicitous of its charitable organizations, has a charitable immunity rule; New York, more concerned with compensating injured plaintiffs, has no charitable immunity rule.

Arguably, the case involves two false conflicts. New York has no interest in conduct on Massachusetts highways, and Massachusetts has no interest in the relationship between a New York charitable organization and its members. The case may be diagrammed like this:

Only Ohio's policy arrow points toward an in-state contact; the case, at least according to the solid arrows, is just a slightly more complicated false conflict.

Second, the interrupted arrow illustrates the problem of postoccurrence interests. Should the fact that plaintiffs, after the accident, acquired a California domicile be considered in the interest calculation or not? The California court refused to place any significance on plaintiff's move for fear that such a course might encourage forum shopping. In *Reich*, however, the problem of postoccurrence interest is really academic, since the tort rules and policies of California and Ohio are the same. For a discussion of the problem of postoccurrence interests, see R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 275–77 (3d ed. 1981).

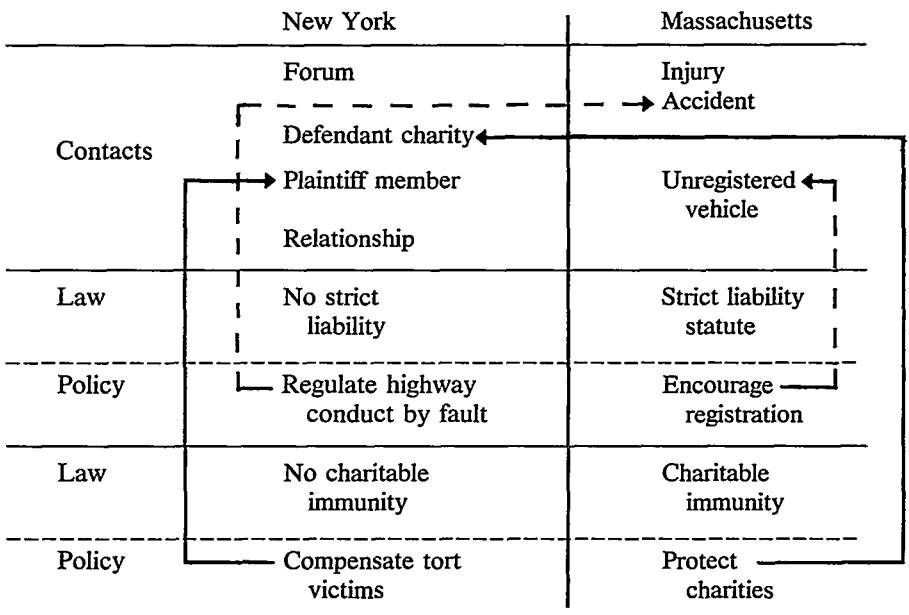
52. The word comes from the French *dépeçer*, meaning "to dissect" or "to take to pieces." Wilde, *Dépeçage in the Choice of Tort Law*, 41 S. CAL. L. REV. 329 n.3 (1968).

53. D. CAVERS, THE CHOICE-OF-LAW PROCESS 34–43 (1965).

54. *Id.*

55. *Id.* at 34–39.

Diagram 11



First, consider the issue of immunity: Massachusetts' policy (protect charities) has no relevant Massachusetts contact. The arrow from its policy crosses the center line and points toward a New York contact. Massachusetts' policy thus will not be advanced by application of its law. New York's policy (compensate tort victims) does have a New York referent; its policy will be advanced by the application of its law. The arrows from both the New York and the Massachusetts policies point toward contacts in New York, indicating that the charitable immunity issue involves a false conflict.

The strict liability issue diagrams as a false conflict favoring Massachusetts law. The Massachusetts policy (encourage registration) has a Massachusetts referent (the unregistered vehicle). The New York policy, however, has no relevant New York contact since the accident and injury occurred in Massachusetts. Once again both policy arrows point in one direction, but this time toward Massachusetts. According to Diagram 11 the court should apply Massachusetts' law of strict liability and New York's law denying charitable immunity. These choices would produce a victory for plaintiff in the conflicts case even though plaintiff would lose if the case had been a domestic case in either New York or Massachusetts.

