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David P. Currie*

Not many years ago it would have been exciting news that the Supreme Court of California had rejected traditional learning and resolved a wrongful death choice-of-law problem by analyzing state interests. Today it would be surprising if that court treated such a case in any other way. It is true that some states have squarely repudiated the new learning.¹ But interest analysis has been explicitly employed by the highest courts of New Hampshire, New York, Oregon, Pennsylvania, and Wisconsin, as well as by some of the federal courts,² and this list is not meant to be exhaustive. Therefore even the news that another state had for the first time employed the interest analysis would be little more earth-shaking than word that still another state had adopted a long-arm statute; and California had long since joined the parade in the early and important case of *Bernkrant v. Fowler*.³

But the decision in *Reich v. Purcell* does afford an opportunity for invidious comparisons between the choice-of-law records of two of our most influential courts, the highest courts of California and of New York. The New York Court of Appeals, in its familiar decision in *Auten v. Auten*,⁴ was among the very first to break cleanly with Mr. Beale's fetters by announcing that it would consider not one, but all contacts, and its *Babcock v. Jackson*⁵ was a pioneer of interest analysis. Yet since *Auten* the New York court has hopped frenetically from theory to theory like an overheated jumping bean: from high-handed manipulation of the traditional procedure and public policy doctrines⁶ to a robotish totting up of contacts without

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¹ See, e.g., *Landers v. Landers*, 153 Conn. 303, 216 A.2d 183 (1966); *Friday v. Smoot*, 211 A.2d 594 (Del. 1965); *White v. King*, 244 Md. 348, 223 A.2d 763 (1966).

² See, e.g., *Williams v. Rawlings Truck Line*, 357 F.2d 581 (D.C. Cir. 1965); *Johnson v. Johnson*, 107 N.H. 30, 216 A.2d 781 (1966); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Lilienthal v. Kaufman*, 239 Ore. 1, 395 P.2d 543 (1964); *Griffith v. United Air Lines*, 416 Pa. 1, 203 A.2d 796 (1964); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

³ 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

⁴ 308 N.Y. 155, 124 N.E.2d 99 (1954).

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

⁶ *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). The procedural basis of *Kilberg* was repudiated in *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962). For the court's less-than-consistent use of public policy compare *Kilberg* with *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 203 N.E.2d 210, 254 N.Y.S.2d 527 (1964) and *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965). In neither of the

regard for policy;⁷ from an old-fashioned choice between equally plausible characterizations⁸ and a situs rule tempered slightly by party autonomy⁹ to the use of interest analysis to reach contradictory results in two practically identical cases.¹⁰ Two of the most recent opinions blazently combine the oil with the water. *Otlarsh v. Aetna Insurance Company*¹¹ applied a Puerto Rican direct-action statute because Puerto Rico had an interest in its application and was the jurisdiction with the most significant relationship, adding that the statute was neither procedural nor contrary to New York policy; *James v. Powell*¹² held unambiguously that whether a transfer of Puerto Rican land by a New York citizen defrauded the holder of a New York judgment was to be determined by the law of the situs but that New York had the "strongest interest" in deciding whether or not to award punitive damages.

Revolutions cannot always be completed overnight, especially when judges are asked to make them; also, it is only fair to point out that this bizarre accretion of decisions represents the handiwork of several judges with divergent views and was accompanied by a number of dissents. But the New York court's inability to keep its collective mind made up greatly increases the burden on lawyers who must argue all variants of both traditional and modern analyses in every case, and creates a strong incentive for appealing as many cases as possible to the state's high court. In addition, if there is any force left in the notion that choice-of-law doctrines ought to facili-

last two cases did the court consider whether on a contacts or interest analysis New York law should be applied.

⁷ *Haag v. Barnes*, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961). *Contrast Downs v. American Mut. Liab. Ins. Co.*, 14 N.Y.2d 266, 200 N.E.2d 204, 251 N.Y.S.2d 19 (1964) (alternative holding), in which the court held New York law applicable by loosely discussing contacts and policies and by noting that any interest of Massachusetts had been acquired after the events in suit. Both cases concerned support for New York women (query, in *Haag*) and their children.

