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Choice-of-Law Symposium

David P. Currie

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WELCOME

DEAN DESSEM: I am very happy to have the task of welcoming you all here today for our 1996 Law Review Symposium, Choice of Law: How It Ought to Be. We have with us a stellar collection of authorities in the area of choice of law, and I think it will be both an interesting and fun day for all of us.

As the announcement for the Symposium states, Mercer is Brainerd Currie's law school. Those of us at Mercer realize that he was not only a graduate of this law school, graduating with the highest average ever, but was also a member of the faculty in his early years of law teaching.
Our student honor society here at Mercer is the Brainerd Currie Honor Society, and an invitation to join the Brainerd Currie Honor Society is the highest honor that one of our students can achieve. We're very proud of our ties to Brainerd Currie, and we're going to hear more about Brainerd Currie and his approach to choice of law throughout the day.

In a former life before becoming a law school dean, I taught civil procedure, and there was always a wonderful case in the casebook dealing with multiple plaintiffs. This particular case was pretty much like a law school hypothetical—it was so confused and convoluted. The Oregon Supreme Court wrestled with a problem that Brainerd Currie had wrestled with back in the 1950s. In the early years of teaching that case a student one day in class said, "You know, the Oregon Supreme Court doesn't cite any cases at all. It just relies on Brainerd Currie." A reference to or reliance on Brainerd Currie was worth, and is still worth, a lot of case law.

We're very proud to recognize Brainerd Currie today. He was a person who made us think, who still makes us think. He was a person who wrote on a clean slate, and that's exactly what this Symposium will do—make us think. Our experts also will be writing on a clean slate for us today.

Before I briefly introduce the panelists, I want to recognize members of the Currie family, whom we are so pleased to have with us today. We have Brainerd Currie's wife, Pick, who told us last night that she spent her first twenty-eight years in Macon. We're very proud and pleased to have her back with us today. She travelled down from Durham, North Carolina to be with us.

Next to her is Brainerd Currie's daughter, Carolyn Currie Hall. We are very pleased that she has travelled to be with us today. We thank you both and extend the hospitality of Mercer and of Macon to you both.

Now, for the panelists, and I'm going to do this in alphabetical order because we have such an outstanding group of scholars in this area.

I'll start with Professor David Currie. David Currie is the son of Brainerd Currie. He is an internationally known legal scholar. He is the Edward Levi Distinguished Service Professor at the University of Chicago and has taught on the University of Chicago faculty since 1962. He is a graduate of the University of Chicago and the Harvard Law School. After graduation from law school, David Currie clerked for Judge Henry Friendly of the Second Circuit and Justice Felix Frankfurter. He is a Fellow of the American Academy of Arts and Sciences and has written many books and articles, including a leading casebook on conflict of laws, which he has co-authored with Dean Herma Hill Kay.
Robert Felix is the James Mozingo Professor of Legal Research at the University of South Carolina School of Law, where he teaches Conflict of Laws, Torts, Products Liability, and Law and Literature. He received both his A.B. and LL.B from the University of Cincinnati. He then went on to get an M.A. from the University of British Columbia and an LL.M. from Harvard. He has co-authored another casebook in the area of conflict of laws and is now working on the fifth edition of a treatise in that area. He is past chair of the Conflict of Laws Section of the AALS.

Dean Herma Hill Kay is also with us. She is the Dean at the University of California School of Law at Berkeley. She has been on the faculty at Berkeley since 1960. Her law degree is from the University of Chicago, where she served on the Law Review and was a member of Order of the Coif. She has her undergraduate degree from Southern Methodist University. She is a Fellow of the American Academy of Arts and Sciences and a member of the Council of the American Law Institute. She has also served as President of both the Order of the Coif and the Association of American Law Schools. She has, with David Currie, co-authored one of the leading conflicts casebooks and has also written widely in the areas of sex-based discrimination and family law.

Next is Professor Marjorie Fine Knowles. Professor Knowles is a Professor at Georgia State University, where she served as Dean from 1986 to 1991. She is an honors graduate of both Smith College and the Harvard Law School. Professor Knowles teaches Corporate Law, Corporate Responsibility, Sex-Based Discrimination, and Conflict of Laws. She is on the board of trustees of the College Retirement Equities Fund. She is also on the Visiting Committee at Harvard Law School, a member of the American Law Institute, and a consultant to the Ford Foundation.

Professor John Rees is the Law School Association Professor of Law at the University of Georgia, where he has taught since 1959. During that time, he, and really all of our panelists, have taught many students. Professor Rees has the distinction, however, of having taught our own Jack Sammons. Professor Rees is a graduate of Hobart College and the University of Virginia, where he served on the editorial board of the *Virginia Law Review*. He teaches Civil Procedure, Federal Courts, and Conflict of Laws.

Finally, we have two of our own professors involved in this Symposium. Professor Jack Sammons is the Griffin Bell Professor of Law here at Mercer. His degrees, in addition to the University of Georgia, are from Duke and Antioch. His current courses include Criminal Law, Evidence, Legal Ethics, and Introduction to Counseling. Professor Sammons is a national expert on professionalism and was one of the major architects of our own Woodruff Curriculum, which just this last
summer received from the American Bar Association the Gambrell Professionalism Award. Professor Sammons has worked with Professor Posnak on a biography of Brainerd Currie.

And, finally, Professor Bruce Posnak. Professor Posnak has been on the faculty here at Mercer University since 1977. His degrees are from the University of Maryland, where he finished second in his law school class. He was in private practice for a short period, but primarily practiced with the Antitrust Division of the Department of Justice. He teaches Antitrust, Statutory Law, Sports Law, and Choice of Law. His scholarly writing has been in the area of choice of law, and one of his choice-of-law articles has just recently been included in an anthology of outstanding choice-of-law articles. Bruce Posnak is the person who, with the assistance of Jack Sammons, conceived and created today’s Symposium.

Please join me in thanking Professor Posnak, Professor Sammons, and the Mercer Law Review. We have here several students from the Law Review: Editor-in-Chief, Brett Steele, and Lead Articles Editor, Elizabeth Wheeler, who is the individual on the Law Review primarily responsible for bringing this all together. I want to thank all of you, and I want to thank our participants and guests for joining with us today to discuss Choice of Law: How it Ought to Be.

**ROUNDTABLE DISCUSSION**

**PROFESSOR POSNAK:** I want to thank the panelists. They have come from the far West, the Midwest and the near Southeast, and so we appreciate your attendance. I also want to thank the audience for attending. I especially want to thank Elizabeth Wheeler and the staff for arranging this. They did the hard work, the administrative work, and we appreciate that.

I want to say a few words before we get into the roundtable discussion itself, meant especially for those of you who have not had a conflict of laws course. First of all, I want to welcome you to the wacky, zany, problematically wonderful world of choice of law, or as Professor Prosser calls it, the “dismal swamp.” Hopefully, today we can make a little light shine through the cypress trees without getting too bogged down. Don’t worry about getting lost. You cannot get lost in choice of law because there is no home, at least in the courts. A lot of commentators think they have found a home, but the courts certainly haven’t.

Choice of law is among the most or the most unthought about areas of the law. Normal people just do not think about it. Even before you came to law school you knew something about contracts, criminal law, negligence—although, you might never have heard the word torts—etc.
It's very unusual for people to have thought anything about choice of law until they take a conflict of laws course. Not only do normal people not stay awake at night reading the latest choice-of-law hornbook, Law Review article, or thinking about whose law should apply in cases having contacts with more than one state, the vast majority of lawyers don't think about choice of law either. Most people, including most lawyers, just assume that when a Georgia court hears a case, the Georgia court is going to apply Georgia law. It isn't necessarily so.

Thinking about choice of law transports one, I believe, to a new dimension on a different plane than other areas of the law. When a case has relevant contacts with more than one state—and don't ask what makes a contact relevant, because what to one person may seem relevant, to another it might not—as more and more cases do in this day and age, the problem of doing justice under law, already difficult, becomes more difficult. Under whose law? If the case has contacts with more than one state, whose law should we be trying to do justice under?

One way to envision this is to think about a law from Georgia on some issue—for example, whether a guest-passenger in a car may recover from the host-driver of the car, and suppose that the Georgia law allows recovery but the competing Alabama law does not. Further, assume, though, one of the parties is from Georgia, the other party is from Alabama, or even though both of the parties are from the same state, the accident happened in a different state. How should the court, wherever the case is brought, go about deciding whether the Georgia law or the Alabama law applies on this issue? It's very important because as a practical matter the choice-of-law issue is almost always outcome-determinative. It's not some legal nicety.

