

## MULTISTATE JUSTICE: BETTER LAW, COMITY, AND FAIRNESS IN THE CONFLICT OF LAWS

*Joseph William Singer\**

*The saying goes “hard cases make bad law.” In the field of conflict of laws, hard cases make bad law when we unduly oversimplify them, seeking tidy solutions for untidy facts. In order to avoid this oversimplification, and give both states’ and both parties’ interests due weight, we should focus on three norms: Substantive Justice (what conflicts scholars call “better law”), Comity, and Fairness and the Protection of Justified Expectations. We must recognize the policies of both states, the rights of both parties, and provide a reasonable justification for applying one state’s law over the other. The first step in any conflict of laws analysis is to analyze charitably the potential interests of both states and the entitlements of both parties. Such analysis will allow us, first, to identify false conflict cases: cases where one state really does not have an interest in applying its law. These cases include certain common domicile cases, certain lonely domicile cases, and certain fortuitous injury cases. In true conflict of laws cases, or “hard” cases, a justification that could be accepted by all parties for applying one state’s law over the other is vital. Often, (but not always) the “better law” analysis will provide the most compelling justification in true conflict of laws cases. All modern forms of conflict analysis include consideration of “better law”; they just call it something else. The sooner we recognize the relevance of “better law,” the sooner we can give it its proper place alongside comity and fairness in understanding and adjudication conflicts of law. Hard cases may not necessarily make bad law—and it may take frank application of “better law” to resolve them.*

---

\* Bussey Professor of Law, Harvard Law School. Thanks and affection go to Martha Minow and Mira Singer. This project was supported in part by funding provided through the research program at Harvard Law School. © 2015 Joseph William Singer.

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1924
II.	SEEING CONFLICTS OF LAW FOR THE CONFLICTS THEY ARE.....	1930
	A. <i>What is Wrong with One-Sided Analysis</i> .....	1930
	B. <i>Mapping Conflicts of Law</i> .....	1937
	C. <i>How to Recognize a False Conflict When You See One</i> .....	1939
	1. <i>Relationship, or Common Domicile Cases</i> .....	1940
	2. <i>Lonely Domicile Cases</i> .....	1943
	3. <i>Fortuitous Injury Cases</i> .....	1946
	4. <i>False Conflicts and True Conflicts</i> .....	1947
III.	JUSTIFICATION IN THE CONFLICT OF LAWS .....	1947
	A. <i>Public Reason</i> .....	1947
	B. <i>Substantive Justice: The Role of “Better Law”</i> .....	1949
	C. <i>Multistate Justice: Public Reason Across Borders</i> .....	1955
IV.	CONCLUSION .....	1959

## I. INTRODUCTION

Hard cases make bad law, but not for the reason you might think. That expression usually is taken to mean that we sometimes make exceptions to general rules in hard cases when we would do better to apply the rule without modification. Deviating from rules may decrease predictability by complicating the law through creating uncertainty about what rules mean and when they will be applied. It may also lead to “like cases” not being treated alike and conflicting principles enshrined in the law with scant guidance about when each applies. I am not a fan of this saying; I believe hard cases usually make good law. They do so because rule application often requires us to determine the appropriate *scope* of the rule in question.<sup>1</sup> Hard cases force us to do that; they teach us the *limits* of existing principles. When a rule leads to untoward consequences, applying it mechanically does not promote rule of law principles. Rather, it violates them.

In the field of conflict of laws, however, hard cases make bad law for an entirely different reason. It is often painful and unsettling to face cases with no easy resolution. For that reason, hard cases sometimes motivate us to oversimplify them by unduly decreasing their complexity. We sometimes find ourselves denying that hard cases really are hard. We may do that by pretending that one side’s argument is less powerful than it really is. We may even fail to recognize the losing argument at all. We may frame the issue in a way that makes the conflict seem—but only seem—to go away. We may seize on a neutral criterion that appears to resolve the case without having to confront difficult value choices, albeit

---

1. Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1383 (2013).

at the cost of arbitrariness. Hard cases are hard for a reason, and the right way to handle hard cases is to *admit that they are hard*. When both sides to a dispute have legitimate interests and viable claims of entitlement, both rule of law norms and our commitment as a free and democratic society to treating each person with equal concern and respect require that we *acknowledge* the conflicting claims. Our basic normative commitments also require us to attempt to articulate a *justification* for the outcome that could or should be accepted by both parties to the dispute.

Thus, we should hesitate to find a conflict of laws to be a false one unless we are really sure that is the case. I do not mean to argue that there are no false conflicts. I am a fan of false conflicts analysis in its proper place. I do claim, however, that many (perhaps most) cases that raise legitimate conflict of laws questions do so because more than one jurisdiction has a valid claim to have its law apply to a controversy or relationship. Additionally, both parties often have legitimate claims to the protection of the laws of their respective jurisdictions. Deciding what to do in such cases requires us to acknowledge *both* states' policies (their "state interests") and the entitlements or rights created by the laws of *both* of the affected jurisdictions.

Deciding hard multistate cases also requires us to attend to three norms. The first is *substantive justice* or what conflicts scholars call *better law*. Conflicts cases raise the same issues of justice that domestic cases raise. Indeed, in some ways conflicts cases raise special issues of justice. Why depart from the law the forum identifies as the substantively just result? How can that be explained as promoting justice? If the two jurisdictions have legitimate interests in applying their rules, why should the forum defer to a law the forum considers unfair? This does not mean that substantive justice is the only thing to consider in choice-of-law cases. It does mean that concern for justice should not vanish from our attention merely because we have a hard case that involves two states with conflicting notions of justice.

The second norm we should focus on is *comity*, or the act of deferring to the law of another jurisdiction when appropriate. Conflict of laws is a field of law that asks courts to sometimes apply the law of a state that the forum might consider to be unfair or unwise. But sometimes that is the right thing to do. To apply the comity norm we ask: When two states have policies that would be impaired if not applied in this situation, which state should defer to the other? Is one state's interest crucial to its economy or relationships centered there? Is one state's interest legitimate but weak? Should one state's policy prevail in true conflicts cases, like the case at hand, because it represents the presumptively just outcome for such cases? What is the right relationship among sovereigns in cases like this?

The third norm to which we should attend is *fairness* and the protection of *justified expectations*. While substantive justice is an important

matter, so is the entitlement of parties to due process of law, meaning both entitlement to the protection of law and entitlement to be free from unfair applications of laws. To apply the fairness norm we ask: Which entitlement should prevail over the other? Which of the parties' rights should be protected and which should give way? Which result will avoid or minimize unfairness to the parties? Does applying either law impose an unfair burden or unfair surprise on one of the parties? Does one of the parties have a stronger entitlement to the protection of the law of their respective state?

Choice-of-law analysis entails recognizing the interests and policies of *both jurisdictions*, as well as the rights, justified expectations, and entitlements of *both parties*. It also usually requires an argument that creates a *link* or a *bridge* between the interests or policies of the two states and between the respective rights or entitlements of the parties. We need to explain *why* the policies of one state should prevail over those of the other and *why* the claimed rights of one party should prevail over those of the other. Doing this requires us to construct a "because clause" that gives a *justification* (or set of justifications) why the policy of one state and/or the rights of one party should prevail over the interests of the other state and/or the rights of the other party.<sup>2</sup> That "because clause" must express reasons that the losing party and the losing state could or should accept as valid reasons for being asked to defer to the policies of the other state or the rights of the other party.<sup>3</sup> *We recognize the policies of both states, the rights of both parties, and give a reasonable justification for applying one over the other.* To my mind, that is what the modern choice-of-law revolution is all about.<sup>4</sup>

How do I know this? I learned it from my colleagues.

Professor Herma Hill Kay has been a champion and an interpreter of Brainerd Currie's interest analysis. She taught us that conflicts cases concern the ability of states to achieve their policies in a multistate system while giving due regard for the interests of their sister states.<sup>5</sup>

---

2. On the kinds of arguments that might constitute a viable "because clause" when conflicting rights are involved, see Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 958–67 (2009).

3. On the normative basis of this way of constructing justification see *id.* at 950–58.

4. For my evolving views on the subject, see generally Joseph William Singer, *Case Four: Choice of Law Theory*, 29 N. ENG. L. REV. 692 (1995); Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197 (1991) [hereinafter Singer, *Facing Real Conflicts*]; Joseph William Singer, *Justice and the Conflict of Laws*, 48 MERCER L. REV. 831 (1997); Joseph William Singer, *Pay No Attention to that Man Behind the Curtain: The Place of Better Law in a Third Restatement of Conflicts*, 75 IND. L.J. 659 (2000); Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731 (1990); Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L.J. 129 (2014) [hereinafter Singer, *Property Law Conflicts*]; Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1 (1989).

5. Herma Hill Kay, In Memoriam, *Chief Justice Traynor and Choice of Law Theory*, 35 HASTINGS L.J. 747, 747–48 (1984); Herma Hill Kay, *Currie's Interest Analysis in the 21st Century: Losing the Battle, But Winning the War*, 37 WILLAMETTE L. REV. 123, 126 (2001); Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 589 (1983).

Professor Louise Weinberg taught us that the forum need not defer to the law of other states unless the reasons for displacing forum law are compelling.<sup>6</sup>

Professor Peter Hay taught us that one compelling reason for deferring to the law of other states is our mutual interest in comity, ensuring that states that have legitimate interests in governing a relationship or dispute have the power to do so—to the extent they can without harming more pressing interests of other states.<sup>7</sup>

Professor Lea Brilmayer taught us that a second compelling reason for deferring to the law of another state is to protect the rights of defendants who would otherwise be subjected to unfair surprise or suffer regulation by a distant sovereign with which they have little connection.<sup>8</sup>

Professor Larry Kramer (as well as Professor Hay) taught us that courts have difficulty interpreting and applying complex academic theories, and that the creation of reasonable presumptions for hard cases will help judges decide choice-of-law cases in a manner compatible with reasoned argument and enlightened theory.<sup>9</sup>

Professor Symeon Symeonides, the Dean of us all, has read every conflict of laws case ever decided, mapped them, applied the best theoretical analysis, and created several sets of new rules for adjudication of choice-of-law issues that combines the best of modern theory with the best of legal doctrinal practice to guide decision making in the future.<sup>10</sup> Both he and Professor Kramer have helped us see that the choice between rigid rules and a flexible approach is a false one since standards can generate presumptions and rules of thumb, while leaving due regard

---

6. Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 90 (1991) [hereinafter Weinberg, *Against Comity*]; Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 472 (1982); Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595, 618 (1984) [hereinafter Weinberg, *On Departing from Forum Law*]; Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1635 (2005) (reviewing Symeon C. Symeonides, *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow* (2005)).

7. Peter Hay, *Full Faith and Credit and Federalism in Choice of Law*, 34 MERCER L. REV. 709, 723 (1983) (stating federalism “must encompass the obligation of ‘each state . . . to give due deference to the laws of other states’ as well as to the needs of the interstate system as a whole” (quoting Brainerd Currie, *Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 18 (1959))); Peter Hay, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1644, 1654 (1981) [hereinafter Hay, *Reflections*] (“Federalism should require that states not ‘push [the] application of their laws to the limits’ at the expense of sister states . . .” (quoting James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 881 (1980))).