⁸ *In re Utassi*, 15 N.Y.2d 436, 209 N.E.2d 65, 261 N.Y.S.2d 4 (1965).

⁹ *Wyatt v. Fulrath*, 16 N.Y.2d 169, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965). In *James v. Powell*, 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S.2d 10 (1967), the situs rule was unmitigated. *Cf. In re Bauer*, 14 N.Y.2d 272, 200 N.E.2d 207, 251 N.Y.S.2d 23 (1964), invalidating an Englishwoman's testamentary exercise in England of a power of appointment in a trust she had set up while living in New York because "the law to be applied here is the law of New York which was the donor's domicile and where there was executed the trust agreement containing the power of appointment . . ." *Id.* at 277, 200 N.E.2d at 209, 251 N.Y.S.2d at 25.

¹⁰ *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). *See Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966) ("reconciling" the two by counting contacts divorced from policy); *Long v. Pan American World Airways*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965) (applying the *Babcock* analysis in a wrongful-death case).

¹¹ 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965).

¹² 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S.2d 10 (1967).

tate the planning of conduct by enabling people to predict the legal consequences of their contemplated acts, New York's zigzag course leaves something to be desired in that respect as well. It may be hoped that the matter will be set to rest by Judge Keating's excellent opinion in *Matter of Crichton*,¹³ applying the interest analysis to hold that Louisiana personalty owned by a New York decedent was not subject to a community property interest in his New York wife. But then some of us had similar hopes at the time of *Babcock v. Jackson*.

Quite another story is California's. It was to be expected that the crude opinion in *Grant v. McAuliffe*,¹⁴ which resorted in part to the unacceptable statement that whether a personal injury action survives the tortfeasor's death was a "procedural" matter, would evoke pained responses from the critics.¹⁵ Nor was there anything new in the method; courts unwilling to live with the senseless results dictated by Beale's analysis had been exploiting the looseness of his basic system or deliberately misapplying it for years.¹⁶ But of course the result reached in *Grant* was right, for an Arizona law whose purpose, if any, was the protection of Arizona estates was simply not applicable to a dead Californian.¹⁷ And by the time of *Bernkrant v. Fowler*¹⁸ the California court had developed the vocabulary to explain, as courts ought to do if there is any sense in their writing opinions, the relevant considerations: The applicability of California law to a case containing foreign facts was to be determined by construing the law in light of its purpose. Since the

¹³ 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967). Especially encouraging is the court's statement, in footnote 8, that "[c]ontacts obtain significance only to the extent that they relate to the policies and purposes sought to be vindicated by the conflicting laws." *Id.* at 135, 288 N.E.2d at 806, 281 N.Y.S.2d at 820. Acceptance of this principle, also strongly suggested by *Babcock*, would equate the interest and contacts analyses. It is perhaps too bad that the parties in *Crichton* conceded the applicability of Louisiana law to realty located there, since the same policy considerations seem to govern its disposition in this case. See generally Hancock, *Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation*, 18 STAN. L. REV. 1299 (1966). But the treatment of the situs problem in *James v. Powell*, 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S.2d 10 (1967), does not give much cause for optimism on this issue.

¹⁴ 41 Cal. 2d 859, 264 P.2d 944 (1953).

¹⁵ See, e.g., Sumner, *Choice of Law Governing Survival of Actions*, 9 HAST. L.J. 128 (1958).

¹⁶ See, e.g., *Duckwall v. Lease*, 106 Ind. App. 664, 20 N.E.2d 204 (1939); *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936). See Professor Leflar's marvelous series of Arkansas cases, e.g., *Western Union Tel. Co. v. Chilton*, 100 Ark. 296, 140 S.W. 26 (1911); *Western Union Tel. Co. v. Griffin*, 92 Ark. 219, 122 S.W. 489 (1909), in which the court alternately characterized the question of damages for failure to deliver a telegram as contract or as tort as occasion demanded, in order to apply Arkansas law to each case. R. LEFLAR, *THE LAW OF CONFLICT OF LAWS* 95-96 (1959).

¹⁷ See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 128-76 (1963).