On the more practical side even, choice of law is something lawyers should be alert to in practice. Many lawyers turn cases down, or lose them, because they aren't thinking in terms of choice of law. Again, they just assume that the forum is going to apply its own law, and under the forum law, they don't have much chance. But if they realize there may be a way to persuade the court to apply the law of some other state, they might have a chance of winning the case. I think this is a very common oversight among lawyers—not to think in choice-of-law terms.

Our goal here today is not to lecture you about how a Georgia court, or any other court, would choose between or among, God forbid—the competing laws. Instead, our goal is to make you generally aware of choice-of-law problems and to discuss not necessarily how courts do go about choosing between competing laws, but how we think they should and why. This is *Choice of Law: How it Ought to Be*. We're assuming a clean slate in the state. It's a new state, and there is no choice-of-law precedent or legislation. We are philosopher kings and queens and we're
going to discuss how we think—a little presumptuously perhaps—the court should go about choosing between competing laws and why.

One final note, one simple thing you should keep in mind—and this may be the most practical thing I say today, for bar or practice purposes—is that the choice-of-law issue is very simple to spot. At least it's very simple to spot when it isn't there. You don't have to worry about a choice of law if only one state is mentioned. If the client or the exam question does not mention more than one state, you can't have a choice-of-law problem.

Let's now get to the meat of our discussion—that is, the cases. I'm going to relate the facts and then ask the panel to render their opinions with dissenters and concurrers. I'm also going to ask the audience after each case whether they have any questions or comments or whether they want to render an opinion. So let's get started with the Walton case.

**WALTON V. ARABIAN AMERICAN OIL CO.**

* [352 U.S. 872 (1956)]

**PROFESSOR POSNAK:** The plaintiff, an Arkansas resident, was temporarily in Saudi Arabia—it's not clear to me whether he's working there or vacationing there. He was injured by the negligence of the defendant's employee while in the scope of his employment. The defendant is a Delaware corporation licensed to do business in New York, and doing business in New York, but it also did much business in Saudi Arabia. The plaintiff sued the defendant in a federal court in New York on the basis of vicarious liability. It looks like duck soup. Everybody knows that an employer is liable for the torts of his employees committed while in the scope of employment.

Neither party said "boo" about the choice-of-law issue. Let's assume, it's not clear from the case, that the judge raised the choice-of-law issues sua sponte.

The first thing we need to know is the forum. It's the federal court in New York. Now, as all you *Erie* mavens know, the Supreme Court in *Klaxon Co. v. Stentor Electric Manufacturing Co.* [313 U.S. 487 (1941)] held that choice of law is a substantive issue, so in a diversity case the federal court in New York has to apply the same choice-of-law rule as a New York state court would apply. So, for our purposes it really doesn't matter that the case is in the federal court, at least theoretically, because the federal court is supposed to do the same thing as a New York state court would do. The plaintiff is from Arkansas. The internal law issue (contracts, torts, etc.) in this case is whether the plaintiff can recover for vicarious liability. The law pattern on this issue is that in Arkansas, Delaware, and New York as we all know, the answer is yes.
We don't know what Saudi Arabia's law is on the issue of vicarious liability—or negligence for that matter—and, indeed, nobody raised the choice-of-law issue.

Our question is what should the court do with these facts. Let me ask for a volunteer from the rectangular round table. Does anybody want to render an opinion?

**PROFESSOR REES:** I'll take a chance. Let me explain first that I refer to Currie's principles by number, and that these appeared in the fourth edition of the casebook at page 203, and that for some reason they don't appear in the fifth edition. These have appeared in various forms in various places, but when I refer to principle 1 it means from that list of Currie's Principles of Interest Analysis.

Now to the opinion: “We have adopted Brainerd Currie's interest analysis as our approach to choice of law. Currie's starting point, as stated in his principle 1, was that 'normally even in cases involving foreign elements the court should be expected as a matter of course to apply the rule of decision found in the law of the forum.' His second principle begins, 'when a court is asked to apply the law of a foreign state.' Thus, if as happened here, neither party asks the court to apply another jurisdiction's law, the forum should apply its own law.”

“In Watts v. Swiss Bank Corporation [265 N.E.2d 739 (N.Y. 1970)], a 1970 New York decision, the court held that in the absence of manifest injustice the court will allow the parties by default in pleading or proof to acquiesce that forum law be applied. In Leary v. Gledhill [84 A.2d 725 (N.J. 1951)], a 1951 opinion of the Supreme Court of New Jersey, Chief Justice Vanderbilt stated, 'the defendant is in no way prejudiced by the application of the law of this State. If he had desired to raise an issue as to foreign law, he might have done so.'”

“Since the laws of the three American states potentially involved do not differ on the issues of negligence and respondeat superior, we will apply our law. Thus, we hold that the law of our state applies. As Dean Kay has said, ‘the question we are trying to answer in choice-of-law cases is under what circumstances is a departure from local law justified?’ Whereas here neither party has asked us to apply a different law, such a departure from our local law is not justified.”

**PROFESSOR POSNAK:** Let me throw a question out to whoever wants to answer it. Why should the choice-of-law issue be treated differently than the subject matter jurisdiction defense? That, of course, the judge is supposed to raise sua sponte, even if nobody has raised it up to the Supreme Court level. Why should choice of law be treated any differently?
PROFESSOR REES: I think this corresponds to what courts, in fact, do. You can have what we would call a conflict of laws case, or choice-of-law case, and if no one raises the issue, they are apt to simply apply their own law.

PROFESSOR POSNAK: But my question is why should choice of law be treated differently than the subject matter jurisdiction defense?

PROFESSOR REES: I think that's of a different magnitude. Certainly the court is without power to decide the case if they don't have subject matter jurisdiction. But here, I assume they are entitled to decide it, whether they decide it rightly or wrongly.

PROFESSOR KAY: You have not identified which hypothetical state we are sitting in, and I have done a little bit of thinking about this. There has been a lot of talk out West about the advantages of separating Northern California from Southern California, and I would offer a hypothetical that this has been accomplished now, and that we are the first court convened to sit in the newly formed state of North California. That has the advantage, although we don't have any precedents or statutes, of having been the place where Justice Traynor was born and taught and worked; so, I think that we can assume that there is some openness to the theories that were proposed in our court.

Now, while I'm in general agreement with what my brother has said here, I do think that we may have to examine a constitutional problem if we follow that line of analysis. I note that there is no contact here, either with Arkansas, except for the plaintiff's residence, or with New York, except for the fact that the Delaware corporation was doing business in New York; nor did this injury in Saudi Arabia arise out of New York law. North California is far removed from all of these events, and I'm wondering if we have a problem of unfair surprise to the defendants if we apply the forum law.

Now, there is a possible solution here, I think, in what's been suggested—if we can apply the common law of all the states that are involved. I don't mean common in the sense of nonstatutory, but rather the similar law of all the states involved, we might be able to resolve the matter. Now, whether that is sufficient to overcome a constitutional objection I'm not clear. The constitutional objection, of course, hasn't been raised either, but I think that's closer to your subject matter jurisdiction argument than the one that was raised.

PROFESSOR POSNAK: That was going to be my next hypothetical. Suppose two people from Georgia made a contract in Georgia to do
something in Georgia, and then for some reason, maybe the plaintiff's brother-in-law was a member of the bar in New York, the plaintiff sued in New York, and the defendant's sister-in-law was a member of the bar in New York, so she didn't ask to dismiss for lack of jurisdiction. There, clearly it would be, under Allstate v. Hague [Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981)], unconstitutional for the forum to apply its own law.

PROFESSOR REES: My assumption was that this new state takes the factual connections that New York had with the facts. Now, at the time of this case, at least, and maybe even now, ARAMCO's American headquarters were in New York City in the Exxon Building on Sixth Avenue, and that gives us at least a factual connection with New York. Maybe it's a simple-minded impression of Allstate, but I read it to mean that if you have factual contacts that would satisfy the traditional or First Restatement method, or interests, either Currie-type or generalized, that application of that jurisdiction's law would not be a violation of due process.

PROFESSOR KAY: So you would be arguing that ARAMCO could never be unfairly surprised by having New York law applied?