8. Lea Brilmayer, *Interstate Federalism*, 1987 BYU L. REV. 949, 960 [hereinafter Brilmayer, *Interstate Federalism*]; Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555, 558 (1984); Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1289 (1989); Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U. L. REV. 389, 389 (1987) [hereinafter Brilmayer, *Shaping and Sharing*].

9. Hay, *Reflections*, *supra* note 7, at 1666 (arguing for new and better rules to replace the First Restatement rules); Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 472 (1991); Larry Kramer, *More Notes on Methods and Objectives in Choice of Law*, 24 CORNELL INT’L. L.J. 245, 263 (1991); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 318 (1990) [hereinafter Kramer, *Rethinking Choice of Law*].

10. See generally SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION IN THE COURTS: TODAY AND TOMORROW* (2003).

for analysis of state policies and individual rights to shape the creation, interpretation, and application of those rules in the future.<sup>11</sup>

We owe all of these scholars a debt of gratitude. I do not mean to argue that we all agree on every point or that we do not have spirited debates. We certainly interpret both interest analysis and other modern choice-of-law theories in different ways. I do mean to argue, however, that our debates have been fruitful; they have improved our understanding of multistate systems and enabled us to better regulate them. Modern choice-of-law analysis is not perfect; the courts still have a hard time understanding and applying it correctly, and state supreme courts decide too few cases to appreciate the nuances, subtleties, and anomalies that grace the field. But, modern choice-of-law analysis as developed by legal scholars has been remarkably successful at directing the attention of lawyers and judges to the right questions. It has also led judges to attend to the relevant considerations when analyzing and deciding choice-of-law controversies. We have not solved all problems or quieted all doubts. *But at least we are speaking the right language.* And we owe that to my esteemed colleagues.<sup>12</sup> I am their student and I thank them for teaching me through their scholarship.

In these remarks, I want to explore the concept of *multistate justice*. How can we seek justice when a case or controversy has contacts with more than one jurisdiction and those jurisdictions differ over the just result? That is the subject of the conflict of laws field, and it is a question that has no easy resolution. With few exceptions, conflict of laws cases are *hard*.

Part I explains that the worst mistake we can make in analyzing a conflict of laws problem is to engage in one-sided analysis. One-sided analysis occurs when we fail to see or appreciate the legitimate interests of one of the states or one of the parties. I will give several examples of bad one-sided analysis to show what is wrong with it. I will then argue that we can avoid this elementary mistake by mapping the case. The core map includes four factors (the interests of both states and the rights of both parties) and six relationships (state A/state B, plaintiff/defendant, state A/plaintiff, state A/defendant, state B/plaintiff, state B/defendant). Understanding those relationships is key to resolving choice-of-law questions. I will conclude by cataloguing the types of cases most likely to be genuine false conflicts. For cases that cannot be resolved as false conflicts, more searching analysis is required.

---

11. *See id.*; *see also* Kramer, *Rethinking Choice of Law*, *supra* note 9.

12. Other scholars, of course, have also been highly influential in developing modern choice-of-law theory and scholarship, among them Patrick Borchers, Gary Simson, Russell Weintraub, among many others, in addition of course to the scholars who invented modern analysis such as Walter Wheeler Cook, Brainerd Currie, David Cavers, Arthur Leflar, Robert Sedler, Arthur von Mehren, and Donald Trautman.

Part II explains the role of justification in conflict of laws.<sup>13</sup> If we have a true conflict, we need a *justification* (or set of justifications) for choosing the interests of one state over those of the other and the rights of one party over the rights of the other. That justification might be external, i.e., one that might be made by a neutral observer who has no allegiance to the law of either jurisdiction, or it might be internal, i.e., reasons given by the forum judge to defer (or not to defer) to the law of the other state. Various types of justification may work. What matters is that they present reasons that are *public* in nature—reasons that can be validly presented to, and might be accepted by, those affected by the decision, no matter which side they are on. This is, after all, the crucial criterion for a legitimate court opinion and a legitimate rule of law. A free and democratic society treats each person with equal concern and respect, and that means we must use “Golden Rule” or “veil of ignorance” reasoning to justify acts of legal coercion by reasons that could or should be accepted by any person. That does not mean that each person *must* or *will* accept the result; it means that the justifications we offer must be ones that are valid reasons for law making in a free and democratic society and ones we believe *could* or *should* be accepted.

Justification in conflict of laws cases is not the same as it is for domestic cases. At the same time, *it is not completely different*. I argue that substantive justice is a crucial aspect of choice-of-law justification. Although almost all courts and most scholars reject consideration of what we call “the better law,” it turns out that better law is not only a crucial factor in most choice-of-law determinations, but it is often outcome determinative. If we pay attention to the *content* of both scholarly and judicial justification rather than the *rhetoric* that is almost unrelentingly hostile to better law, we will find that consideration of the presumptively fair result is often the primary reason for deciding the case one way rather than the other. At the same time, multistate cases are not exactly like domestic ones; application of the “better law” always has a cost when true conflicts are at issue. The cost is the interference with the legitimate interests of another state and the rights of one of the parties. For that reason, although “better law” is relevant, it is not determinative in true conflicts cases.

Multistate justice includes consideration of the substantively just result with the norm of coexisting with sister sovereigns (comity) and parties who have rights based on the laws of those sister sovereigns (fairness). Sometimes what the forum views as the “better law” should give way to the law of the state where a relationship is centered or which has overriding interests in regulating conduct that happened there or injuries that were suffered there. Multistate justice is a combination of attention to presumptively applicable substantive norms (better law), protection of justified expectations and entitlements (fairness), and insuring the ability

---

13. On the importance of justifying the exercise of state power, see Brilmayer, *Shaping and Sharing*, *supra* note 8, at 391–92.

of states to determine the consequences of events crucial to their economies and relationships (comity).

Combining these norms properly depends on crafting justifications for resolution of the controversy in a manner that could or should be acceptable to all sides. This is a high standard, and when cases are truly hard, it may be one we cannot meet. That, however, is to be expected. *No conflict of laws method can turn hard cases into easy ones.* But, that should not deter us from doing the best we can to give justifications for the results that seem, all things considered, to be the best way to promote justice in multistate cases. The least we can do is to offer reasons that *could* be accepted by the losing party as legitimate reasons for the choice of law and which might be understood by the state whose law is not applied to be an appropriate occasion for deference and respect to the law of the other jurisdiction. The justifications we offer to resolve conflicts of law need not compel agreement or acquiescence; all they need do is to express cognizable and appropriate reasons for the decision and to fashion those reasons in a manner that respects each person and gives due deference to each sovereign. *Substantive justice, comity, fairness, and public justification*—those are the building blocks of modern choice-of-law theory.

## II. SEEING CONFLICTS OF LAW FOR THE CONFLICTS THEY ARE

### A. *What is Wrong with One-Sided Analysis*

Conflict of law cases involve two or more jurisdictions that have significant contacts with a relationship or set of events. When the facts are spread over two states, it is often the case that either state could apply its law to the parties' relationship or conduct. When that is the case, one might think that the last thing one would want to do would be to fail to recognize the interests of both states and both parties. That, however, is the biggest failing in choice-of-law analysis in the courts. More often than we would like, judges and lawyers (and sometimes scholars) fail to see and to identify the two-sided nature of the controversy. That is the biggest sin in the choice-of-law field: treating the conflict as no conflict at all by refusing to recognize the legitimate interests of one of the states and/or one of the parties.

This elementary mistake can be easily avoided, but doing so requires us to understand *why* lawyers and judges make this mistake. There are three different reasons this mistake occurs. First and foremost, lawyers and judges may focus on the strong interests of one state and become so taken with them that they fail to consider the other state's policies. Or they recognize the interests of both states but fail to construct the best arguments on both sides of the case. Second, lawyers and judges may misunderstand the relevance and weight the Second Restatement places on its appeal to the "basic policies underlying the particular field



of law.”<sup>14</sup> Third, lawyers and judges may misunderstand or misapply the theory of false conflicts analysis.

Consider two well-known cases: *Bryant v. Silverman*<sup>15</sup> and *Schultz v. Boy Scouts of America*.<sup>16</sup> In *Bryant*, a plane owned by an airline whose principal place of business was in Arizona left New Mexico for Colorado where it crashed upon attempting to land.<sup>17</sup> The victim plaintiffs were domiciled in and purchased their tickets in various states.<sup>18</sup> Wrongful death actions were brought in Arizona in the defendant’s “home state.”<sup>19</sup> Colorado, but not Arizona, limited compensatory damages to pecuniary loss and prohibited punitive damages.<sup>20</sup> The case involved conduct and injury in Colorado, and, for two of the three plaintiffs, contracts made in Colorado (where the tickets were purchased), while the parties were all domiciled elsewhere.<sup>21</sup> One plaintiff was domiciled in Arizona, a second in New Mexico, and a third in Texas.<sup>22</sup> Two of the tickets were purchased in Colorado while one was purchased in New Mexico.<sup>23</sup>

The court purported to apply the Second Restatement to adjudicate the case, but it made so many mistakes in its analysis that it is hard to count them all. What matters here is the court’s refusal to recognize both the legitimate interests of the state of Colorado in limiting liability for companies doing business there and the potential rights of the defendant airline to the benefits of Colorado law. At every turn, the court failed to recognize Colorado interests or misrepresented them.<sup>24</sup>

The case actually presented a true conflict between the compensatory interests of the states where the parties were domiciled (or established the contractual relationship) and the defendant-protecting interests of the place of the accident. The domicile states had potential interests in justice between the parties, requiring an airline that operated negligently and caused wrongful death to provide full civil recourse to its victims. The defendant’s principal place of business also had a regulatory interest in inducing nonnegligent decision making by its corporations and in punishing any outrageous business decisions there that led to catastrophic consequences, no matter where they occur. As for the plaintiff who bought a ticket in New Mexico, that state had an interest in ensuring that the parties acted in good faith to perform the contractual obliga-

---

14. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(e) (1971).

15. 703 P.2d 1190 (Ariz. 1985).

16. 480 N.E.2d 679 (N.Y. 1985).

17. *Bryant*, 703 P.2d at 1191.

18. *Id.*

19. *Id.*; see also *Daimler AG v. Bauman*, 134 S. Ct. 746, 749 (2014) (identifying the state of incorporation and the state of the principal place of business as places where a corporation is “at home” and subject to general jurisdiction).

20. *Bryant*, 703 P.2d at 1191.

21. *Id.* at 1193.

22. *Id.* at 1191.

23. *Id.* at 1193–94.

24. See Brilmayer, *Interstate Federalism*, *supra* note 8, at 958–63 (criticizing versions of interest analysis that fail to adequately appreciate the interests of defendant protecting states).

tions; that interest certainly would include operating safely to the extent possible.