¹⁸ 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

propriety of this approach has nothing to do with whether the case sounds in tort or in contract, the California court's use of interest analysis in *Reich v. Purcell* was entirely to be expected.¹⁹

On an interest analysis *Reich* was an easy case. The apparent purpose of Missouri's damage limitation, the court found, was to protect defendants from "the imposition of excessive financial burdens."²⁰ In contrast to the refractory *Kilberg v. Northeast Air-*

¹⁹ It is possible to quibble with parts of the opinion. The court's categorical statement that "[i]n a complex situation involving multistate contacts . . . no single state alone can be deemed to create exclusively governing rights," 67 Adv. Cal. at 562, 432 P.2d at 729, 63 Cal. Rptr. at 33, for example, is an understandable and praise-worthy attempt to discredit the place-of-the-wrong rule; but it seems not inconceivable that there may be whole cases in which all states but one prove disinterested. I also think it unfortunate that the court chose to perpetuate the silly quarrel over the local-law theory. Complex cases, said the Chief Justice, demonstrate that "the forum can only apply its own law." *Id.* Nobody, I think, has ever suggested why it makes the smallest particle of difference whether a court feels it is applying foreign law as such or applying a law of its own patterned upon foreign law; the important question, under either theory, is whether foreign law is to be consulted at all.

Chief Justice Traynor's modern explanation of *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953), is certainly an improvement upon the original opinion in that case; but it is not the way of interest analysis to resolve a dispute over intra-family tort immunity by declaring without reference to the content of law, as the court did in the language quoted from *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955), that the state of domicile "has the primary responsibility for establishing and regulating the incidents of the family relationship." *Id.* at 428, 289 P.2d at 218. All that was in issue in *Emery* was whether California ought to grant relief under its own law to a Californian injured by another Californian in Idaho. The answer is obvious: Idaho would simply be meddling if it sought to extend an immunity law embodying a policy of promoting family harmony or of protecting insurers from fraud into California family and insurance relations. But there was no necessity, and no justification, for the court at the same time to resolve the quite different case of a California accident involving an Idaho family. It is true that Idaho's policy may reach that case, but granting relief may serve legitimate California interests if California law expresses such policies, in promoting safety on its highways and in providing a fund for the satisfaction of California creditors who may have extended aid to the victims. At first glance, therefore, this case seems a true conflict situation; but one can easily, I think, agree with the New Hampshire and Pennsylvania courts, *Johnson v. Johnson*, 107 N.H. 30, 216 A.2d 781 (1966); *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966), that the marginal effect of the immunity rule upon the behavior of drivers already deterred by the danger to themselves and by the threat of damages to anyone outside their families is minimal, and that there is no reason to invoke the rather unconvincing policy respecting local creditors unless there are creditors in the actual case who will in fact go uncompensated absent recovery. This analysis would lead to the conclusion that California should not apply its anti-immunity law to a California accident involving an Idaho family, and therefore that the law of the domicile does govern both variants; but not for the shortcut reason suggested by *Emery*.

²⁰ 67 Adv. Cal. at 565, 432 P.2d at 731, 63 Cal. Rptr. at 35. The court's analysis of policies underlying the wrongful death laws and their damage limitations is a standard one, so much so as to raise a danger signal. For no Ohio or Missouri materials are cited in explanation of these policies; the court contents itself with such general statements as "[l]imitations of damages for wrongful death . . . have little or nothing to do with conduct," *id.* at 565, 432 P.2d at 730-31, 63 Cal. Rptr. at 34-35, and the "proceeds . . . are not distributed through the decedent's estate and,

*lines*²¹ situation, in which the state with such a limitation was not only the place of the accident but also the defendant's state of incorporation and of principal business, in *Reich* the defendant was a non-resident just passing through. "We fail to perceive," said the California court, "any substantial interest Missouri might have in extending the benefits of its limitation of damages to travelers from states having no similar limitation."²² Consequently "giving effect to Ohio's interests in affording full recovery to injured [Ohio] parties does not conflict with any substantial interest of Missouri," and "the Missouri limitation does not apply."²³