PROFESSOR REES: I think so.

PROFESSOR POSNAK: How about if they relied on Saudi Arabian law and structured their behavior on such reliance, not New York law, but Saudi Arabian law?

PROFESSOR REES: Then they should have raised it.

PROFESSOR POSNAK: If they didn't, they just forfeited it?

PROFESSOR REES: If anybody has lawyers familiar with Saudi Arabian law, I would think it would be ARAMCO.

PROFESSOR POSNAK: Professor Felix?

PROFESSOR FELIX: I'm a little uncomfortable with a solution to start with that is kind of pre-conflict—that is, to move immediately to a decision because one or both parties has failed to provide the court with information about the law of the place that is selected by the forum's choice-of-law rule.
Dean Kay, I think to go a step further in splitting California, perhaps split it along the San Andreas Fault rather than northern and southern. I might assume that Charleston, South Carolina, has become a new country, or perhaps operates within the United States the way Quebec operates in Canada. My first move would be to do what the Charleston lawyers call Broad Street research. I would call someone who has business contacts in Saudi Arabia and ask the desert rainmaker if he could lead me to some information about Saudi Arabian law. I must say all I've found so far is what Brainerd Currie revealed in his long essay on the Walton case, which is that there is a rudimentary traffic code and some royal edicts. There is a little more information suggested by David Cavers in the Choice of Law Process, but it doesn't look like much is going to turn up.

Trying to structure my treatment of the case with some respect to the New York law regarding judicial notice, I think there is a difference between abusing discretion and trying to get information to determine whether discretion is being abused. I think the lawyers here, as officers of the court, could be directed to try to find out more than is apparently available from the two sources noted, and to be added to what might come from whatever contacts I have been led to in Saudi Arabia. Failing that, the task of the court—I assume we're bound by Erie-Klaxon (Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)—would be to try to reach a decision that is just here without straining existing New York law too much.

Brainerd Currie notes that when a conflict involves a foreign country, perhaps Erie-Klaxon should not extend to such a case. I would look back at Day & Zimmerman (Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3 (1975)) and the rather blunt "one-liner" that the Supreme Court handed the fifth circuit that Erie-Klaxon means just what it says, and perhaps be able to treat this as a case falling within the foreign relations power of the United States and announce a kind of transnational rule to reach a just result along the lines suggested by my colleagues.

**PROFESSOR KAY:** There is a reference that your Broad Street research may have overlooked. It was an article published in the California State Bar Journal [36 CAL. BAR J. 118 (1961)] by our former Attorney General, Evelle Younger, and he suggested that if you looked at Article 48 of the Saudi Arabian motor vehicle regulations, you would discover upon the first offense the driver's license should be withdrawn for one year, damages shall be paid for, and the driver shall officially be given fifty lashes in front of a large group of drivers. I'm sure ARAMCO would be happy to offer up its CEO.
PROFESSOR FELIX: The court would waive the fifty lashes.

PROFESSOR POSNAK: David, do you want to make a comment?

PROFESSOR CURRIE: First, let me say how thrilled I am to be home. I was born in Macon, and I have to come back here, a little like Antaeus in the great myths, to get my annual fix of barbecue from Fresh Air Barbecue, which I haven’t done yet. I’m looking forward to that tomorrow. And I understand that we’re staying in Miss Mamie Adams’s house over on College Street, and it’s a lovely home and I like it a whole lot.

Now, I understand we’re supposed to say something about the Walton case as well. New York law doesn’t have anything to do with the Walton case. It didn’t happen in New York. The parties are not from New York. I understand the company has its headquarters there, but it’s a Delaware corporation. The New York laws are not designed to regulate the conduct of people in Saudi Arabia or to compensate people who live in Arkansas and get hurt in Saudi Arabia. So I think the idea that New York law governs this case, which was promulgated by somebody named Currie a few years ago, is not sustainable.

It seems to me that my former colleague and student, Larry Kramer, who I’m sorry to say wasn’t able to be here today, had the better of that argument when he said it’s up to the plaintiff to point to some law that gives a right to relief. What are the possibilities here? New York has a law that gives a right to relief in some cases, but not in this case, for the reason I’m suggesting. It’s not a case that has anything seriously to do with New York.

New York’s law, in providing liability in the case of negligent accidents and extending that liability to the employer of the negligent party, is trying to improve safety within New York by creating an incentive for people to watch their employees and see to it they drive safely. It may be trying to compensate people in whom New York has a concern for harm that has been inflicted upon them by somebody’s negligent conduct. That’s not this case. New York doesn’t provide this plaintiff with an opportunity for relief.

Maybe Saudi Arabian law does, but the plaintiff hasn’t shown us that it does. The plaintiff hasn’t even invoked the law of Arkansas, which might, because the plaintiff is from Arkansas, have a compensatory interest here.

So if the question had been raised by the defendant, if the defendant had argued that this was not a case for the application of New York law, and the plaintiff had not shown that there was any law that gave a right to relief, then it seems to me what the court should have done is to say,
"Sorry, Plaintiff, you lose. You haven't shown that any law gives you a right to relief." That's Larry Kramer's approach to this case, and I think it's quite right. The only trouble is, as my Brother Rees has said, the defendant never objected to the application of New York law; never doubted that there was a right to relief.

You ask why shouldn't the judge raise these questions. The judge shouldn't raise these questions because it's for the parties in an adversary system to raise all the questions that benefit them, with one narrow exception, which is different from this, and that's subject matter jurisdiction. I quite agree with Judge Kay that the application of New York law, if objected to, would be unconstitutional, but constitutional questions are lost every day in the courts by the failure of somebody's lawyer to raise them. Lawyers ought to be very careful about this sort of thing.

The reason that subject matter jurisdiction is different is that subject matter jurisdiction, unlike your ordinary constitutional question of choice of law, unlike the choice-of-law question at the state level, which we're talking about here, is a question that transcends the interests of the parties. The courts have their own interests at stake, and the interest of federalism as well. If you allow the parties to foist a case off on the federal court that doesn't belong there, in the first place you're burdening the federal courts. In the second place, you're interfering with state rights. Those are two good reasons why the parties shouldn't be allowed to foist such a case off on the federal court.

But the question of choice of law affects only the interests of the parties. So if the defendant has a lawyer who doesn't understand where the defendant's interests lie and who doesn't raise the question, well, that's just too bad. And that's this case.

So I concur for slightly different reasons, perhaps, and certainly for different reasons from those that another Currie would have applied, that said that you apply New York law even if there's an objection, just because it's a good law and there hasn't been any better reason. I think a good reason is shown once the defendant says, "Hey, wait a minute, New York law doesn't apply to this case." Then you can't apply it.

PROFESSOR POSNAK: Judge Knowles?

PROFESSOR KNOWLES: But the defendant's lawyer didn't say that, Judge Currie. And I'm in awe of joining into this discussion because as many of you know I'm by far the most junior, not in years, but in knowledge and publishing in this field. But it seems to me that I'd like to apply what Professor Sammons told us about Brainerd Currie's approach to decision-making. It seems to me that my brethren at the
other end of the table are right. The first principle would be to apply New York law. The defendant did not object, and the judge, asking for evidence of foreign law and receiving none, had no foreign law to apply.

It does, however, seem to me that there is a more just approach to this. I would separate out two kinds of issues that the court could have addressed had the lawyers done what you suggested, and I wish they had. One might have to do with tortious conduct—that is, what kind of rudimentary traffic code there was in Saudi Arabia. If we have no evidence on that, are we secure in applying our own normal rules of the road? The second kind of issue has to do with what Professor Posnak has identified as potential vicarious liability. That's plain old agency law, with which we are quite familiar. I don't think there is any problem, and, indeed, I think there is a governmental interest in applying either New York, Delaware, or Arkansas law, which I assume to be the same on the question of whether ARAMCO is liable for the negligent acts of its employees. I don't think there would be any quarrel on that.

So if we move beyond displaced foreign law, we have a number of options that this judge could have pursued, and I would follow the recommendation to remand it.

Now, one further point, Judge Currie. I always get intrigued when people rely on the adversarial system because I think one can confidently predict that on a remand, such as suggested in the actual opinion, we will have a battle of experts, probably better financed on the ARAMCO side, testifying as to what the outcome would be if Saudi Arabian law were proven and applied. We continually hear people deriding the battle of experts, but it's a direct result of adhering to the notion of the adversarial system in this case because that's how one would prove the law.