On the other hand, the place of the accident had a defendant-protecting policy. By banning punitive damages in wrongful death actions, the state may have thought they were unnecessary for deterrence, or that they were potentially unfair since they are based on the civil standard of a preponderance of evidence rather than the criminal standard of proving the case beyond a reasonable doubt.<sup>25</sup> States that ban punitive damages may also believe they are unfair because they are boundless and decided by juries with no guidance or limitation. There is a reason the Supreme Court has found due process problems with the award of punitive damages, although it has not banned them completely.<sup>26</sup> The place of the accident might also believe that punitive damages *over* deter, as do damages for pain and suffering. Or, it might believe that pain and suffering damages are available for survival claims, and thus it would be duplicative to allow them for wrongful death claims. Whatever set of reasons one can imagine, it is clear that Colorado had important and relevant regulatory interests in protecting businesses from ruinous liability, while affording plaintiffs recovery for expenses and pecuniary losses suffered because of the defendant's negligence.

The *Bryant* court ignored or failed to appreciate Colorado's interests in the case. It argued that the "state where the injury occurs does not have a strong interest in compensation if the injured plaintiff is a non-resident."<sup>27</sup> This is so muddled that it is hard to figure out what the court is thinking. Here, the place of the injury had a *defendant-protecting* policy rather than a plaintiff-protecting one. Its interest was in *protecting the defendant from untoward liability* greater than necessary to achieve the compensatory, deterrent, and civil recourse goals of tort law. The court completely ignored that interest. It might have done so because of a perverse understanding of false conflicts analysis, believing that states have interests in protecting resident corporations but not nonresidents.

That is a misreading of the holding of *Babcock v. Jackson*.<sup>28</sup> *Babcock* involved a loss-allocating rule (a guest statute) and held that Ontario, as the place of the accident, should be willing to defer to New York, the common domicile of the parties and the place where their relationship was centered, to determine whether there should be a tort remedy for negligent conduct by a host who injured a guest in the car when the place of the accident would deny such a remedy.<sup>29</sup> Ontario's defend-

---

25. *But see* *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 216–17 (Colo. 1984) ("Moreover, section 13–25–127(2), 6 C.R.S. (1973), provides a significant safeguard to a civil defendant by requiring that the statutory elements of a punitive damages claim be proven beyond a reasonable doubt. We thus reject Robins' due process claims.").

26. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) (limiting an award of punitive damages on due process grounds).

27. *Bryant*, 703 P.2d at 1194.

28. 191 N.E.2d 279 (N.Y. 1963).

29. *Id.* at 284–85.

ant-protecting policy in *Babcock* was *not* intended to regulate conduct; it did not promote hosts to take guests in their cars (or at least no one has argued that to be the case), nor did it promote tourism in Ontario. The defendant-protecting policy of Colorado in *Bryant*, however, was *not* a loss-allocating rule. It was a conduct-*liberating* rule; by decreasing potential damages, it was intended to promote business activity in Colorado. No one thinks that means that the only businesses Colorado cared about were those that had their principal place of business in Colorado. Colorado's defendant-protecting rules were conduct-regulating in the sense that they promoted investment in Colorado by businesses, *no matter where domiciled*. It is a misreading of *Babcock* to assume that Colorado had no interest in protecting a nonresident corporation from ruinous liability when it was conducting business inside Colorado.

Nor did it make sense for the court to argue that the place of the injury has no interest in compensating a nonresident. Although some interpretations of interest analysis may suggest that states have no interest in protecting or compensating nonresidents, that is not a convincing way to understand state interests. States have interests in protecting nonresidents within their borders from harmful conduct—strong interests. Thomas Hobbes taught us that the first goal of government is to protect us from harm.<sup>30</sup> States with compensatory policies may sometimes engage in comity and defer to the law of another state to enable it to promote its defendant-protecting policy if a relationship is centered there, but that is not because the place of the injury has no interest in the welfare of nonresidents.

The *Bryant* court then went on to argue that Arizona law would better achieve Colorado interests than would application of Colorado law, because Arizona law promoted the basic policies underlying tort law.<sup>31</sup> The court referred to the “policy behind both Colorado and Arizona damage laws” as a reason to apply the law of the common domicile of the parties in Arizona.<sup>32</sup> That suggests that Colorado should be happy to apply Arizona law because Arizona law better achieves tort law policy than does Colorado law. *But that is nonsense*. In this case, Colorado policy *differed* from Arizona policy, and it is not plausible to believe that Colorado had no interest in extending its business-protective laws to the defendant in this case who was operating in Colorado merely because the defendant's offices were elsewhere. Nor did the court consider that the defendant had a right to operate inside Colorado under the protection of Colorado law and to operate in a nondiscriminatory fashion, enjoying the same benefits as other businesses operating inside Colorado.

---

30. THOMAS HOBBS, *LEVIATHAN* ch. 13, 90 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) (“The Passions that encline men to Peace, are Feare of Death . . .”); *id.* at ch. 20, 138 (“That men who choose their Sovereign, do it for fear of one another.”).

31. *Bryant*, 703 P.2d at 1195–96.

32. *Id.* at 1197. Because the parties were all domiciled in states that had plaintiff-protecting law, the court treated the case as involving common interests of the domicile states in greater recovery.

In short, the *Bryant* court failed to develop the *reasons* behind the defendant-protective Colorado policy, to understand its relevance to the parties and the occurrence in the case, and to see the case as providing a real conflict between the policies of the two states and the rights of both parties. I do not mean to argue that the court was wrong to consider the basic policies underlying tort law, quite the contrary. But it was a fundamental error for the court not to see that tort law involves a *compromise* between plaintiff-protecting interests of compensation and deterrence, and defendant-protecting interests of freedom of action and security from ruinous and unwarranted liability. In this case, one state erred on the side of the plaintiff and the other on the side of the defendant. Since many states ban punitive damages and many states have tort reform statutes that limit tort liability to ensure that compensation is compatible with reasonable economic activity, it is wrong for a court to pretend that defendant-protecting policies are not cognizable by courts in multistate cases.

The opposite problem occurred in the famous case of *Schultz v. Boy Scouts of America*.<sup>33</sup> In that case, the court deferred to the law of the common domicile of the parties (New Jersey), which granted the Boy Scouts charitable immunity from a claim by two boys and their family arising out of a Scoutmaster's sexual abuse of the boys rather than the plaintiff-protecting law of New York where some of the sexual abuse occurred.<sup>34</sup> The result caused outrage among many conflicts scholars partly because of the archaic nature of New Jersey law but partly because of the court's confused application of false conflicts analysis. The court found New Jersey to be an interested state because the relationship was centered there, and it was the common domicile of the parties.<sup>35</sup> The court interpreted the immunity rule to be a loss-allocating one, assuming that only plaintiff-protecting rules are conduct regulating.<sup>36</sup> In doing that, the court made the same mistake as the court in *Bryant*; it failed to see that the New Jersey defendant-protective law was a conduct-liberating one designed to encourage charities to operate without fear of ruinous liability, utilizing other laws (such as criminal law) to prevent wrongful conduct.

In any event, the *Schultz* court's interpretation of the New Jersey rule as a loss-allocating one led it to assume (wrongly) that New York's rule was *also* a loss-allocating one.<sup>37</sup> But that does not follow at all. Even if one views New Jersey's rule as a relationship-shaping one (rather than a conduct-liberating one), New York's proplaintiff law might very well have deterrent functions. Liability on the Boy Scouts might well induce

---

33. 480 N.E.2d 679 (N.Y. 1985).

34. *Id.* at 686–87.

35. *Id.* at 687.

36. *Id.* at 686.

37. *Id.*

them to better screen Scoutmasters and better regulate their behavior at Boy Scout camps in New York.

The court also used false conflicts analysis inappropriately to suggest that New York had no interest in protecting a nonresident plaintiff by hearing a tort suit arising out of a tort by a nonresident defendant.<sup>38</sup> The idea that New York has no interest in preventing sexual abuse within its territory is absurd.<sup>39</sup> New York has no less interest in the matter just because the plaintiff is from New Jersey. Would New York fail to apply its murder laws just because the victim of a New York homicide does not live in New York? Again, one might well believe that it is not unreasonable for New York courts to defer to New Jersey law to regulate a relationship centered there, but that would only be the case when the New Jersey interest outweighs New York's regulatory one. The court treated the case as a false conflict, but this was a misapplication of false conflicts analysis and too facile an application of the loss-allocating/conduct-regulating distinction.

*Bryant* failed to correctly analyze and appreciate the *defendant*-protecting policies of Colorado, and *Schultz* failed to correctly analyze and appreciate the *plaintiff*-protecting policies of New York. That does not necessarily mean that the cases were wrongly decided. It does show that the failure to see the case from both sides and to analyze charitably the potential interests of both states can lead courts to simplify what should be complicated. This oversimplification promotes injustice by refusing to recognize the policies and interests of a sovereign state as well as the rights of one of the parties.

One-sided analysis sometimes exists in other fields besides torts. Both courts and scholars tend to characterize the field of contracts as promoting "freedom of contract" and thus express a preference for laws that do not regulate contract terms but do enforce choice-of-law clauses, no matter what law is chosen or what its content is. This is problematic because the *only* reason we have a conflict of laws regarding contracts is *because of one the states wants to regulate the terms of the agreement*. Such regulations do not take away our "freedom;" they ordinarily protect consumers by ensuring that we get what we want out of our agreements. Such laws set minimum standards for market relationships and ensure that those agreements do not cause harmful externalities. To assume the justified expectations of the parties are best promoted by choosing the law that enforces the literal terms of the agreement is to fail to recognize that the interests all states have in regulating the contours of contractual relationships.

To resolve a contracts conflict of laws by reference to "freedom of contract" or the "justified expectations of the parties" is to fail to recognize and analyze the reasons behind the law of the state that regulates

---

38. *Id.* at 688–89.

39. See Brilmayer, *Shaping and Sharing*, *supra* note 8, at 414 (arguing that states have "a responsibility to share with visitors the benefits of forum law").

contract terms by setting minimum standards to protect the interests of consumers or other market actors. Those regulations ordinarily *promote* the justified expectations of consumers rather than violate them. In that sense, they *promote* freedom of contract rather than violate it. Consumer protection laws prevent businesses from offering products that are harmful or do not work as the consumers think they will. Rather than interferences with freedom, such laws promote freedom by giving consumers the security of knowing they will not be cheated when they enter the marketplace.

Again, this does not mean that we should never enforce choice-of-law clauses or that we should automatically choose the law of the state that eschews consumer protection or mandatory terms. It does mean that conflict of laws analysis of contracts cases is incompetent if it does not recognize the legitimate interests of both states and both parties and then give a reason for going one way or the other that does not deny the interests on both sides. Mere invocation of the justified expectations of the parties to justify choice of the law of the state that enforces the contract as written fails to acknowledge that the state that interprets the contract differently does so *precisely in order to protect justified expectations*. It merely finds those expectations to be based on something other than the four corners of a written agreement.