Why was the court so confident that Missouri's policy applied only to Missouri defendants? It is easy enough to agree that, in recognition of the interests of other states, Missouri would not want to extend its limitation to all wrongful death cases in the world;²⁴ but an analyst with the traditional territorial bias would doubtless assert, as dogmatically as the California court denied, that Missouri policy does reach all accidents within the state. Professor Morris's great example of a camp manned entirely by Americans in a remote part of Quebec²⁵ raises some doubt whether a jurisdiction always cares what happens within its borders. But has Chief Justice Traynor done any more in *Reich* than to rely upon an anti-territorial bias that I share but cannot satisfactorily explain? Must we fall back upon the unconvincing notion that Missouri legislators can be presumed to be trying to please Missouri voters and therefore to have acted for their exclusive benefit? Is it enough to argue the incongruity of denying relief in *Reich* while granting it if the same parties had collided in California? Others might call it incongruous that the result should depend upon whether one collides with a Missourian or a Californian; for

therefore, are not subject to the claims of the decedent's creditors." *Id.* at 565, 432 P.2d at 731, 63 Cal. Rptr. at 35. But Ohio's interest should be analyzed with an eye to the language of its own statute and to any authoritative expositions of its purpose by the Ohio courts, for surely these issues are matters that might differ from state to state. *See, e.g.,* *Gore v. Northeast Airlines*, 373 F.2d 717 (2d Cir. 1967), citing New York state-court opinions that "the fear of large recoveries in wrongful death actions might influence common carriers to exercise more care in transporting their passengers than they might perhaps exercise if the possible recoveries in such actions were arbitrarily limited . . ." *Id.* at 722. *See also* B. CURRIE, *supra* note 17, at 701-02, comparing the policies of varying death statutes. Moreover, the quoted statements go beyond the *Reich* case itself; as in *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955), the court seems very nearly to have decided a case not presented, namely, an Ohio accident between Missourians.

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

²² 67 Adv. Cal. at 565, 432 P.2d at 731, 63 Cal. Rptr. at 35.

²³ *Id.*

²⁴ *Cf.* B. CURRIE, *supra* note 17, at 81-82.

²⁵ Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881, 885 (1951).

which factor is to be awarded the pejorative "fortuitous" depends once again on one's territorial or anti-territorial prejudice. Perhaps more spadework needs doing on this basic and common problem.

An interesting wrinkle in *Reich* was provided by the fact that the victims were "contemplating settling" in California and were on their way there when the accident occurred. It was probably unnecessary for the court to decide whether Ohio or California law applied, since both were the same and since one or the other was the home state at the time of the accident.²⁶ But the court held that the victims had not become Californians when struck and that California therefore had no interest but Ohio had. This may seem a bit artificial and might seem even more so had the Reichs definitively abandoned their Ohio home and decided to move to California,²⁷ but so would any other resolution of such a borderline matter. Construction of laws in accord with policy always becomes fuzzy about the edges, but at least the process is concerned with the relevant.

On the court's decision that the victims of the accident were Ohio domiciliaries, a further interesting question arose, since the beneficiaries of the death statutes were Californians when the suit was brought. This fact suggests two problems: first, whether the focus of the California compensatory policy is upon victims or upon their dependents; and second, the effect of the beneficiaries' move to California after the accident. The ultimate beneficiaries of California's compensatory policy are of course the dependents, and it is they who might burden the state itself if there were no recovery. Yet the prospect of determining the rights of beneficiaries from several states under as many different laws may induce us to analogize the death benefit to an insurance policy.²⁸ Assuming that it is the dependents who are determinative, it is easy to argue that California became interested in their welfare when they moved in; yet the award of California damages, if both Ohio and Missouri forbade them, might leave us uneasy. Chief Justice Traynor said it would encourage forum shopping; this suggests that plaintiffs might move after an accident to a state

²⁶ But the fact that the domestic rules of all contact states would provide the same outcome if applicable may not always dictate the result, for it is possible that a policy analysis may show none of them applies. See D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 34-43 (1965).

²⁷ See *In re Estate of Jones*, 192 Iowa 78, 182 N.W. 227 (1921), holding for estate-distribution purposes that an Iowan who had uprooted himself and set sail on the *Lusitania* to make a new home in Wales was still an Iowan when torpedoed.