So I would vote with my brethren at the end of the table, but I wish that we had a better way to solve this case.

**PROFESSOR POSNAK:** David, I have to take up for your father, and ask you isn't this fairer? Doesn't it make more sense that the party who is going to benefit from the displacement of the forum law have the burden of pleading and proving the foreign law? If the defendant is the one that doesn't want the forum law applied, shouldn't he bear the burden and lose if nobody shows what the foreign law is?

**PROFESSOR CURRIE:** Well, my bottom line, remember, is that there was a burden on the defendant to say, "Wait a minute, New York law doesn't apply," but because the defendant did not say that, the defendant is bearing the consequences.
But then the question is what is the nature of this burden, and what
does it take to satisfy it? My father's notion was that the defendant
could satisfy this burden only by proving the content of Saudi Arabian
law, and I think that misconceives his own theory of the conflict of laws,
which is that the question of which law applies is not some question
divorced from the merits of a case. It's not this brooding omnipresence
in the sky—some of you may have encountered that phrase someplace
or other—that we call Conflict of Laws rules, although the American
Law Institute back in 1934 pretended there was and tried to foist some
off on us.

Choice of law—and this is the essence of the Currie method—choice
of law is just the ordinary process of interpretation of the various
substantive laws in question in light of their purposes. Therefore the
first question, once it is raised by the defendant, is what is the scope of
the New York law? Does it give relief in this case? When construed in
light of its purposes I'd suggest, as I tried to explain a moment ago, that
New York law doesn't give a right of relief in this case. Therefore, you
can't use it as a fallback law and say because you haven't shown what
the other law is you have to apply the New York law. The New York
law does not apply. It's just as if the New York legislature had passed
a statute saying, yes indeed there is vicarious liability for negligent torts
in New York, but not for these in Saudi Arabia. I interpret the law not
to apply, and I don't see how you can apply it.

PROFESSOR POSNAK: How about Arkansas, you alluded to —

PROFESSOR CURRIE: Yes, I think the case is somewhat different
if the plaintiff says, "Hey, I have a right to recover under Arkansas law."
The plaintiff didn't do that either, so far as I know, and the basic
point—and this is Larry Kramer's point in his wonderful article
challenging this small application of the Currie theory—is that Currie's
theory is right, but he is misapplying it here. The plaintiff didn't show
that the Arkansas law gave a right to relief either. Maybe it does
because the plaintiff was from Arkansas. That's one of the more extreme
applications of interest analysis, to construe the law providing relief to
provide a sort of personal relief that rides around with the plaintiff to
Saudi Arabia, and that might interfere with the legitimate expectations
of a company doing business in Saudi Arabia and trying to rely on the
Saudi Arabian law, particularly if you're talking about something like
a speed limit. But, again, I get out of that one by saying, "Look, sorry,
the plaintiff didn't show a right to relief under Arkansas law."
PROFESSOR KAY: I don't follow our co-author Larry Kramer's analysis of this matter as faithfully as my Brother David Currie does because I think that if you follow his argument, what you're saying is that the plaintiff, who is a resident of Arkansas, has no right to claim the applicability to him of New York law; whereas, if the plaintiff had been a New Yorker injured in Saudi Arabia, the New York plaintiff would have a right to claim the application of New York's positive law. And Larry went on to argue that if a court is willing to apply the law of its state to its own residents but not to the residents of other states, that would violate the Privileges and Immunities Clause or the Equal Protection Clause of the Constitution. He concludes that New York would be required to apply its law to the nonresident.

But I would argue that the constitutional analysis can be avoided. New York law is not limited by the boundaries of New York. It's correct that New York law needs to be interpreted as to its applicability when it faces a conflict with another jurisdiction's law that is offered in its stead, but as you point out nobody has done that here. So, it seems to me that as a New York judge, looking at New York law, you would simply say that this is the law that we apply. The parties are properly before a New York court. There are sufficient contacts—here I'm taking the other side and agreeing with you—here to apply the New York law to this defendant. There is no problem of unfair surprise. Why shouldn't we apply New York law directly instead of being forced to do so by the constitution?

PROFESSOR CURRIE: There are problems with the Privileges and Immunities Clause in the Currie thesis of choice of law, as I believe Judge Schreter is aware. It seems to me that an article which bore Professor Currie's name dealing with this topic also bore hers.

PROFESSOR KAY: Her former name.

PROFESSOR CURRIE: Yes. They were the first ones to call attention to this very serious problem. Here, you've got a choice-of-law method that in many cases, as applied by its inventor, finds that the law applies for the benefit of a local citizen and not for somebody from another state. That's discrimination. It's a distinction in treatment based upon the place somebody lives.

And you look at Article Four of the Constitution, which I happen to have here in my pocket. I always carry it with me. As you see it's falling apart, but it's still a coherent document in most respects, despite the Supreme Court of the United States in its many manifestations. It says in Article Four, basically, you're not supposed to discriminate
against people from outside the state. This is one country. You are supposed to treat people from other states as if they were citizens of your state. Citizens of every state are entitled to the privileges of citizens in every state. That's what it says.

That doesn't mean you can never make any distinctions between local and out-of-state people. The Supreme Court of the United States in 1856 decided a case called *Conner v. Elliott* [59 U.S. (18 How.) 591 (1856)] in which the allegation was made that somebody who didn't live in Louisiana was entitled to the benefit of the Louisiana community property laws with respect to property that was located in Louisiana. The Supreme Court said the Privileges and Immunities Clause didn't require Louisiana to extend the benefits of its community property law, which were designed for married people who live in Louisiana, to citizens of other states. Why not? Because to extend Louisiana law to that case would defeat the legitimate interests of other states.

The Privileges and Immunities Clause has to be read, as I believe Judge Schreter once wrote, in conjunction with the Due Process and Full Faith and Credit Clauses, which limit the power of a state which has no interest in the case to meddle with the affairs of another. I resolve this, as I think Currie and Kay resolved this one time, by saying that where the other state has a legitimate interest in the application of its law, the state may defer to that interest, and it doesn't violate the Privileges and Immunities Clause in refusing to extend the benefits that it extends to its own citizens to the citizens of another state.

**PROFESSOR KAY:** Well, the analysis that my learned Brother has given is eminently correct.

**PROFESSOR CURRIE:** Thank you.

**PROFESSOR KAY:** But I was using that opinion to refute Larry Kramer's argument. Larry fell into what I thought was an incorrect application of the Privileges and Immunities Clause precisely because he did not follow the Currie/Schreter article.

**PROFESSOR POSNAK:** He followed Douglas Laycock's theory.

**PROFESSOR KAY:** That's correct.

**PROFESSOR POSNAK:** Justice Felix?

**PROFESSOR FELIX:** I think the decision in the case is, of course, triggered by the New York choice-of-law rule. Apply the law of the place
of injury, which the court in the actual case decided that it could not
depart from. If we shift to interest analysis there would be two
possibilities. One, it remains, as in the case, that we effectively have no
law in Saudi Arabia, and then we get back to your discussion.

If we were to assume that the law of Saudi Arabia did not recognize
the doctrine of respondeat superior, how then should the case come out?
We would at least have a basis for interest analysis. We then come back
to the problem of whether New York has an interest in the application
of its own law and should apply it as a forum, or whether there is some
lesser interest that New York has which might be buttressed by
referring to the laws of the other states with which there is a contact,
though whether there is an interest there remains a debate among us.

Analogizing to the Washington case of Johnson v. Spider Staging [555
P.2d 997 (Wash. 1976)], in which we have a comparable pattern, with
the exception that Washington was also the place of incorporation of the
defendant, one might ask if in an instance in which the incorporation in
Delaware is essentially formalistic and made for the purpose of having
the advantage of the internal affairs rules of Delaware corporation law,
could we not find an interest in New York in policing the activities of
companies which are in effect economically and functionally New York
corporations and arrive at a New York interest there?

PROFESSOR KNOWLES: You could take it one step further. New
York has a nondefendant-protecting rule of vicarious liability and it's a
New York-based defendant. I think we could take judicial notice of the
Delaware incorporation of the overwhelming majority of Fortune 500,
Fortune 1,000, Fortune 5,000 companies in this country, and the state
that we find has an interest in the application of its law, New York,
would not protect this defendant.