The same is true for property and procedure. The situs rule for real property is often justified by the need to have clear title so that owners can use and transfer their land. But property conflicts usually arise because another state has legitimate interests in applying its law as well.<sup>40</sup> That state may be the domicile of the owner or the place where a relationship is centered or the contract made. For example, when a married couple domiciled in New Jersey divorces while owning real estate in both New Jersey and Pennsylvania, application of the law of the situs may result in a division of the marital property that is not deemed fair by the standards of *either* New Jersey or Pennsylvania. The situs' interest in clarity of title can be satisfied in such cases simply by ensuring that the property is transferred by deed and the deed recorded at the situs. Laser-like fixation on the interests of the situs prevents us from seeing the overriding interests of the marital domicile in gender equality and protection of justified expectations. And while most procedural issues will be governed by the law of the forum, we have come to classify many traditionally "procedural" rules as substantive for choice-of-law purposes, such as marital privileges, burdens of proof, statutes of repose, and even statutes of limitation. Therefore, it may be appropriate to ignore the interests of the forum in preference to the law of place that governs the substantive aspects of the case.

All this means that the first step in any conflict of laws case is to analyze *charitably* the potential interests of both states and the entitlements

---

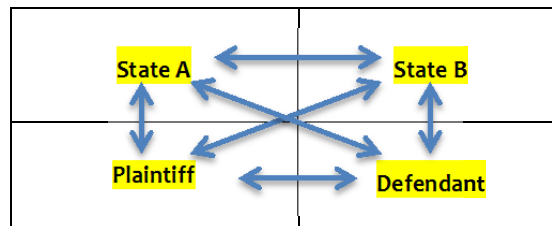
40. See Joseph William Singer, *Property Law Conflicts*, supra note 4, at 132 (2014).

of both parties. Simplifying the case by overlooking the legitimate interests of one of the states or one of the parties is exactly what we should not do if we want to achieve justice in multistate cases.

### B. Mapping Conflicts of Law

How can we avoid one-sided analysis? We can do that by mapping the case to ensure we have thought of the interests of both states and the rights of both parties, as well as the relationships among them. There are four boxes to fill and six relationships to consider.

FIGURE 1



At the most basic level, this simple diagram reminds us to look at what each state is trying to achieve by its law and what rights each party claims based on their connections with the two states. Beyond that, it suggests we consider three types of relationships and three sets of norms. First, we consider the relations between the states. Which state should defer to the law of the other state? The state-to-state relationship is where we consider the norm of *comity*. Second, we consider the relations between each of the parties and each of the states. Why might the plaintiff have a claim to the protection of state A's law and a right not to be regulated by state B? Why might defendant make the opposite arguments? Third, we consider the relationship between the parties. The party-state relationships and the party-party relationship are where we consider the norms of *fairness* and *substantive justice*. Which entitlement should prevail and which should give way? Which party has the better argument for the benefit of one state's law or for being protected from the law of the other state? Which choice minimizes unfairness if it cannot be avoided entirely? Whose rights should prevail? What is the just result in a case like this that crosses borders?

Although a simple model like this may seem obvious, analysis of cases like *Bryant* and *Schultz* shows that it is surprisingly easy for judges to engage in one-sided analysis that fails to recognize the legitimate interests of both states and both parties. Simple mapping may be all that is needed to remind decision makers about the two-sided nature of the controversy.

TABLE 1

State A	State B
contacts	contacts
law	law
policies	policies
state interests	state interests
party rights	party rights

The above diagram is a simplification of the standard methodology that asks us to look at the contacts with each state, their respective laws, the policies behind those laws (i.e., the goals they seek to achieve and the rights and liberties they seek to protect), the *interests* the states have in applying their policies to the contacts in this case, and the claims each party might make that they are *entitled* to protection of one state's law and have a right to be free from the regulation of the other. The contacts, laws, and policies tell us the content of each state's law. The real analysis is done through consideration of state interests and party rights. State-interest analysis tells us the reasons a state has cogent and strong interests in applying its law in this case even though some contacts are in the other jurisdiction. Party-rights analysis tells us the reasons why a party may be entitled to the protection of one state's law and free from regulation by the other state.

Deciding the case requires *reasons* to be given for choosing one state's law over that of the other state. That usually requires some kind of statement about why one state's interests are strong or pertinent while the other state's interests are weak (or weaker) or less pertinent in the case at hand. It also requires a comparison of the rights of the parties with an explanation of why one party has an entitlement to the substantive protection of one state while the other has a just obligation to comply with that state's law. That suggests that we should understand the best arguments that could be made on both sides of the case and make a judgment about which resolution best promotes state sovereignty and rightful entitlements in a multistate system.



TABLE 2

State A	State B
consider why state A interests are strong and state B interests are weak	consider why state B interests are strong and state A interests are weak
consider why plaintiff has a right to the entitlements granted by state A and why this is not unfair to defendant	consider why defendant has a right to the entitlements granted by state B and why this is not unfair to plaintiff
<b>Decide</b> the case by expressing: <ul style="list-style-type: none"> <li>➤ <b>a holding</b> (when the fact law pattern is like X, apply Y law); and</li> <li>➤ <b>giving reasons</b> that could be accepted by the losing state and the losing party as a fair resolution of the case</li> </ul>	

Deciding the case after doing this analysis requires articulating a rule of law that identifies the law/fact pattern in the case, chooses the law to be applied, and justifies that choice by reasons that could or should be accepted by the losing party.

### *C. How to Recognize a False Conflict When You See One*

I have argued that the worst mistake one can make in analyzing a conflict of laws problem is to ignore the legitimate interests of one of the states or one of the parties. Luckily, that mistake can be avoided by the simple device of remembering that there are always four boxes one must check in doing a choice-of-law analysis: the policies of both states and the rights of both parties. Deciding the case and justifying the result requires reasons why one state's interests and/or one party's rights should prevail over the other.

This does not mean that we should avoid false conflicts analysis entirely. One of the most useful contributions of the modern approach to choice-of-law analysis is to recognize that sometimes only one state has a real or a legitimate interest in applying its law. In such cases, Brainerd Currie was right to argue that it is both irrational and unfair to apply the law of a state that has no interest in adjudicating the case. Luckily, we have enough experience with fact patterns in the courts to be able to identify some plausible false conflicts. There are three standard patterns that may reasonably be viewed as false conflicts: (1) certain *relationship*

or *common domicile* cases; (2) certain *lonely domicile* cases; and (3) certain *fortuitous injury* cases. Notice I say “certain” because it is important not to overgeneralize about these cases; not all cases in these categories constitute false conflicts. New facts may prompt us to distinguish the new case from these more typical ones.

1. *Relationship, or Common Domicile Cases*

The case that made false conflicts analysis a staple of choice-of-law theory is *Babcock v. Jackson*.<sup>41</sup> In that case, friends from New York traveled to Ontario where they had an auto accident.<sup>42</sup> Ontario, but not New York, prohibited suits by guests against hosts.<sup>43</sup> The standard argument for applying New York law is that Ontario is interested in protecting Ontario domiciliaries from suit by guests and in protecting Ontario insurance companies from fraudulent claims where friends lie to prove negligence that did not exist in order to recoup insurance funds. Since the case involves neither an Ontario defendant nor an Ontario insurance company, Ontario has no interest in applying its law. New York has an interest in compensation for its domiciliary because the consequences of not having compensation will be felt at home in the domicile. New York is interested and Ontario is not: *voilà*, a false conflict and an easy case.

This analysis assumes a couple of things: (1) that the Ontario guest statute represents a loss-allocating rule rather than a conduct-regulating one; (2) that Ontario has no interest in extending protective (immunizing) rights to nonresidents acting within its borders; and (3) that it would not be discriminatory to grant plaintiff a remedy under New York law when the court would deny such a remedy if either the plaintiff or the defendant were domiciled in Ontario. All three of these assumptions are problematic, but they are not serious enough to jettison the *Babcock* rule; they merely require us to understand it correctly.

First, consider the assumption that the guest statute is a loss-allocating rule rather than a conduct-regulating one. One might think this is the case because the rule in question *denies* liability rather than imposes it. If law is defined by the positivist idea of “commands of the sovereign,” then a law that fails to coerce anyone to do anything is not a regulatory law at all. But that argument should fail. Wesley Hohfeld taught us that a law that confers or recognizes liberty is as much a law as one that constrains conduct.<sup>44</sup> A *liberating* law is one that requires individuals to suffer harm that may result from the free actions of others.

Consider that guest statutes are exceptions from the usual obligation to act reasonably and to pay up if one is negligent; they liberate

---

41. 191 N.E.2d 279 (N.Y. 1963).

42. *Id.* at 280.

43. *Id.*

44. See Joseph William Singer, *The Legal Rights Debate from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 993.

hosts from fear of liability to their guests. One might well believe they are intended to “regulate” behavior by giving hosts incentives to help others. That is the purpose, for example, of Good Samaritan laws that protect people from liability if they try to help strangers in distress. It is also the purpose of charitable immunity laws like the one in *Schultz*, which was designed to promote charitable giving and ensure donations go to the persons the charities want to help rather than being diverted to other causes. Finally, remember the damage limitations laws of Colorado in the *Bryant* case; those laws were designed to promote business investment in Colorado by lowering the legal vulnerability businesses would face from negligent conduct.

This means that the *Babcock* guest statute situation is a fairly narrow one. The state that has a defendant-protecting law is not a disinterested state if its law is intended to promote commerce or charitable work, to protect individuals from unfair obligations, or to give incentives for desirable social activities such as economic competition, free speech, or religious practices. This does not mean that *Babcock* was wrongly decided; most scholars agree that any interests Ontario had in applying its law were weak to nonexistent. Guest statutes are not designed to increase tourism or promote business investment. Rather, they regulate relationships. And when the relationship is centered elsewhere, it promotes both comity and fairness to defer to the place where the relationship is centered. That makes *Babcock* a false conflict and correctly decided.

A similar case to *Babcock* is *Haumschild v. Continental Casualty Co.*,<sup>45</sup> where a Wisconsin couple was involved in an accident in California, and California (but not Wisconsin) had marital immunity.<sup>46</sup> That case, like *Babcock*, can reasonably be interpreted as a false conflict since marital immunity laws (like guest statutes) are not designed to promote tourism. Although California is not indifferent to the welfare of nonresidents, their marital immunity laws are not directed at nonresident couples whose states are perfectly happy to have them sue each other.

It is important to understand, however, that the *Babcock* false conflicts analysis does *not* reasonably extend to cases like *Bryant* or variations on *Bryant*. *Bryant* may or may not have been correctly decided, but it was *not* a false conflict. When a law protects defendants by limiting their liability (through statutes of repose or damage limitations or short statutes of limitation) and thus promotes business investment, it cannot be characterized as a mere “loss-allocating” rule; rather, it is intended to apply to the defendant’s conduct by liberating the defendant from liability. For that reason, it is a mistake to talk about a “common domicile rule” that emerges from the *Babcock* case. When the defendant-protecting rule is intended to promote business investment or other activity, or is intended to protect the defendant from what is seen as an un-

---

45. 95 N.W.2d 814 (Wis. 1959).