²⁸ Or to find a policy of preserving a citizen's life by increasing the financial goad toward a higher standard of care, or one of protecting the decedent's creditors as in *Gore v. Northeast Airlines*, 373 F.2d 717 (2d Cir. 1967).

with favorable death laws.²⁹ Underlying or buttressing this consideration is a retroactivity problem. The case supposed is very much as if California, having had a damage limitation, had repealed it retroactively so as to allow full relief for accidents that had occurred while the limitation had still been in force. It is a problem similar to that overlooked by the Supreme Court in *Clay v. Sun Insurance Office, Limited*,³⁰ where Florida was allowed to invalidate a suit clause in an insurance policy on the basis of an interest that may have been acquired when the insured moved into Florida after the policy was issued. In a case like *Clay* or *Reich*, moreover, the retroactive assertion of an interest is more offensive than in the usual domestic situation because, as the Chief Justice suggested, it is precipitated by the unilateral act of an interested party.³¹

The California court's frank holding that Missouri's limitation policy is only for local defendants suggests a constitutional issue of discrimination against people from other states. Chief Justice Traynor dealt with this issue obliquely by urging that "[a] defendant cannot reasonably complain when compensatory damages are assessed in accordance with the law of his domicile and plaintiffs receive no more than they would had they been injured at home."³² But article IV of the Constitution requires that a state give the citizens of other states the privileges and immunities it gives its own citizens, not the treatment they receive at home. It would hardly seem appropriate for Missouri to tax the Missouri income of Californians at twice the Missouri rate just because California has high rates. Yet the article IV command of altruism collides at some point with the prohibition against meddling found in the full faith and credit clause of the same article and in the fourteenth amendment as well. When Nevada gives North Carolinians the benefit of the same divorce laws that govern Nevada

²⁹ *Accord, id.*

³⁰ 377 U.S. 179 (1964). See B. Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89, 91-99.

³¹ The court's treatment of California law enabled it to conclude that California was a disinterested forum. If a conflict between Ohio and Missouri laws had been discovered, the court would have been in a pretty pickle. See B. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754 (1963): But since the conflict was a false one the case is significant principally as an illustration of how a case can come to be brought in a disinterested forum. It is rather easy if one of the parties has moved after the events in suit took place. See also *Tramontana v. S. A. Empresa*, 350 F.2d 468 (D.C. Cir. 1965); *Long v. Pan American World Airways*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965). In *Long* the court held the defendant's New York incorporation and business operations did not create a New York interest in wrongful death damages and resolved a conflict between Maryland and Pennsylvania laws.

³² 67 Adv. Cal. at 565, 432 P.2d at 731, 63 Cal. Rptr. at 35.

citizens, it infringes North Carolina interests without promoting its own.³³ Since article IV can hardly be read to require and to forbid the same thing at the same time, Professors Brainerd Currie and Herma Kay concluded that a disinterested state is forbidden, and consequently not required, to apply its own law to defeat another state's interest.³⁴ This choice is not an arbitrary one. In the first place, the opposite result would drain the full faith clause of any power to fulfill its purpose to keep states from meddling with what is none of their business. Secondly, a state does not well serve the privilege clause's evident purpose of reducing interstate friction by giving nonresidents benefits that contravene their home state's policy.³⁵ Accordingly, the application of Missouri's damage law in *Reich* was constitutionally forbidden, not required.³⁶

Now that the courts are receptive to arguments departing from the traditional analysis, the task of the ivory-clad is to develop tools for the solution of the more difficult cases that at first glance involve true conflicts.³⁷

For each interested state simply to apply its own law in such cases³⁸ is unappealing because it may cause forum-shopping and, to the lawyer's tidy mind, simply because it is disuniform. It may also have an adverse effect upon predictability at the planning

³³ *Williams v. North Carolina*, 325 U.S. 226 (1945).

³⁴ See B. CURRIE, *supra* note 17, at 445-525.

³⁵ This would not technically occur if Missouri law were applied in *Reich*, since the court held that Ohio, but not California, had an interest in granting full recovery. The prototype case used in the text is adequate to show the appropriateness of using this consideration to resolve the apparent conflict between constitutional commands.