PROFESSOR POSNAK: I think unless somebody has something
urgent to say that we ought to move on because we have a lot of other
material and cases. But, first, let me ask if there are any questions or
comments? Ted?

TED BLUMOFF: A question for Judge Currie. To the extent that
vicarious liability rests on deterrent rationale, doesn't applying it or not
applying it in this case where you have a corporation that does a lot of
business in New York turn on the fortuity of the accident occurring in
Saudi Arabia because the deterrent rationale is the same with respect
to ARAMCO, regardless of where the accident occurred?
PROFESSOR CURRIE: Because it's a case of vicarious liability you mean?

TED BLUMOFF: Yes.

PROFESSOR CURRIE: And because the pressure that New York is putting on the company is pressure on the corporation as such, and that will make its people everywhere be more careful. That's one of the wonderful things about this approach to choice of law because there are so many possible ways of looking at the particular law in question. This question focuses on the particular law in question, asks what is its purpose, and reaches the conclusion that it applies. Notice that every step in this analysis is subjective, one on which reasonable people can disagree. What is the purpose of the vicarious liability law? A tentative conclusion, among other things, is deterrence.

The second step is, given that deterrence is one of its purposes, is the deterrent purpose served by applying the law in this case? I wasn't really focusing on the fact that this was basically a New York corporation because I didn't know it until it was brought up by my fellow judge. Prima facie you say, well, they're not trying to control conduct in Saudi Arabia. But it's vicarious liability, and so you are talking about putting pressure on the bosses of the corporation. If you make them more careful across the board, then they'll be more careful in New York, and that's what we really care about. That's not an implausible argument. It's the best argument I've heard for the substantive applicability of New York law in this case.

To respond to it, I wouldn't deny that deterrence is a purpose of this law. I wouldn't deny that you get some marginal deterrence by applying this to a Saudi Arabian case. But I think that's such a marginal kind of deterrence when you're talking about conduct in a foreign country, and the people who are really going to be deterred by this are the local officials in Saudi Arabia. I'm not sure that, as a New York judge, I would want to push that deterrent policy so far in the face of arguably upsetting legitimate expectations in Saudi Arabia.

TED BLUMOFF: Isn't interest analysis always, doesn't it always turn on an empirical question that we really can't answer?

PROFESSOR CURRIE: That is one of the objections that its opponents always make. This is so darn subjective. You can't tell what the purpose of a law is, and you certainly can't tell which connecting factors are enough to bring a particular case within the purpose of the law. But this is not a problem that is confined to the conflict of laws.
People pretend that domestic cases are easy to solve, and they're not. Think about the construction of any statute in a domestic case. You've got to figure out what the purpose is. You've got to guess at it, surmise, conjecture. You know why people pass these laws more or less. Borderline cases are hard in domestic law as well as in conflict of laws. So, I don't think it's an appropriate objection to say that it makes the cases hard. It's enough if we come out with more accurate results that more nearly further the policies that underlie these laws. Because we all know laws are passed not just as academic exercises, but in order to accomplish something in society, and in my view—and this goes all the way back to Blackstone—interpretation and application of the law should strive to accomplish the purposes for which those laws were adopted. We do the best we can.

PROFESSOR POSNAK: That's the essence of Brainerd Currie's approach as well. Hal?

HAL LEWIS: Is there another tea leaf here as far as possibly ascertaining whether New York has an interest in the activity of the trial judge at the beginning of this case? The one thing we know that did not happen is that the trial judge did not dismiss this action sua sponte on the ground of forum non conveniens. Perhaps, in an anachronistic argument, since this was a 1956 case, but at least if this came up today it would widely be understood, I believe, after Piper v. Reyno [Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)] that a judge perhaps on her own motion could dismiss this in favor of a foreign jurisdiction. Is there anything to be read into the fact that the judge didn't do that? Can we say that that's an inadvertent indication of some kind of an interest of New York here?

PROFESSOR CURRIE: If I'm the judge, and I don't dismiss it, it's not because I think the New York law applies, it's because it's a convenient forum for the parties. This is the corporate headquarters, and we knew from the opinion it's a place where the company is doing business. Why make them go back to Saudi Arabia? The plaintiff has left Saudi Arabia suddenly and permanently, and that doesn't seem an appropriate solution.

HAL LEWIS: That's so even though the court in Piper indicated that among the appropriate considerations in deciding whether to dismiss here would be the court's calculation of various sovereign interests, as well as familiarity with the applicable laws?
PROFESSOR CURRIE: It's always awkward when you have to apply foreign law because you're always guessing. That's what's so awkward about the diversity jurisdiction after Erie, but it's only one of the factors.

PROFESSOR POSNAK: Any other questions, comments, opinions? Anyone want to render a dissenting opinion? Okay, let's move on to the next case. I think we're in for some fireworks today. This is the one case in which I thought we would find a consensus.

The next case we'll discuss is Grant v. McAuliffe.

GRANT V. MCAULIFFE
[264 P.2d 944 (CAL. 1953)]

PROFESSOR POSNAK: The judge who rendered the opinion was Roger Traynor, whom Herma Hill Kay clerked for, although not at that time, 1953, did you?

PROFESSOR KAY: No. I clerked for him in 1959-60.

PROFESSOR POSNAK: In this case we have three plaintiffs from California. They were injured in Arizona in a car wreck when the car they were in collided with a car driven by someone named Pullen, who also was from California. So there are four people, all from California, involved in this accident in Arizona. Mr. Pullen's negligence caused the accident which also proved fatal to him. Several weeks later an administrator was appointed by a California court to administer Pullen's estate, and the three Californians injured in the other car sued Pullen's estate in California to recover for their injuries.

Under California law a tortfeasor's negligence survives his death. You can sue the estate in other words. Under Arizona law, which was the common law, if the tortfeasor dies before the complaint is filed, the complaint must be dismissed.

There is one way to visualize the choice-of-law issue that may be helpful: Two laws are competing; they're fighting against each other for application. We have the California law that says you can sue even though the tortfeasor died and the Arizona law saying, no, you can't. The question is who is going to win that fight.

Would you like to get us started again Judge Rees?

PROFESSOR REES: I'm sure what I say won't be agreed with universally. "We have adopted Brainerd Currie's interest analysis as our approach to choice-of-law problems. Under interest analysis, 'when a court is asked to apply the law of a foreign state different from the law
of the forum it should inquire into the policies expressed in the respective laws and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies."

"The evident policy expressed in Arizona's abatement rule is the protection of Arizona deceased tortfeasors, and their estates from tort claims asserted after the death of the tortfeasor. In this case, since the deceased tortfeasor and his estate were not citizens of Arizona, Arizona has no interest in the application of its abatement rule."

"The evident policy expressed in our survival rule is to permit injured citizens of this state to assert tort claims against the estate of a deceased tortfeasor, particularly where the deceased tortfeasor and his estate are also citizens of this state. In this case, since the plaintiffs, as well as the deceased tortfeasor and his estate, are citizens of this state, we have an interest in the application of our survival rule."

"As expressed in Currie's principle number three, 'if the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.' Under interest analysis this situation is known as a false conflict."

PROFESSOR POSNAK: Concurrers or dissenters?

PROFESSOR KAY: You know, I was thinking, as I was driving across Georgia yesterday that I was a sort of sitting conflict of laws problem. And I gather from what I've been told here that if I were to cross over the center line and collide with a car, my rights and those of my heirs would vary depending on whether the car that I collided with carried another Californian or carried somebody from Georgia or even somebody from North Carolina. Maybe some of my fellow panelists were driving too yesterday. Why should this analysis be one that depends so heavily on the residence of the parties?

PROFESSOR REES: I'm not sure it's literally the residence of the parties. It isn't always the residence of the parties. But, certainly, it seems to me that if you have a rule designed for compensation, the residence of the person that would be compensated is relevant. I'm not really sure how to classify the nonsurvival or abatement rule of Arizona. My assumption is that it is designed for the protection of Arizona estates, and Arizona would not want to assert an interest if there was no Arizona estate involved. And if you can get past that point, then, and if you can show that the other state has an interest, it seems to me that
it would be a false conflict, which would require application of the law of the only interested state.

PROFESSOR KAY: But this analysis doesn't go to a rule of common domicile, does it?