Whether or not this result is a shocking anomaly is not the point of this exposition.[56] Rather, the point is that interest analysis favors *dépeçage*. In the words of one commentator,

56. Conflicts scholars are divided on the question of whether this sort of result is anomalous. Professor Currie clearly did not approve. "It is one thing to fall between two stools; it is quite another to put together half a donkey and half a camel, and then ride to victory on the snythetic hybrid." D. CAVERS, THE CHOICE-OF-LAW PROCESS 39 (1965) (quoting "Judge" Currie's response to Cavers' hypothetical *dépeçage* case). *See also* the

> Since every rule may have a different purpose and therefore must be construed separately, the court is confronted with a conflict between single rules rather than a conflict between entire "tort laws" of two states as would be the approach under traditional choice-of-law rules. A necessary consequence of every method which approaches choice of law by examining the purposes of conflicting domestic rules is a tendency to break down choice of law problems into smaller groups in order to facilitate more adequate analysis of underlying policies.[57]

If *dépeçage* is likely to become more common, courts and students will be required to understand contact-policy patterns that are considerably more complicated than the typical false conflict, true conflict, or unprovided-for case. The diagrams can help them grasp this added complexity.

IV. CONCLUSION

Governmental interest analysis—among the most significant developments in the modern choice-of-law literature—is sufficiently difficult to cause confusion and reluctance among courts and students. This Article offers the diagram as a technique for understanding and explaining this challenging theory.

Of course, a conflicts case must be carefully analyzed before a diagram can be of use. The diagram cannot help to determine the policy that motivates a substantive rule; nor can it pick out the relevant contacts. Once these difficult determinations have been made, however, the diagram provides a handy device for memorializing them, thus facilitating subsequent analysis and discussion.

It might be objected that anyone who can construct a diagram of a case already has enough mastery of Currie's thought so that he no longer needs the diagram. This may be so, but the diagram keeps the contacts and the relevant policies before the mind and reduces the need for mental gymnastics during the discussion. A similar point might be made with regard to symbolic logic. If a person is sufficiently sophisticated to translate from English into the predicate calculus,[58] he is also likely to be able to perform most operations using traditional Aristotelian logic. Nevertheless, the symbolism—just like the diagram—has considerable value because of its elegance and economy of expression.

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views of Dean Griswold, and Professors Rheinstein and Reese, *id.* at 35–36. Professor Cavers, on the other hand, finds this result supportable. He would find such a situation offensive only if the two issues were closely related. *Id.* at 41–42. For instance, suppose State *A* permitted a cause of action for a relatively disfavored tort, say, criminal conversation, and restricted its use by a six-month statute of limitations. State *B* has no such cause of action at all, but has a two-year statute of limitations for all torts. Cavers would suggest that use of *dépeçage* in this case to create a recovery is not justifiable. *A*'s decision to limit the time period is closely related in policy to its decision to allow the disfavored tort. Using *B*'s statute with *A*'s cause of action would produce a result offensive to the policy of both states.

57. *See* Wilde, *Dépeçage in the Choice of Tort Law*, 41 S. CAL. L. REV. 329, 345 (1968). *See also* Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 59 (1973). *Dépeçage* may be more common under modern choice-of-law systems, but it is not unknown in the traditional system. *See, e.g.*, Maryland Casualty Co. v. Jacek, 156 F. Supp. 43 (D.N.J. 1957); Lillegraven v. Tengs, 375 P.2d 139 (Alaska 1962).

58. For an explanation of translation from English into the first order predicate calculus, see R. JEFFREY, FORMAL LOGIC: ITS SCOPE AND LIMITS ch. 7 (2d ed. 1981); B. MATES, ELEMENTARY LOGIC ch. 5 (2d ed. 1972).