46. *Id.* at 815.

fair obligation, then the defendant-protecting law of the place of conduct and injury has an interest in applying its law, and the *Babcock* rule should not apply. That does not tell us how such cases should be decided, just that they are not false conflicts.

A similar observation should be made about reverse *Babcock* cases where the conduct and injury occur in a plaintiff-protecting state and the common domicile or relationship is centered in a defendant-protecting one. That was the situation in *Schultz*. The reason *Schultz* was so controversial was because it was patently unreasonable for the New York Court of Appeals to characterize its plaintiff-protecting tort law as merely “loss-allocating.”<sup>47</sup> The New York law was reasonably intended to induce the Boy Scouts to engage in more careful monitoring of its Scoutmasters and to act to protect boys from sexual abuse if they came to New York. New York cannot claim it is disinterested in criminal activity within its borders merely because the victim is from elsewhere.

New York had strong interests in deterring sexual abuse within its borders and giving civil recourse to a victim, regardless of his domicile, who suffered such abuse in New York. That does not mean that New York law necessarily should have been applied; after all, the relationship was centered in New Jersey and it appeared that no New Yorkers were put at risk, as they might have been if the case involved negligent driving on the roads. There was an argument that New York should engage in comity by deferring to the law of the place where the relationship was centered. But that argument was based on the idea that New Jersey interests outweighed New York interests, not that New York had no interest in applying its law.

There is no consensus about the question of whether negligence liability regulates conduct in car accident cases. Some courts find it natural to assume that negligence liability is intended to induce safe driving; the well known case of *Hurtado v. Superior Court* holds as much.<sup>48</sup> But other cases such as *Saharceski v. Marcure* hold the opposite.<sup>49</sup> That means that in reverse *Babcock* cases, one must climb a higher mountain to convince the court that the conflict is a false one. For that reason, I tend to think of the *Babcock* rule as focused on promoting certain types of social relationships by limiting liability rather than as simple “common domicile cases.” Many common domicile cases are true, rather than false, conflicts. I have argued that this can be true either when the law of the common domicile is a defendant-protecting one (as in *Schultz*), or when it is a plaintiff-protecting one (as in *Bryant*).

The second problem with the *Babcock* rule is the problem of discrimination. We have learned to worry about this problem because of the

---

47. *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 686 (N.Y. 1985).

48. 522 P.2d 666, 672 (Cal. 1974).

49. 366 N.E.2d 1245, 1252 (Mass. 1977).

scholarship of Professor Lea Brilmayer.<sup>50</sup> Is it unfair to deny immunity to nonresident defendants when resident defendants would get the benefit of Ontario law? Is it discriminatory to give the plaintiff a remedy when the defendant is a New Yorker but not when the plaintiff is a resident of Ontario? And is there anything wrong with applying New York law to New York defendants and Ontario law to Ontario defendants when all claims arise out of the same accident?<sup>51</sup> If the answer is yes to any of these questions, then interest analysis is a bust, and we need to return to seemingly “neutral” rules like applying the law of the place of the injury no matter what it is. Without rehearsing all the arguments one might make on the subject, the modern consensus seems to be that the domicile of the parties can be a relevant contact in cases involving torts, contracts, and property. That is one of the modern innovations that has stuck and convinced most scholars. That is because the consequences of many actions are felt at the domicile and governments care about harms to their people especially if the harm took place at the domicile or the conduct foreseeably caused harm there. And if domicile is relevant to choice-of-law determinations, that means that sometimes it might tip the balance one way or the other. The only way to avoid the discrimination issue is to go back to the First Restatement’s insistence that domicile is not a contact that is relevant to choice-of-law determinations in cases that are not about “status.”

But the problems with that way of thinking are legion. *Babcock* really is a case where the New York forum had no good reason to apply Ontario law just to avoid a discrimination claim. New York had good reasons to give the New York plaintiff a remedy against the New York defendant and *no good reason not to do so*. And if that is so, it is not unreasonable to imagine a New York court going the other way and applying Ontario law if the defendant is domiciled in Ontario, on the ground that an Ontario resident driving at home has the right to the protections of Ontario law while a New Yorker has no right to drag his home state’s law along with him to another jurisdiction, thus subjecting the defendant to liability he would not have under his home state’s law. That brings us to the case of the *lonely domicile*.

## 2. *Lonely Domicile Cases*

When the only contact with one of the jurisdictions is the fact that one of the parties lives there, we ordinarily will find that state to have no legitimate interest in applying its law in a multistate case. In one pattern, the plaintiff travels to another state which has a defendant-protecting law. Examples include *Cipolla v. Shaposka*<sup>52</sup> and *Foster v. Leggett*.<sup>53</sup> In

---

50. Brilmayer, *Shaping and Sharing*, *supra* note 8 (focusing on the question of discrimination against nonresidents).

51. *See, e.g.*, *Edwards v. Erie Coach Lines Co.*, 952 N.E.2d 1033 (N.Y. 2011).

52. 267 A.2d 854 (Pa. 1970).

53. 484 S.W.2d 827 (Ky. 1972).

*Cipolla*, friends were traveling from the defendant-protecting state of Delaware (which had a guest statute) to the plaintiff-protecting state of Pennsylvania.<sup>54</sup> Because the defendant lived in the defendant-protecting state and the plaintiff lived in the plaintiff-protecting state, we have what looks like a true conflict. In such cases, it is not unreasonable to suggest that the result should differ depending on where the accident takes place. If the plaintiff goes to the defendant-protecting state and gets in the car with the defendant, one would think the defendant would have the right to the protective law of his home state, and the plaintiff has no right to drag his home state's law with him and impose on the defendant a legal obligation he does not have at home. Conversely, when the defendant travels to a plaintiff-protecting state, as in *Hall v. University of Nevada*,<sup>55</sup> one would expect the plaintiff to have the right to the protection of his home state's law and the defendant to be unable to drag his immunizing law with him when he travels to a plaintiff-protecting state.

Once again, such cases make sense when the *only* contact one of the parties has is with the state of his domicile, and the pattern is one that normally accompanies true conflicts (plaintiff lives in a plaintiff-protecting state and defendant lives in a defendant-protecting state). If we add more contacts or reverse the laws, all of a sudden we have cases that are much more complicated. For example, *Cipolla* itself involved a trip from Delaware to Pennsylvania.<sup>56</sup> To apply the lonely domicile rule mechanically would mean that the case should come out differently based solely on the location of the accident. If it happens in Delaware, the defendant is immune; if it happens in Pennsylvania, the plaintiff has a claim. That means the outcome would be different depending on whether the accident happened early in the trip (in Delaware) or late in the trip (in Pennsylvania). But it is not clear why that makes sense. The place of the accident is an accident; it is fortuitous. The fact that Pennsylvania was the *destination* makes the case *different* from a case where the defendant was simply driving around at home, never left his home state, and did not intend to do so either. Deciding to drive *from* Delaware *to* Pennsylvania makes Pennsylvania a relevant contact that must be taken into account. The airline crash cases have agreed that the departure and destination are relevant contacts for choice-of-law purposes.<sup>57</sup>

A similar argument can be made about *Foster v. Leggett*, where an Ohio defendant was driving on Ohio roads with a Kentucky guest.<sup>58</sup> What justified the court in applying the plaintiff-protecting law of Kentucky rather than the Ohio guest statute was that the defendant had a residence in Kentucky (although domiciled in Ohio), the parties had a dating rela-

---

54. *Cipolla*, 267 A.2d at 855.

55. 141 Cal. Rptr. 439, 441 (Ct. App. 1977).

56. *Cipolla*, 267 A.2d at 855.

57. See, e.g., *In re Air Crash Disaster at Wash.*, D.C. On Jan. 13, 1983, 559 F. Supp. 333, 343-44 (D.D.C. 1983) (adopting the analysis of Professor Reese); Willis L. M. Reese, *The Law Governing Airplane Accidents*, 39 WASH. & LEE L. REV. 1303, 1311-12 (1983).

58. *Foster*, 484 S.W.2d at 828.

tionship, and that relationship was centered in Kentucky.<sup>59</sup> Kentucky was not a “lonely domicile” state; it had important contacts *other than the plaintiff’s domicile*.<sup>60</sup> It would be a mistake to simplify the case and apply a “lonely domicile rule.”

Similar difficulties arise if we reverse the laws and create a typical unprovided-for or no-interest case. When the plaintiff lives in a defendant-protecting state, as in *Hurtado v. Superior Court*,<sup>61</sup> and travels to a plaintiff-protecting state like California and is injured there, it is sensible to view the plaintiff’s domicile as having no interest in applying its law. Damage limitations laws are intended to protect defendants from ruinous liability or to promote economic activity. But the defendant was domiciled in California and was driving at home.<sup>62</sup> The defendant cannot be unfairly surprised by application of California law, and it would be discriminatory to deny the nonresident plaintiff a remedy. This is so whether we view the California law as conduct regulating or loss allocating. The plaintiff’s domicile has no interest in having its resident *not recover*. *Hurtado* is sensibly viewed as a false conflict.

The same cannot be said when the plaintiff travels to a plaintiff-protecting state from her residence in a defendant-protecting one. Such cases are hard rather than easy. *Erwin v. Thomas* applied the law of the place of the accident (Oregon) when it granted plaintiff a remedy even though the plaintiff’s domicile would not grant her a remedy for loss of consortium.<sup>63</sup> Traditional analysis suggests neither state is interested in applying its law because plaintiff comes from a defendant-protecting state, defendant comes from a plaintiff-protecting one, and the law at the place of the accident is an immunizing law (like that in *Haumschild* and *Babcock*) not intended to induce tourism or business investment. Although Brainerd Currie thought that the forum should adjudicate such cases by applying forum law, Larry Kramer has argued the case should be dismissed (with the defendant winning) since no state gives the plaintiff a remedy.<sup>64</sup>

I have argued, in contrast, that the defendant’s domicile has an interest in making its residents pay their debts even if tortious rather than contractual in nature—even if they were incurred in another state that would not recognize those obligations.<sup>65</sup> I reject versions of interest analysis that see states as only interested in helping their residents rather than also having interests in regulating them and making them treat oth-

---

59. *Id.*

60. *Id.* at 829.

61. 522 P.2d 666, 672 (Cal. 1974).

62. *Id.* at 668–69.

63. 506 P.2d 494, 496 (Or. 1973).

64. Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176; Larry Kramer, *The Myth of the “Unprovided-For” Case*, 74 VA. L. REV. 1045, 1065–74 (1989); see also Brilmayer, *Interstate Federalism*, *supra* note 8, at 969 (arguing that the burden is on the plaintiff to find a law that grants a recovery).