PROFESSOR REES: It comes close. Are you talking in your hypothetical about the defendant dying in the accident and the problem being survival or are you talking about a conduct rule of the —

PROFESSOR KAY: Well, let's just substitute Georgia for Arizona here. Surely, there is maybe some closer contact, if only in geographical proximity, between California and Arizona where you may have accidents of these kinds; indeed, we've had conflicts problems involving California and Nevada where people are drawn to Nevada by the proximity of its gaming possibilities. But I had come all the way across the country to rent a car in Atlanta to drive down to this Symposium. It would be only the sheerest coincidence if another Californian and I should get involved together in an accident here. If Georgia has a rule saying that if the tort dies with the tortfeasor, why shouldn't a Georgia court want to apply that law?

PROFESSOR REES: Are you the deceased tortfeasor?

PROFESSOR KAY: Why not?

PROFESSOR REES: Okay, your state of California would allow the suit against your estate. It seems to me—to look at it another way—that the only state that really cares about how this comes out would be the state where all of the parties are domiciled. This is a dispute between Californians. Why do we care where it happened?

PROFESSOR KAY: So, it is a common domicile rule?

PROFESSOR REES: I think it might be at that point.

PROFESSOR POSNAK: Justice Currie?

PROFESSOR CURRIE: Well, now, Judge Kay is having a good time with this, and I think we all are. One of the other principal criticisms that is often levelled at Currie's interest analysis is its parochialism, that it always somehow tends to come out favoring local parties. The
laws tend to always be found to protect people and not to apply to places, and there’s a lot of disagreement about that.

The first point I’d like to make on this is that that’s not the essence of what Currie is talking about. That’s the result of particular applications of his interest analysis. The essence of the analysis is not that laws are designed to protect people and not to refer to places. The essence of the analysis is that you approach these problems as a problem of interpretation of the law in light of its purpose. That approach led him, because of his particular view of the world, to conclude in many cases, although not in all cases, that a particular law was designed to protect local residents—not always.

Speed limits, for example, are the traditional example that he used of a law that is territorial in its design. Everybody who is in Georgia is supposed to obey the Georgia speed limit, and Georgia had no intention of regulating the conduct of Georgia people in South Carolina when it passed the speed limit, which I’m happy to say is a little higher than it used to be. It’s a good idea.

But Herma asks the question, “Well, now, how come results differ because of the residence of the parties?” The simplest answer is they differ sometimes because of the residence of the parties because the residence of the parties is found to be relevant to the purpose and therefore to the applicability of the law. A more general way of putting it is that the result may depend upon the residence of the parties because we have a federal system in which every state has the right to make its own laws for its own people. Some states have different ideas of what the proper law ought to be. So, I don’t find this strange or ridiculous. It’s just the natural consequence of a federal system. We can disagree as to the results of the interpretation of a particular law. I happen to agree, and I’m going to concur with Judge Rees’s opinion here.

I wish that Currie had never used the term interest analysis, because I think it has confused a lot of people. What we’re talking about is not an abstract question of whether this state cares about these people. Does New York care about the actions of the Arabian-American oil company because it has its headquarters there? The inquiry can be undertaken only in the context of the language purpose of a particular law. The approach should be called something like interpretation analysis rather than interest analysis. It focuses on the particular law.

So, I would answer the question in *Grant v. McAuliffe* by asking the questions, “Does the Arizona law apply?” “No,” for the reasons given by my Brother Rees. “Does the California law apply here?” “Yes,” for the reasons given by my Brother Rees; and therefore I apply the California law. It’s very simple. This is one of the easiest cases.
Let me say just one final word as to this question of the common-domicile rule. Of course, you know, Herma knows what she's doing when she suggests that the whole idea of the Currie analysis is that there are no rules. It may turn out in a thousand cases that you decide in a sequence that in every one of them you happen to apply the law of the common domicile of the parties, but that doesn't mean you've got a rule that you apply automatically in the next case, the way the New York court did in the case *Schultz v. Boy Scouts of America, Inc.* [480 N.E.2d 679 (N.Y. 1985)], which we're going to come to in a few minutes here. It just means that that's the result of the analysis of a thousand different statutes in light of their purposes and their language. But, no, you shouldn't draw any general conclusions.

My final word is that this whole question about whether you look at where something happened or whether you look to who was involved, involves two contrasting but equally legitimate views of what a state is all about. In a sense a state is a geographical unit. It's drawn by those imaginary lines that you see on the map. To some extent, everything that happens in that state is the concern of that state. A state is a geographical entity, and we see that reflected, of course, in things like the speed limits. But a state is also a community of people, and you see that in the laws that provide for voting rights, and in the laws that provide for who can be a public official in the state. You've got to be a resident of Georgia to be a governor of Georgia, and that makes sense because Georgia is a community. In each case the judge must determine in which of these general ideas about the state the particular law fits. Is this a law that reflects the view of the state as a community or a law that reflects the view of the state as a territory? In many of the cases we're discussing, it's not obvious which of those conclusions is the right one.

**PROFESSOR POSNAK:** I just want to say one thing. I want to correct what you said about your father. He did not name it "interest analysis." It was Professor Ehrenzweig who was responsible for that misleading label.

**PROFESSOR KNOWLES:** I concur with Judge Rees, but I want to make two points perhaps more strongly based on years of teaching students these opinions. It seems to me very important at the outset to focus on the issue which we are deciding. If the question had been whether Judge Kay had crossed the centerline while going over the speed limit and what the speed limit was, that would be a very different question in my mind from a question of the survival of the action.
The second point I'd like to make is that I agree with Judge Currie that this problem arises only because we allow our states to have different rules on these subjects. I tell my Conflict of Laws class at the outset that in general, not in these two cases maybe, but in general most conflicts cases can be turned into country music songs. They have decided that the chorus of the song is "that's the price you pay for a federal system." If we didn't have California and Arizona weighing the values in the abatement of an action or the survival of an action differently, we wouldn't have this problem. And, so, I think paying deference to that fact is an important thing that the court should do.

PROFESSOR POSNAK: Let me ask one question here. Is there any substance to the argument of Professor Twerski and Professor Laycock that the Arizona law should apply because that's what people expect? If you ask somebody after they've had an accident in Arizona, no matter where they are from, whose law they would expect to govern liability, they would say Arizona; therefore, to fulfill those expectations the court ought to apply Arizona law. Does anybody want to comment on that?

PROFESSOR REES: Well, that's certainly true as to the criminal law and as to motor vehicle regulations. But if you go beyond that I suppose you'd need to go out and do a poll of the public to see what they think the law is. I mean, it seems to me that they have no right to make the assumption beyond the conduct rules of that jurisdiction.

PROFESSOR POSNAK: Okay. But let's assume there's been a poll and the vast majority would expect to apply the law where the cause of action arose. Is that a good reason for applying it?

PROFESSOR KNOWLES: But that's assuming your definition of where the cause of action arose. You are assuming it had to be where the accident physically happened, in your definition.

PROFESSOR POSNAK: Do Twerski and Laycock have a legitimate point?

PROFESSOR KAY: Well, there is the so-called "cocktail party" standard of jurisprudence—namely, that lawyers ought to be able to reassure nonlawyers that the law is regular and predictable and is what they expect. But, of course, one of the questions that arises in this field is why people expect that stability must relate to the geographical contacts. One of the great things that interest analysis did was to force us to examine why those geographical contacts were thought to be so self
evident and were necessarily the place from which we should start. Of course, then you go down this road which David aptly characterizes as construction and interpretation, and it's fairly clear that by and large this is not what legislatures are looking to. It's true that they are there to govern Georgia, and the undeveloped image in their minds may be of Georgia places and Georgia people, but that doesn't mean that they've necessarily thought consciously that the law stops at the Georgia border.

If I may make two minor points here: One is that despite the rule of the road analogy, I didn't see anybody driving less than eighty yesterday afternoon. And on the comment, David I think is quite right. I was playing devil's advocate here, if only to bring out what I think is one of the great misconceptions about this approach. It was expressed, I think, most clearly by Harold Korn in his incredibly lengthy analysis of all the New York guest statute cases where he said that if you go through all these cases you will see that this was merely a minor revolution in the law of torts, and it can be summed up by the common-domicile rule. I think his conclusion is quite misleading and puts an end to analysis instead of a beginning. I think that what my Brother David Currie has just said is by far the best answer to that argument I've ever seen, and, David, I wish you'd put it in writing.

PROFESSOR POSNAK: Justice Felix?