³⁶ This consideration lends force to the court's assertion in *Reich* that the interest analysis need not be less certain than the undeservedly hallowed place-of-the-wrong rule. Parenthetically it seems apt to add to the court's statement—that recent defections deprive the traditional rule of its chief virtue—the observation that there never was much certainty to begin with, because the rule was so often and so unpredictably departed from by invocation of public policy, *e.g.*, *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936); by avoiding the tort classification, *e.g.*, *Western Union Tel. Co. v. Griffin*, 92 Ark. 219, 122 S.W. 489 (1909); and even by employing the *renvoi*, *e.g.*, *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (concurring opinion). Note also the possibility, exploited in *Richards v. United States*, 369 U.S. 1 (1962) (construing the Federal Tort Claims Act), of locating the place of wrong where the act rather than the injury occurred. Moreover, interest analysis produces no disuniformity in *Reich*, for the conflict is false; all courts should agree—indeed the Constitution commands—that relief be granted.

³⁷ *Reich* would present such a case if the defendant were from Missouri. Such a case is found in *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); *Kell v. Henderson*, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (Super. Ct. 1965), *aff'd*, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966) (the reverse of *Babcock*); *Lilienthal v. Kaufman*, 239 Ore. 1, 395 P.2d 543 (1964).

³⁸ See B. CURRIE, *supra* note 17, at 119. For Currie's later explanation or relaxation of this principle see text accompanying note 41 *infra*.

stage: it cannot simply be predicted that the plaintiff—which ever he may be—will choose the most favorable law, because the declaratory judgment remedy may make it possible for the prospective defendant to choose the forum. Moreover, I am unimpressed by the argument that it is undemocratic for judges to attempt to balance interests,³⁹ for they do it all the time both in constitutional litigation and in formulating the common law. The most serious problem is whether a rational choice can be made between competing state interests.

Both courts and commentators have been at work on this problem, and considerable progress has been made. Mr. Justice Traynor led the way in his opinion in *Bernkrant v. Fowler*,⁴⁰ recognizing that the interests of other states and the expectations of the parties may properly be taken into account in determining the reach of local policy. The older Professor Currie came fully to accept this principle, enthusiastically approving *Bernkrant*, although he stubbornly refused to admit that it was proper to balance interests.⁴¹ Professor Cavers attempted without conspicuous success, to apply the same analysis to the troublesome *Shanahan v. George B. Landers Construction Company*,⁴² Professor Baxter made it the core of his analysis, arguing that the comparative-impairment principle would resolve most cases that appeared to present true conflicts.⁴³ At least two courts have avoided conflicts in interspousal cases by this route.⁴⁴ Cavers has hinted that Oregon should have used this analysis and deferred to California law in *Lilienthal v. Kaufman*⁴⁵—where an Oregon spendthrift claimed incapacity under Oregon law in a suit on a contract he had made in California with a Californian—but I think this would have been a mistake. It is California that should defer if the same problem is presented to its courts. To uphold contracts made in California by Oregon spendthrifts would open the door to wholesale defeat of Oregon's protective policy; every spendthrift who wanted to risk his assets would trot down to California. California policy, on the other hand,

³⁹ See B. CURRIE, *supra* note 17, at 124, 272-80.

⁴⁰ 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

⁴¹ See B. Currie, *supra* note 31, at 757-61. Indeed he had anticipated *Bernkrant*, in *The Silver Oar and all that: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 65-75 (1959).

⁴² 266 F.2d 400 (1st Cir. 1959); see Cavers, *The Conditional Seller's Remedies and the Choice-of-Law Process—Some Notes on Shanahan*, 35 N.Y.U. L. REV. 1126, 1139-42 (1960). For a much more far-reaching and substantial contribution to the resolution of true or apparent conflicts see generally D. CAVERS, *supra* note 26.

⁴³ Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

⁴⁴ See note 19 *supra*.

⁴⁵ D. CAVERS, *supra* note 26, at 189-92 (1965). Oregon did defer in a still more recent true conflict decision based on an amalgam of contacts and interest analysis. *Casey v. Manson Constr. Co.*, 84 Adv. Ore. 947, 428 P.2d 898 (1967).

is not greatly impaired by applying Oregon law to invalidate the contract, for the California businessman has plenty of people other than Oregon irresponsibles with whom to contract. Cavers' suggestion of unfair surprise seems far-fetched in the extreme. What businessman in his right mind would accept a promissory note for a substantial sum without making a credit check, which would be certain to reveal the spendthrift's questionable status?