65. Singer, *Facing Real Conflicts*, *supra* note 4, at 211–17.

ers justly.<sup>66</sup> In effect, the defendant has money in the bank that the defendant's domicile believes belongs to the plaintiff even if the plaintiff's residence thinks not. The case would be different if the rule in question were intended to "liberate" by inducing travel or investment, but denial of loss of consortium hardly fits that model. One might argue that the forum should not impoverish its own resident defendant to benefit a plaintiff who has no remedies under the law of her state; why hurt your own citizens to help someone whose state thinks she deserves nothing? But one could easily argue the opposite, based on the reasoning of *Hurtado*. The place of the accident may protect defendants from such liability, but that does not mean the defendant's domicile is therefore obligated to come to the same conclusion. The defendant's domicile may view the plaintiff as having a rightful claim against the defendant's assets, especially when the defendant-protecting law of the place of the accident seems not to be a conduct-liberating rule designed to promote investment there. The point here is not to determine a final resolution of the case. *Erwin*, at least in my mind, is a much harder case than *Hurtado*, which is the quintessential lonely domicile case involving a plaintiff from a defendant-protecting state and legitimately viewed as a false conflict.

### 3. *Fortuitous Injury Cases*

We often see the argument that the place of the injury is not relevant in torts cases because it is fortuitous. No one plans to have an accident, and they certainly do not plan to have it in a particular state. That argument, baldly stated, states too much. People buy insurance based on expected liabilities, and they may well take into account both the places where they live and act, and what their tort laws are in determining how much insurance to buy. Certainly insurance companies take into account state laws when they set premiums. The idea that the place of injury has no relevance because of its fortuity is a vast overstatement.

But there is one pattern where the place of the injury should indeed be characterized as irrelevant for choice of law purposes. That happens when defendant acts in a plaintiff-protecting state and the only contact with the defendant-protecting state is the fact that the accident occurred there. *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.* involved a bar in Washington, D.C., that served liquor to a patron who drove to Maryland and injured plaintiffs who were also D.C. residents.<sup>67</sup> All contacts were with the District of Columbia except the accident, and the District of Columbia had a plaintiff-protecting dram shop act, making the tavern liable for serving liquor to an intoxicated patron and helping cause the accident.<sup>68</sup> The fortuity that the accident occurred in Maryland should not

---

66. See Brilmayer, *Shaping and Sharing*, *supra* note 8, at 397 (interpreting interest analysts as only "thinking of responsiveness to the inhabitants of the forum").

67. 534 A.2d 1268, 1269–70 (D.C. 1987).

68. *Id.* at 1270.



alter the case in any way. Maryland's refusal to impose liability on the tavern is intended to protect Maryland taverns, and the D.C. tavern cannot expect to benefit from that law.

The only way to find Maryland interested in applying its law is if one believes protecting taverns from liability places all the burden on the drunk driver and adds sufficient incentives not to drink and drive, such that one could view the Maryland law as a conduct-regulating one designed to deter drunk driving within the state by *not* putting liability on taverns. That proposition arguably passes the straight-face test;<sup>69</sup> one could plausibly claim that placing full liability on drunk drivers might have added deterrent effects on them and promotes suits against the drivers rather than "deep pocket taverns." On the other hand, the straight-face test is a low bar. States that refuse to impose tavern liability usually do so because they do not view the bar as the proximate (or moral) cause of the harm, or they do not want bars to worry about potential liability for every drink they serve. If the usual way of interpreting the point of tavern liability laws (and tavern immunity laws) is valid, then Maryland has no interest in applying its law.

#### 4. *False Conflicts and True Conflicts*

I have argued that it is crucial to recognize the interests of both states and both parties. In this Part, I have explained that in *certain* patterns of cases, it is nonetheless reasonable to argue that only one state is really interested in applying its law. But I have also cautioned against coming to that conclusion too quickly or fashioning rules that are broader than they should be (therefore, treating cases as false conflicts when in reality both states have significant reasons to apply their laws to the case).

When a case is a false conflict, it is because one state has no legitimate interest in applying its law. When both states have a legitimate interest in applying their law, our task is to understand what those interests are and what rights they protect, and then give a reason for preferring the interests of one state and/or the rights of one party over those of the other. That is the subject of the next Part.

### III. JUSTIFICATION IN THE CONFLICT OF LAWS

#### A. *Public Reason*

We live in a free and democratic society that treats each person with equal concern and respect, and seeks to act in accord with the rule of law. That is a mouthful, and it is even harder to figure out what it actually means in practice. But that does not mean it is meaningless drivel; our basic values of equality, freedom, and democracy have crucial conse-

---

69. The "straight face test" means one could make the argument in court without laughing.

quences for the rule of law, and they do put certain things off the table. One of the core requirements of a society that respects the equal dignity of each person is to consider each person's welfare equally when a decision about a rule of law needs to be made.

Philosopher Rainer Forst has argued that the most basic entitlement a person has in a free and democratic society is the right to justification, i.e., the right to be given a reason for being asked to suffer a burden.<sup>70</sup> John Rawls has called this the idea of "public reason."<sup>71</sup> There is a vast literature trying to figure out what this means and how "neutral" it can be. What matters is that there is an underlying agreement among political philosophers: governments that respect individuals as equals cannot simply act as they please. And the most important check on tyrannical laws is a combination of democratic procedures creating electoral accountability and a practice of justifying laws in ways that could or should be accepted by all persons, no matter their situation or station.

This norm has consequences for choice-of-law theory. It means that application of a seemingly neutral rule, like "apply the law of the place of injury," does not satisfy the basic requirements of public reason unless additional justifications are given to explain *why* the place of the injury has a better claim to regulate the case than other states which also have relevant contacts with the injury. While it is true that a place of injury rule is neutral between the parties, so is a rule that allows the person whose last name is first in the alphabet to win. The place of the injury is a criterion, but in the absence of reasoning and justification, it is not a *relevant* criterion for deciding a case.

That is why modern choice-of-law analysis is so important and such a valuable contribution to jurisprudence. It brought norms underlying public reason, the rule of law, democratic theory, and the idea that "all [persons] are created equal" into the conflict of laws system. Attending to the policies of the states, their interests in applying those policies in multistate cases, and the rights and liberties of the parties under the laws of the several states is a prerequisite to a decision that can be justified to those affected by it. That is why the modern choice-of-law revolution succeeded in displacing the First Restatement, and it is why it was such a great accomplishment.

---

70. RAINER FORST, JUSTIFICATION AND CRITIQUE: TOWARDS A CRITICAL THEORY OF POLITICS 1–13 (Ciaran Cronin trans., Polity Press 2014) (2011); RAINER FORST, THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE 1–3 (Jeffrey Flynn trans., Columbia University Press 2012) (2007).

71. JOHN RAWLS, POLITICAL LIBERALISM 212–54 (2d ed. 1996); see also ERIC MACGILVRAY, RECONSTRUCTING PUBLIC REASON 1–17 (2004); Eduardo M. Peñalver, *Is Public Reason Counterproductive?*, 110 W. VA. L. REV. 515, 517–23 (2007).

*B. Substantive Justice: The Role of “Better Law”*

I have argued in the past that the forum should generally apply its own law on the ground that its rule is what the forum considers the just outcome.<sup>72</sup> However, I have also argued that forum law should sometimes be displaced for reasons of comity or fairness. A forum law presumption is not popular among conflicts scholars or judges. It is the law in two states (Kentucky and Michigan) and was Brainerd Currie’s solution to true conflicts.<sup>73</sup> Professor Louise Weinberg, at least, has been a champion of forum law.<sup>74</sup> Whether or not one agrees that a forum law presumption is appropriate, it is important to note that it is a form of the “better law” approach created by Robert Leflar which has been adopted to some extent in five states (Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin).<sup>75</sup> Application of forum law can be justified on the ground that it is the substantive result the forum considers fair and should be displaced only for compelling reasons, such as preventing unfair surprise to the defendant or deferring to the ability of another state to regulate events centered there and important to its economy or social relations.

It remains one of the great puzzlements to me why “better law” remains so controversial. On one hand, I understand that it may appear parochial and nonneutral. Judging which law is “better” denigrates the law of the state whose law is judged worse and arguably fails to treat sovereigns equally. That is especially a problem when one declares forum law to be better; the conclusion seems to be self-congratulatory and suspicious. On what grounds is such an announcement made? Because no federal law adjudicates the matter, the announcement that one state’s law is better smacks of hubris on the part of the judge. Worse still, if the issue is based on common law, choosing the law of another state is silly; the court should change forum law to the better rule and the conflict will disappear. If the forum is declaring its own statute to be worse than that of another state, how is that justified in democratic terms where judges are supposed to apply statutes unless unconstitutional? For these reasons (and others) there is a strong intuition among many conflicts scholars that “better law” is either irrelevant or pernicious as a way of adjudicating choice-of-law issues.

This assumption is unwarranted. *All* modern approaches to conflicts issues include consideration of better law; they just call it something else. To begin with, the Second Restatement favors plaintiff-protecting poli-

---

72. Singer, *Facing Real Conflicts*, *supra* note 4, at 198–206.

73. *Foster v. Leggett*, 484 S.W.2d 827, 829 (Ky. 1972); *Olmstead v. Anderson*, 400 N.W.2d 292, 302 (Mich. 1987); Currie, *supra* note 64, at 176.

74. See, e.g., Louise Weinberg, *Against Comity*, *supra* note 6, at 87–88; Louise Weinberg, *On Departing from Forum Law*, *supra* note 6, at 595, 596.

75. Symeon C. Symeonides, *Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey*, 62 AM. J. COMP. L. 223, 282 tbl. 2 (2014).

cies.<sup>76</sup> Section 6 clearly refers to “basic policies underlying the field of law” as one of the relevant factors in deciding which law to apply.<sup>77</sup> Section 145 comment b notes that compensation and deterrence “underlie the tort field”<sup>78</sup> and many courts have found likewise. Those policies suggest that the court can reasonably choose the law that favors the plaintiff when it conflicts with a law that would provide less compensation or less deterrence.<sup>79</sup>

Similarly, the Restatement identifies “justified expectations” as crucial to the areas of contracts and property and then interprets that to suggest a preference for freedom of contract.<sup>80</sup> This preference counsels against choosing a law that “regulates” the contract by imposing mandatory terms.<sup>81</sup> The Restatement argues that where parties do not choose the applicable law or otherwise think about it, “it may at least be said, subject perhaps to rare exceptions, that they expected that the provisions of the contract would be binding on them.”<sup>82</sup> Moreover, choice-of-law clauses are enforceable in most instances with the exception of clauses that violate a “fundamental [public] policy.”<sup>83</sup> Thus, although there are limits to the principle, the Second Restatement expresses a preference for the law that refuses to mandate the terms of contracts but, rather, enforces their terms no matter what they are.<sup>84</sup> Since those seeking to enforce contracts usually bring breach of contract claims, here too the Restatement (and the courts) prefer plaintiff-protecting policies.

Courts have embraced these substantive norms with a vengeance. Dozens of cases recite that the basic policies of tort law are compensation and deterrence, making a plaintiff preference commonplace in torts choice-of-law decisions. Similarly, nearly every choice-of-law case involving contracts, whether or not it involves a choice-of-law clause, embraces a preference for enforcing contracts as written, rather than applying laws that invalidate agreements or that regulate their terms. On the other hand, torts cases rule for defendants when application of plaintiff-protecting law would cause unfair surprise to the defendant; that in turn seems to effectuate a “basic policy” of the field by denying liability if the defendant is not morally responsible for the harm because it could not foresee that its conduct would violate its legal duties. Even the First Restatement contained an exception to the place of injury rule for a defendant who acts in reliance on an immunizing law, and the Second

---

76. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. b (1971).