PROFESSOR FELIX: Just three points. One, on the nature of so-called interest analysis as a case-by-case approach, in Currie's article on survival of action, he notes that there are 256 different permutations of this case, 174 of which raise conflict of laws points.

On Judge Rees's interpretation of the policy behind the no-survival rule, that raises an interesting issue of how do you know what the purpose of the law is. If you fall back on the medieval notion of actio moritur cum persona—that is, that death abates the issue—a historical explanation of that might well be that there was no one to pursue the action, or that there was no one to pursue the personal action against. This, I think, highlights the difference between that and examining a rule of law to see what it does today. To give it a better name, functional analysis, and that's how you derive the purpose, rather than either historical explanations of how the rule arose or statements as to how one thinks the rule ought to apply.

I think Judge Kay's devil's advocate could be taken even a step further, and it illustrates one further aspect of Twerski's notion of territorialism—that is, when does common sense seem not quite in harmony with interest analysis? Suppose this had been a fistfight in a Maine saloon between two people who happened to be Californians
working there for the summer; do you still want to apply California law? Well, on a theory of common domicile, this is just an accident of the federal system, okay. Let's have a knife fight in Ulan Bator, Mongolia, and get outside the federal system a little bit. Are we still going to find the happenstance of two Californians meeting there in a knife fight to the death to justify going after the estate in California when some long years later it's being administered?

PROFESSOR POSNAK: Does anybody else have anything to say?

PROFESSOR CURRIE: Just a word, Bruce, about your question about expectations of somebody travelling in Arizona. I agree there are sometimes real problems with the application of foreign law to people who are driving along in one state expecting to be judged by the rules of the road of that state. But I have a hard time imagining this person rocketing down the Arizona highway and saying, "Well, how fast shall I drive; how reckless shall I be today? I know that under the laws of Arizona, if I go too fast, and I kill somebody, I'll have to pay unless I have the good fortune to die. But I know that in Arizona if I have the good fortune to die before I get sued, my heirs will not have to pay; and, therefore, I will drive recklessly." I don't think this is the best case for worrying about the legitimate expectations of the person who is driving in Arizona.

PROFESSOR POSNAK: That's what I was looking for. Ted?

TED BLUMOFF: Is it still a false conflict if Arizona law required gross negligence for contributory negligence, while California stuck with the normal contributory negligence standards, and the defendant's estate wants to pursue a contributory negligence defense in California.

PROFESSOR POSNAK: Say it again.

TED BLUMOFF: Do we still have a false conflict if the law on contributory negligence were different in Arizona than California? Assume that Arizona required gross negligence in order to be successful on the defense, and California requires only negligence. So it's a little easier for the defendant to pursue the defense in California.

PROFESSOR FELIX: Well, I think you have buried the survival issue. And you're getting into Babcock v. Jackson [191 N.E.2d 279 (N.Y. 1963)].
TED BLUMOFF: I'm bringing in a substantive law question because Bruce raised the question about the substantive law earlier. Would it still be a false conflict if everyone was from California in a California court, and Arizona had a different law?

PROFESSOR POSNAK: Well, it depends. If Arizona has a law of contributory negligence, assuming that one of the purposes behind having a contributory negligence rather than comparative negligence is to deter and to make people drive safer, then I think it makes it a different case. It's not Babcock. There is an argument, is there not, that Arizona has an interest?

PROFESSOR KAY: In a California estate? It's still a California estate in his hypothetical.

PROFESSOR CURRIE: It may make everybody in Arizona careful by punishing them and their heirs—if you will—if they don't. You can concoct cases where Arizona has an interest in the application of its law. I think it's the reverse of the one you put. It's where Arizona is tougher on plaintiffs driving in Arizona than California is.

PROFESSOR KAY: One of the variations on Hurtado v. Superior Court of Sacramento County [522 P.2d 666 (Cal. 1974)], which we're going to get to later on, is found in Hernandez v. Burger [162 Cal. Rptr. 564 (Cal. Ct. App. 1980)], a case of a California visitor to Mexico who injured someone in Mexico. The Mexican plaintiff would not be allowed to recover the full amount of the damages under the law of Mexico because there was a cap. California did not have a cap on damages. There was actually an argument made—to my astonishment—by a lower court judge that it was in Mexico's interest to allow the California defendant to have the protection of Mexican law because that would encourage more tourist trade to come to Mexico! That has to be an erroneous reading of interest analysis.

PROFESSOR KNOWLES: But it seems to me that it's very questionable that people regulate their conduct based on the contributory negligence or guest statutes. That would be an interesting poll, even in this courtroom.

TED BLUMOFF: Does that matter?

PROFESSOR KNOWLES: Well, it depends on whether you think that Judge Posnak's question about how significant the assumption of people
is and what the expectation that people have about the outcome, how significant that is.

**BABCOCK V. JACKSON**
[191 N.E.2d 279 (N.Y. 1963)]

*PROFESSOR POSNAK:* One of my major criticisms of your new edition, is that it reduced Babcock v. Jackson to a note case.

*PROFESSOR KAY:* Oh, Larry Kramer did it over my bitter objection.

*PROFESSOR CURRIE:* Larry is responsible for all the errors.

*PROFESSOR POSNAK:* This case was the first one to explicitly use interest analysis, and it's clearly the most famous case, or maybe infamous case, in choice-of-law jurisprudence. It was taken out of that latest edition.

*PROFESSOR REES:* Professor Kramer described it as analytic mush.

*PROFESSOR KAY:* Correct.

*PROFESSOR REES:* I think that's his excuse for not including it.

*PROFESSOR CURRIE:* That should have been his excuse for including it.

*PROFESSOR KAY:* Do I have your vote to put it back in the next edition?

*PROFESSOR POSNAK:* Yes. And, by the way, Larry Kramer is not here to defend himself, but that's his own fault. He was invited. A little thing like getting married got in the way. He got married this weekend.

*PROFESSOR CURRIE:* He's not getting married today, is he?

*PROFESSOR KAY:* Good point.

*PROFESSOR POSNAK:* This case is very similar to the case we just did. The plaintiff was the guest of the defendant making an automobile trip. They were going to Canada for the weekend, and they were both residents of New York. The defendant picked up the plaintiff in New York and was going to take her back to New York after the weekend.
They went to Canada for the weekend, and while driving in Ontario, Canada the defendant lost control of his car and collided into a stone wall. The plaintiff passenger-guest was seriously injured, and she sued in New York for his negligence. Ontario did not allow a guest to recover. You shouldn't bite the hand that feeds you, and a guest can't recover against the host. Under New York law, it didn't matter—the guest can recover just like somebody who was in another car. And, by the way, this scenario, the conflict between these two laws was the one that produced the most cases that have been put in conflict of laws casebooks. We have a New York forum. Plaintiff is from New York. Defendant is from New York. The internal law issue is can a guest recover? And under New York law, the answer is yes. Under Ontario law, the answer is no.

PROFESSOR CURRIE: The answer is for the benefit of the people who might think that the place of the accident had something to do with it, you might put that on the board, too.

PROFESSOR POSNAK: Oh, have I left that out?

PROFESSOR KAY: Yes, right.

PROFESSOR FELIX: That's so fortuitous.

PROFESSOR POSNAK: That's one of the things that's on my scorecard. That's right, we don't care where the accident occurred but some people might. Okay, who wants to start the ball rolling here?

PROFESSOR REES: Do you want me to do it again? I did take the time to write all this stuff out. I think I need to do something with it.

PROFESSOR POSNAK: You can be our official starter.

PROFESSOR REES: All right. Again, I say: "We have adopted Currie's interest analysis, and we have to inquire into the policies expressed in the respective laws and the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies."

"The policy behind Ontario's guest statute is to prevent the fraudulent assertion of claims by passengers in collusion with drivers against insurance companies. So, its purpose is to protect insurance companies. The fraudulent claims intended to be prevented by the statute are those asserted against Ontario defendants and their insurance carriers. In
this case, since the insurance was not issued on an Ontario automobile, Ontario has no interest in the application of its guest statute."

"The policy behind our rule of host-guest liability is compensation of our resident guest for injuries caused by hosts, and especially where the host is also a resident of this state. In this case since both the plaintiff-guest and defendant-host are citizens of this state, we have an interest in the application of our rule of host-guest liability. Therefore, of course, the law of the only interested state applies. It's a false conflict."