Unfortunately, I think a number of cases will remain that cannot fairly be solved on the comparative-impairment basis; vide the notorious *Kilberg* problem.⁴⁶ Professors von Mehren and Trautman have made a manful attempt to get at these refractory cases, suggesting among other things that substantive choices be made according to whether a particular law is on the wax or the wane.⁴⁷ Wrongful death limitations, and restrictions on the capacity of married women, for example, should be disregarded in true conflict cases. That this process amounts to making law is no cause for alarm, for judges rightly make lots of law. That it may involve overruling the legislature is more serious if believed, but the problem after all is one of construction in the light of circumstances not likely to have been foreseen by the legislature. It has been protested that a court should not abandon a local policy in conflicts cases unless it is willing to do so in domestic cases as well,⁴⁸ but the desire to respect interests of other states is perhaps an adequate distinguishing factor, as it is in the analogous cases subordinating to a foreign interest any deterrent policy of a law allowing spouses to recover damages.⁴⁹ The slippery nature of the determination of whether a law is waxing or waning, or more generally whether it is good or bad, is of course a problem and will decrease the uniformity attainable by this process unless it is undertaken by the Supreme Court under the full faith and credit clause. But there is plenty of uncertainty in interest analysis anyway, as there always is in applying laws in accord with their policies, and maybe the Court ought to undertake the job.⁵⁰

⁴⁶ See note 6 *supra*.

⁴⁷ A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 215-408 (1965). See especially *id.* at 376-78, 394.

⁴⁸ B. CURRIE, *supra* note 17, at 153-54, 154 n.82.

⁴⁹ See text accompanying note 44 *supra*.

⁵⁰ An obvious starting point is suggested by a variant of *Western Air Lines v. Sobieski*, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961). If California required and Delaware forbade cumulative voting in the same corporation would the Court hold that either state could apply its own law? *Cf.* *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959), refusing under the commerce clause to let Illinois require contour mudguards that Arkansas forbade. But why was it Illinois and not Arkansas that had to yield? See the very interesting suggestion in Horowitz, *Toward A Federal Common Law of Choice of Law*, 14 U.C.L.A. L. REV. 1191, 1195 (1967), that the commerce

Another possibility for dealing with irreducible conflicts would be to resort—after all else has failed—to an arbitrary rule akin to those of the first *Restatement of Conflicts*. Lest this suggestion be thought a sellout, I hasten to observe that I reach this point only after an analysis of state policies has led to the conclusion that interest analysis gives no way to choose between two interested states. At that point either choice will equally satisfy the interest analysis, and it becomes appropriate to consider other relevant policies such as the desire for uniformity and predictability. Some of the *Restatement* rules, which were formulated with a territorial imperative in mind, are too complicated to serve this purpose very well;⁵¹ some, like the place-of-contracting and place-of-incorporation rules, are too easily manipulable by one or both parties. For example, a decision to refer the usury question to the place of contracting should not be made without explicit consideration of whether or not the law upholding such contracts is substantively preferable. The best rule, as suggested rather snidely elsewhere for the case in which there is no interested state, would be to apply the law of the state first in the alphabet.⁵² But don't hold your breath.

Interest analysis, like other methods of approaching choice-of-law, is not perfect. But it has the virtue of recognizing that laws are adopted in order to accomplish social goals and that they should be applied so as to carry out their purposes. Enlightened courts have followed this principle for years in non-conflicts cases; *Reich v. Purcell* is welcome as additional evidence that its application to choice-of-law is no longer the exclusive preserve of the professors.

Robert A. Gorman*

Reich v. Purcell is, I think, an easy case making good law. It is a prime example of what has come to be called a "false conflict," a case in which the states which are factually related to the trans-

clause itself may have something to say about choice-of-law, and his proposal for a federal common-law choice-of-law doctrine binding upon the states and based upon such "multistate policies" as the facilitation of multistate transactions.

⁵¹ An example is the place of contracting rule, which takes many sections to define.

⁵² B. CURRIE, *supra* note 17, at 609.

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