77. *Id.* § 6(2)(e).

78. *Id.* § 145 cmt. b.

79. *Id.*

80. *Id.* §§ 6(2)(d), 145 cmt. b, 188 cmt. b.

81. *Id.* (noting the importance of protecting the “justified expectations of the parties” and asserting that “subject perhaps to rare exceptions, [the parties] expect[] that the provisions of the contract would be binding upon them”).

82. *Id.* § 188 cmt. b.

83. *Id.* § 187(2)(b) (applying the law chosen by the parties with a potential exception for issues concerning “fundamental [public] policies”).

84. *See id.* §§ 6, 187.

Restatement's reference to the justified expectations of the parties would seem to counsel a similar concern.<sup>85</sup>

All of this means that, in the important areas of torts and contracts, the modern approach embodied in both theory and practice does not in any way eschew consideration of the better law—quite the contrary. In fact, it suggests a preference for application of plaintiff-protecting policies in torts because they promote compensation and deterrence, and it shows preference for enforcement of choice-of-law clauses (with some exceptions) because they promote the justified expectations of the parties. These plaintiff-favoring policies have been so influential in modern conflict of laws that they have led some courts to engage in one-sided analysis, as I have shown. The focus on compensation and deterrence led the *Bryant* court to fail to recognize Colorado's interest in protecting defendants doing business there from ruinous liability which is unnecessary to achieve the purposes of tort law. It also has led some courts to ignore the interests of states that regulate contracts to protect the legitimate expectations of contracting parties or to avoid harmful economic effects.<sup>86</sup>

At the same time, the vast majority of courts will not allow choice-of-law clauses to enable sellers of products to evade the consumer protection laws of the consumer's domicile when the consumer makes the contract there (by phone or Internet or otherwise), and the product is shipped to or sold at the consumer's domicile. In such cases, the “better law” seems to be to limit freedom of contract to protect the consumer's justified expectations that the product will work and be safe, regardless of what the contract says. Although it is not clear whether consumer protection laws satisfy the Second Restatement's notion of a “fundamental [public] policy,” certainly the courts have come to a consensus that choice-of-law clauses are not enforceable if they waive the protections of the consumer protection law of the consumer's domicile when the product is shipped there or the transaction took place there. Thus, in consumer protection cases, we see a substantive preference for the regulatory law of the consumer's domicile if the transaction also occurs there. Again, an assumption about what is the “substantively just” result seems to drive these cases.

Moreover, as Dean Symeonides has shown, when conduct and injury are in different states, courts ordinarily apply the law that favors the plaintiff.<sup>87</sup> When the place of the injury has a plaintiff-protecting law, that jurisdiction has strong interests in protecting its people from harm created by actions over the border, and the place of the conduct has no legiti-

---

85. *Id.* § 6(2)(d).

86. Examples include franchise cases where courts downplay the regulatory interests of state laws that regulate franchise agreements to protect basic rights of franchisees. *See, e.g.,* Tele-Save Merch. Co. v. Consumers Distrib. Co., 814 F.2d 1120, 1124 (6th Cir. 1987).

87. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(d)(2) (1971) (referring to the “protection of justified expectations” as a factor relevant to choice-of-law determinations); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 382(2) (1934) (“A person who acts pursuant to a privilege conferred by the law of the place of acting will not be held liable for the results of his act in another state.”).

mate claim to immunize its citizens from liability for actions that cause harm in a plaintiff-protecting state. Hobbes taught us that the first function of government is to protect us from violent death.<sup>88</sup> The place of the injury that seeks to protect its people therefore has a strong claim to apply its victim-protecting law to harms suffered there. The only exception to this principle is when the harm was fortuitous, and the defendant could not have foreseen that it would occur at the place of the injury. In such cases, it is possible that the case represents a tragic conflict, and protection of the justified expectations of the defendant *might* outweigh the rights of the plaintiff to the protective law of her home state.

Conversely, when the defendant acts in a plaintiff-protecting state and accidentally (but foreseeably) causes harm in a defendant-protecting state, the courts ordinarily apply the law of the place of conduct rather than the place of injury. They do so either because the case represents a false conflict (the defendant could not have relied on application of the defendant-protecting law of the place of injury if it does no business there), or because the place of conduct has interests in regulating negligent conduct within its borders. These interests arise because any resulting harm *could* have happened at the place of conduct, or because the place of conduct has interests in making actors within its territory provide a remedy for those that they negligently harm wherever located. In these cases, the only argument for applying the defendant-protecting law of the place of injury is that the plaintiff has no expectation of recovery, and it makes no sense to impoverish a resident defendant to help a plaintiff whose own state is happy to leave uncompensated. Whatever the reason, as Symeonides has shown (and enshrined in the statutes of two states), cross-border torts are usually adjudicated by application of the law that favors the plaintiff.

I teach conflict of laws by having students work through ten moot court problems, all of which represent classic “true conflicts.” They act as judges and as lawyers on both sides, engage in oral argument, decide the cases in their judicial roles, and write short memos explaining what law should be applied on each question. They end the semester with a full judicial opinion. Because I insist they mention the policies and interests of both states and the rights or entitlements of both parties, and then give reasons for choosing one set over the other, I have seen many versions of arguments that explain why the interests of one state outweigh those of the other. Many students try to use Restatement (Second) analysis and explain why the interests of one state are “stronger” than the other. When they do this, they generally employ one of two types of arguments to make their case. Often they resort to comparative impairment arguments—the default position and the overriding exception to the presumptively applicable choice-of-law rules in the Louisiana statute drafted

---

88. HOBBS, *supra* note 30, ch. 13, at 90 (“The Passions that encline men to Peace, are Feare of Death . . . .”); *id.* ch. 20, at 138 (“That men who choose their Sovereign, do it for feare of one another . . . .”).

by Dean Symeonides. Other times, they resort to better law and forthrightly explain why, in a hard case, one policy should prevail.

Most of my students agree with the academic consensus and think better law is anathema, so they tend to use comparative impairment analysis. Comparative impairment analysis is attractive to many students because it allows consideration of policy and avoids outright statements that one state's interest is "strong" and the other "weak." It seems to give a *reason* for finding a state's interest to be stronger than that of the other state (that it is more impaired if not applied here). Outright comparisons of the strength of state interests seem to rest on judgments about the importance of the interests fostered by each state and therefore seem to get too close to better law for students who want to avoid it. With comparative impairment, students can justify choice of a state's law because its policy is "more impaired" if not applied here than is the law of the other state. Such analysis has the flavor of cost/benefit analysis or economic analysis of law or utilitarian calculus where the goal is to "do the least harm" when harm cannot be avoided.

However, policies have to be *interpreted*, and in my experience, the students *shape the policies* of the respective states to explain why one state's policies are highly impaired while the other's are less impaired. For example, in a dram shop case, it is typical to argue that application of the plaintiff-protecting law of the place of injury does not impair the defendant-immunizing law of the place where the tavern is located because the tavern is already under a regulatory and/or criminal law obligation not to serve liquor to intoxicated patrons. Conversely, there are few resources the place of injury has for protecting its people from negligent taverns located out of state if they cannot apply tavern liability laws to regulate conduct that foreseeably causes havoc in the forum. This argument suggests that protection of people from harm is a very important policy, and that tort liability is only a minor change from the immunizing law of the place of conduct.

But students sometimes make precisely the opposite argument, noting that the place of the injury has lots of ways to protect its people from drunk driving other than holding the tavern liable. It can impose full liability on the drunk driver or increase its criminal law penalties for drunk driving, thereby increasing the cost of drunk driving. On the other hand, there is little the tavern can do to protect itself from frivolous lawsuits at the place of the injury. Dram shop laws do not impose strict liability on taverns; they generally require proof that liquor was served after the patron was visibly drunk and proof that this added liquor was the proximate cause of the harm—something that is very hard to prove given the fact that someone who was already drunk might have caused the harm anyway. Moreover, civil liability that puts an uninsured tavern out of business creates a burden far beyond regulatory enforcement or a criminal fine. The possibility of ruinous liability may force all taverns near the border to purchase insurance, thereby increasing the costs of doing busi-

ness and substantially undermining the protective policies of the tavern state's immunity rule. This version of the argument characterizes the state policies in a way that deems application of the dram shop liability law to constitute a substantial impairment of the defendant-immunizing policies of the place of conduct.

What matters here is not which interpretation is correct, but the fact that comparative impairment analysis is manipulable. That does not mean it is not useful; it means that judgment is required to determine which argument is more plausible. In practice, comparative impairment analysis cannot be cleanly disentangled from arguments about the nature of state policies. The weight, importance, and pertinence of state interests in the case at hand are judgments about which interest should, on balance, give way. Those judgments are, at base, *substantive* judgments. For that reason, it may not be surprising that my students who use comparative impairment analysis to justify their choice of law write papers that wind up being similar (although not identical) to the papers of students who forthrightly argue that one law should apply because it is the substantively just result or the presumptively applicable (better) policy. In the dram shop cases, for example, some students apply better law to argue that taverns should not generally be held responsible because they are not the "real cause" of the harm to the plaintiff, or they may argue the exact opposite, i.e., that taverns should compensate their victims when their negligent actions cause harm, especially when that harm materializes in a state that recognizes the negligent conduct for the negligence it is. *What is striking to me is the extent to which students make better law arguments without realizing it.* I often point out to them that they are doing this, and they are often sheepish about it. I suggest they should make other arguments if they really reject consideration of better law, or, alternatively, admit that better law is relevant in hard cases.

In my view, we should recognize that simply asserting that one state's interests outweigh those of the other is a presentable argument. When we hear such a statement, we often want to know *why*. However, normative arguments are often premised on evaluative assertions.<sup>89</sup> Fairness arguments depend on views about *the way the world should be*, the ways we should act, and the ways we should not act in relation to others.<sup>90</sup> Utilitarians seek to justify moral choices by regard to their consequences, and many legal scholars seek to quantify those consequences by reference to monetary values, and costs and benefits. But normative theories based on rights or virtues or fairness depend on *judgments* about the obligations we have to each other if we treat each person as free and equal, and we seek to construct a democratic society that enables the people to govern themselves. In a free and democratic society, judgments are made by law makers about relationships or conduct that is "subprime" and not

---

89. See Singer, *supra* note 2, at 958–68 (explaining the normative status of evaluative assertions).

90. See SUSAN NEIMAN, MORALITY CLARITY: A GUIDE FOR GROWN-UP IDEALISTS 19 (2008) ("Truth tells us how the world is; morality tells us how it ought to be.").



tolerated in a society that protects individual dignity.<sup>91</sup> Sometimes conflicts of law reflect such judgments.

If I argue that slavery is wrong because it denies both equality and freedom, one might profess skepticism and ask, “why should we care about those things?” But if someone made that argument today, we would not take them seriously. We start from the premise that freedom and equality are building blocks of our normative democratic system, and then we talk about how to interpret what they mean. One way we do that is to assert that a certain course of conduct violates those norms as we understand them or should understand them.

It may be helpful to supplement an argument that one interest outweighs another by comparative impairment analysis or by reference to better law. But it is also the case that we should not be embarrassed by a simple argument that the interest of the place of the injury in protecting its people from harm outweighs the interest of the place where the tavern is located in protecting them from the need to buy insurance. That simple statement is not unreasoned, parochial, or a denial of equal respect to the jurisdiction whose law is given less weight. It is a justification for choosing one law over the other that is consistent with the values of a free and democratic society.

When a case is hard—and any case is hard when two states have legitimate interests in applying their law—it is an answer rather than an evasion to *assert* that one interest outweighs the other. Sometimes we can give additional arguments about why one interest outweighs another. But sometimes we engage in the normative analysis first *by characterizing what the state interests and party rights are*. I have argued that it is proper to argue that, all other things being equal, democracies would do well to place protective interests for plaintiffs over immunizing interests for defendants, as long as application of the plaintiff-protecting law is not unfairly unforeseeable to the defendant. That is because the first job of government is to protect us from harm. That represents a better law argument, but it is also sufficiently neutral in the sense that it is based on shared norms of sovereign states that agree on the value of promoting the rule of law in a free and democratic society.

### C. *Multistate Justice: Public Reason Across Borders*

I have argued that choice-of-law analysis legitimately includes consideration of which outcome is substantively just despite the reservations of most judges and scholars. In some cases, it should even be outcome determinative. My own view is that it is arbitrary to decide *Cipolla* by reference to which side of the state line the accident occurs. I agree with the dissenting judge that better law is as valid a way to decide that case as using the place of the injury as a tie breaker. At the same time, no court

---

91. JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION (forthcoming Sept. 2015); Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1330–31 (2014).

or scholar makes better law the *only* criterion. Even Kentucky, which has a strict forum law rule, must depart from forum law when application of that law would be unconstitutional. And, although it is hard to find such a choice unconstitutional under the *Allstate* test, we know from *Shutts* that there are cases that would fall outside the constitutional norm.<sup>92</sup> What factors might lead a court to apply a rule of law it views as fundamentally unjust? That is the topic of the next and final Part.

I have in the past argued that the forum should generally apply its own law on the ground that that rule is what the forum considers the just outcome.<sup>93</sup> However, I have also argued that multistate cases are distinguishable from domestic cases because they involve contacts with states with other laws, those states have interests in applying their laws, and one of the parties may claim a right to the protection of the law of that other state. That means the two basic reasons for departing from forum law are *comity* and *fairness*.

The *comity* norm rests on the idea that the forum generally has the power to regulate its own people and its own affairs, but it should defer to the ability of other states to regulate events centered there, even if the forum thinks that other state is fundamentally misguided. That, after all, was the theory behind *Babcock* and *Haumschild*. Ontario might wish to protect its hosts from suit by its guests and might view that law as protecting the justified expectations of the parties and the rights of the defendant. But, a version of *Babcock* where the plaintiff foolishly sues in Ontario court might come out the same way as the actual case that was heard in New York. That is because Ontario might well conclude that its law was not designed to promote tourism or business investment, and a relationship centered in New York should be governed by New York law. That was one reason New York applied New Jersey law in *Schultz*. New York considered the New Jersey rule foolish, archaic, and even barbaric, but it deferred nonetheless, on the ground that New Jersey was the right state to regulate relationships centered there. Similar reasoning might lead a state that prohibits same-sex marriage to allow a spouse validly married in Massachusetts to visit his husband in the hospital in McLean, Virginia, even though Virginia law does not recognize him as a spouse.

The *fairness* norm rests on the idea that it is wrong to apply the law of a state if the defendant could not have foreseen that law applying to her. Indeed, this norm is so fundamental that it is enshrined in the *Allstate* test for constitutionality of choice-of-law decisions.<sup>94</sup> An example might be the personal jurisdiction case of *World-Wide Volkswagen v. Woodson*.<sup>95</sup> That ruling held that a New York retailer could not be sued

---

92. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Phillips Petrol. Co. v. Shutts* 472 U.S. 797 (1985).

93. Singer, *Facing Real Conflicts*, *supra* note 4, at 198–206.

94. *Allstate Ins. Co.*, 449 U.S. at 317–18.

95. 444 U.S. 286 (1980).

in Oklahoma just because the plaintiff drove the car there and was injured there.<sup>96</sup> But, can Oklahoma law be applied when the case is heard back home in New York? Both the First and Second Restatement have a presumption for the law of the place of injury, suggesting that Oklahoma law might well apply. Some Justices expressed the view in *Sun Oil Co.* that a conflicts rule must be constitutional if it is traditional.<sup>97</sup> That would suggest no problem with applying Oklahoma law in *World-Wide Volkswagen*.

But, Professor Linda Silberman long ago taught us that parties care less about “where they are hung than whether”;<sup>98</sup> it would be incoherent indeed to find it to be a violation of due process of law to haul the defendant into court in Oklahoma, but then perfectly constitutional to apply Oklahoma law to a local transaction between a New York seller and a New York buyer. It is at least arguable that a defendant-protecting law of New York should be applied over a plaintiff-protecting one of Oklahoma in order to avoid unfair surprise to the defendant and thus a kind of injustice.

Justice in multistate cases is thus both like and unlike justice in domestic cases. Multistate cases (those that involve contacts with more than one state) involve issues of substantive justice just as domestic cases do. And as I have shown, the substantive justice of the result is a factor both scholars and courts have found to be significant, and sometimes determinative, in adjudicating conflicts cases. On the other hand, as I have also shown, multistate cases are distinguishable from domestic cases because they involve costs that are absent from domestic cases. Those costs are (1) interference with the ability of another state to apply its laws and achieve its policies when they are relevant; and (2) potential unfairness that comes from applying a law to a person when they could not have known that law would apply to them.

For that reason, multistate justice is a compromise affair. That, however, does not make it incoherent. Justice is often a compromise affair; we often find ourselves seeking the least unfair result, rather than the unambiguously fair one.

For those who continue to worry about the seemingly open-ended nature of modern choice-of-law analysis, let me set your minds at ease. It is not always the case that judges must engage in a multi-faceted complex analysis even when cases are hard. That is because we now have sufficient experience with modern choice-of-law analysis to have generated presumptive rules to guide us. I have previously explained the types of cases that are likely to represent genuine false conflicts which should lead us to apply the law of the only state with a real interest in the matter. I also believe that Dean Symeonides has performed a remarkable service to the profession by generating reasonable presumptive rules to

---

96. *Id.* at 298–99.

97. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727–29 (1988).

98. Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978).

guide choice-of-law analysis. In my view, the best version of those presumptive rules is embodied in the Oregon conflict of laws statute Symeonides helped draft.<sup>99</sup> That statutory structure has its controversial aspects, and I do not necessarily agree with all of the resolutions of difficult problems it provides. But that statutory rule structure does provide an extraordinarily helpful reference point by which to measure the solutions we come up with ourselves. In any event, the Oregon rules have sufficient experience and justification behind them that a reasonable decision maker unversed in conflicts analysis would do well to follow them, unless she can explain why she has reached a result different from what those rules counsel.

Those Oregon rules are in line with my recommendations here. They embody Symeonides' useful method of creating fact/law patterns to give some order to choice-of-law cases and to systematize arguments and counterarguments in prototypical cases. They also embody comparative impairment analysis, and my experience with my students is that they usually find that to be the best and most persuasive way to argue that one state's interests "outweigh" those of the other state. The Oregon statute also embodies better law theory by allowing parties to choose the applicable law but limiting those choices to protect the rights of consumers.<sup>100</sup> It further embodies better law theory by choosing the plaintiff-protecting law (with some exceptions) when the conduct and injury are in different states.<sup>101</sup>

I am sometimes a critic of the conduct-regulating/loss-allocating distinction embodied in those statutes because many laws promote both types of policies. Still, it is useful to distinguish laws intended primarily to regulate conduct (by promoting reasonable conduct) or to liberate conduct (by removing legal impediments or liabilities) from laws primarily designed to shape the legitimate contours of relationships. Relationship shaping laws are usually best governed by the law of the place where the relationship is centered unless the place of conduct and injury has interests that override the interests of the parties' domicile. The Oregon statutes agree with that premise and ask us to consider the relative interests of both the place where a relationship is centered and the place of the accident. The presumptive rules in the Oregon laws are a vast improvement over the First Restatement rules, and we never would have known about them if the modern choice-of-law revolution had not occurred. Conflict of laws is hard, but thanks to the wisdom and experience of my colleagues, especially Dean Symeonides, we also have some guidance through treacherous waters.

---

99. See ORE. REV. STAT. §§ 15.300–15.460 (2013).

100. See *id.* §§ 15.320, 15.330.

101. See *id.* §§ 15.440–15.445.

## IV. CONCLUSION

Choice-of-law methodology has improved markedly since the modern era. We have done a good job to focus on state interests and the rights of the parties, rather than abstract notions of vested rights that fail to consider the legitimate claims of all relevant actors. At the same time, modern analysis is not perfect. The biggest problem with current scholarship is its failure to appreciate the relevance and importance of better law. The biggest problem with choice-of-law analysis in the courts is the tendency of some judges to engage in one-sided analysis that fails to adequately consider the interests of both states and both parties.

Judges can be forgiven for their shortcomings. They adjudicate too few choice-of-law cases to have a sense of the whole field. That causes them to overgeneralize and to oversimplify cases. The best antidote to this is emphasizing the importance of understanding the interests of both states and the entitlements of both parties, and then asking courts to give reasons why one should prevail over the other—reasons that might be accepted by the losing side. Those reasons are likely to focus on the question of which state should defer to the other (comity) and which party has the greater claim to the entitlement of the protection of one state's law (fairness). Sometimes those reasons will focus on achieving what the forum views as the substantively just result (better law). Focusing on the question of *why* one state should prevail and the other state give way and *why* one party's rights should give way to those of the other party will allow us to better understand and shape the rules governing choice-of-law determinations. Courts who do not want to engage in such nuanced, focused analysis would do better to simply read the Oregon statute and apply the presumptive rules outlined there.

Scholars, on the other hand, would do well to recognize and acknowledge that justifications about which state's policy should give way often focus on achieving substantive justice, even when phrased in terms of figuring out which state has the most significant relationship with the case or which state's policies are most impaired if not applied. But, choice-of-law justifications also sometimes focus on the idea of allowing states to regulate relationships centered there, regulating harmful conduct that occurs there, or protecting parties from injury or unfair surprise. The choice-of-law system is built on recognition of state interests and party rights, and justification for the choice based on considerations of substantive justice, comity, and fairness. The sooner we recognize the relevance of substantive justice (or "better law"), the sooner we can give it its proper place alongside comity and fairness in understanding and adjudicating conflicts of law. The sooner we recognize conflicts of law as the conflicts they are, the better off we will be and the more just our resolution of multistate cases will be.