PROFESSOR POSNAK: That's one of the questions I have. Does anybody see any way to distinguish this case from the Grant case?

PROFESSOR CURRIE: Well, it all depends on what you think the purpose of the law is. If you think that the purpose of the law is to encourage hitchhiking in Ontario, you can easily distinguish the case. You don't want to discourage people from picking up people along the side of the road by the risk of having to pay damages if they are driving recklessly.

PROFESSOR REES: The policy I have came from the opinion of the court, which they got from the University of Toronto Law Journal, it's an anticollusion policy for the protection of the insurance company.

PROFESSOR POSNAK: Should we rely on law reviews to that extent?

PROFESSOR REES: We've got to rely on something.

PROFESSOR POSNAK: I think what they should have done, and this is one of the things that people don't do enough of is when they're trying to figure out the purpose behind a law they should not just contemplate their belly button and come up with a purpose. They should look at the legislative history of the guest statute in Ontario and the cases from Ontario involving its guest statute. Perhaps the legislative history or the cases discussed the policies behind Ontario's guest statute?

PROFESSOR REES: I had assumed that the New York court had done that and had come to the conclusion that it was an anticollusion policy to protect Ontario insurers.

PROFESSOR CURRIE: One of the real difficulties, of course, is the inadequacy of the materials at the state level. Illinois didn't have any legislative history until just a few years ago. You couldn't go back and
read the debates in the Illinois legislature, fascinating though they are, because they weren't written down anywhere.

**PROFESSOR KNOWLES:** Georgia still doesn't have any official legislative history.

**PROFESSOR CURRIE:** So that complicates further the already impossible task of being certain what the purpose of the law is. Now, I don't think the purpose of the law is what I said it was; therefore, I'm going to have to concur again, but it shows something about the subjectivity of the inquiry.

Maybe one should say at this point that after having attempted to apply this highly subjective and debatable analysis through three cases we ought to overrule our prior precedents and not adopt interest analysis anymore. We ought to say this happened in Ontario, and we should therefore apply the Ontario law, which is what people would have done mechanically for centuries before any of us started thinking about this.

One of the things that people in the audience ought to recognize, and I'm not sure you all do, is how unrepresentative this panel is of the way people think about choice-of-law questions. I'm very pleased to say that this work by Currie, which was done forty years ago or so, is still after forty years the focus of a great deal of excitement and attention among conflict of laws scholars and controversy among the judges, but it's not universally accepted. That's why people keep talking about it all the time. It has been vigorously attacked, not always by people who misunderstand it, although there has been a lot of that, too. Lots of people don't think this way.

Lots of people today would still tell you—and some of them have been referred to by some of my fellow judges today—"Look, this happened in Ontario. What are you talking about? You can't take New York law into Ontario. That's contrary to the whole idea of a world that is divided up into sovereignties on the basis of territorial borders."

So all this business about looking at the purpose of the law is alien to the way a lot of people thought about this subject and continue to think about this subject, and that's why this whole theory that we're talking about today aroused such controversy at the time it was new.

**PROFESSOR KAY:** Yes. And it aroused controversy not just here, but if you look at this subject from an international perspective, you will find that when this theory was first announced it was greeted in Europe as though the United States had suddenly taken leave of its senses and Currie was some sort of wild man who threw away everything good that had happened before he wrote and had nothing to put in its stead. He
was seen as trying to turn a private law subject into a public law subject, and that reaction did, I think, come directly from the word, "interest analysis," especially when coupled with governmental interest analysis. In my lectures at the Hague, I tried to show with the help of one of my students who spoke several languages that the Germans couldn't even agree on how to translate the term "interest analysis" let alone, you know, how to understand it.

But I was hoping that we might take the opportunity here in this case to say a few words about whether the question here really is one of legislative intent because, as one of my students has argued very vigorously, that is Lea Brilmayer, who also was invited but was unable to come, that this theory really does not take legislative intent with the kind of seriousness that it purports to because if a legislature were to enact one of these jurisdiction selective rules, like the place of the wrong, theorists who follow Currie's lead would ignore that as not being a declaration of the true interest of the state. She argues that if you're not going to accept what the legislature does when it tells you what law it wants you to apply, then you really are being misleading and worse when you say that you're following legislative intent.

I, myself, don't think that the purpose ever was to follow legislative intent, so the legislative debates, as informative as they might be, go really more to helping the judge decide what the sense behind the law is. I think David Cavers made the suggestion that we should talk about purpose rather than policy.

PROFESSOR KNOWLES: Right.

PROFESSOR KAY: And I think that judges do always have to try and figure out what sense the law makes and what it is designed to do. While the legislative debates can be helpful on that, I don't think they're necessarily determinative. We've all seen judges, including the Supreme Court of the United States, where they do have quite ample legislative materials, disagree sometimes down to the merest comma and hyphen about what the legislative history shows. So, I think that one of the great advantages is that we are not really here trying to find legislative intent in that sense of the term. We're really trying to discover purpose. So, it may be, Marjorie, that Georgia is better off not to have it because the Georgia judges, then, won't be as distracted maybe as some of the other judges will be.

PROFESSOR KNOWLES: That may be.

PROFESSOR POSNAK: Judge Felix?
PROFESSOR FELIX: Just briefly on the point of European reactions. Clearly, I think the novelty was part of it. I think another thing was the fact that for Europeans, conflict of laws is, for the most part, international. They are much more sensitive about territorialism, and one might even say that at that level it's almost a concept of act of state. Even when they have a federal system, they tend to treat private law as national, which would get us to footnote twelve in Babcock about the decision of the Supreme Court of Canada, but let me save that for a moment and get to a point that Judge Currie raised about the way people think.

About a year and a half ago in South Carolina, a family rented a bus in Charleston to go to a football game at Notre Dame. On the way back they decided to drive all the way through rather than spend the night in Indiana. The driver fell asleep in Indiana and crashed the bus in Indiana. Indiana at that time, at least, had a guest statute that focused only on close members of the family and hitchhikers.

So, the South Carolina court had a choice between South Carolina law in a common-domicile case—having a few years earlier declared its own guest statute unconstitutional as violative of Equal Protection—or the Indiana statute, which had the further anomaly of the insurance company having settled with an uncle who was not a member of the family group named in the Indiana guest statute, and denied relief to the rest. I watched the argument, and the attorney for the appellant, the plaintiff, was repeatedly asked how the court could recognize a cause of action when none was vested by the place of injury. The decision was based on two earlier lex loci delicti cases, which I would guess were arguably on all threes with this case, and the decision was rendered as an unpublished opinion which may not be cited as precedent. That's one illustration of the intensity of vested rights thinking.

The footnote is fairly interesting because it suggests in part a renvoi solution. I think it illustrates, if I understand Canadian practice, a unified approach for civil cases, and suggests to us that this is a slightly different, albeit peripheral footnote difference, between Grant and Babcock. One might ask what information, if any, should the court derive from the choice-of-law practices of the other states with which the case has contact.

PROFESSOR KNOWLES: I just wanted to second what my colleagues have said about the hostility in some American courts to interest analysis, however it is labelled, and, indeed, to some other forms of choice of law. I scrawled for myself a hypothetical opinion of the Georgia Court of Appeals or Georgia Supreme Court.
We have had lengthy arguments by learned counsel urging us to abandon our present approach to choice of law based on the rock solid foundation of vested rights. For tort actions that means the law of the place of the tort governs.

We have been urged to adopt some theories promulgated by law professors not actively engaged in the practice of law. They have urged us to adopt either Restatement Two, which focuses on the place of the most significant contact; something called interest analysis, which despite the list of principles we have yet to totally fathom; and then something that is unabashedly subjective promulgated by Professor Leflar advocating that we choose the better law.

We do not choose to forsake the rock solid foundation of vested rights theory embodied in Restatement One; therefore, in the state of Georgia we will have none of these new fangled approaches. Does that adequately convey it?

**PROFESSOR FELIX:** To which one might add the best captain is the one who takes the best care of his ship and never leaves the harbor.

**PROFESSOR KAY:** Now you know what to say on the bar exam.

**PROFESSOR POSNAK:** Let me ask Professor Rees, what special twists Georgia gives to the traditional, First Restatement approach.

**PROFESSOR REES:** We have two peculiarities. You can't count on them using either one in a particular case, but every time I think they're dead, they crop up again. And the first one is that we don't use other states' common law.

**PROFESSOR POSNAK:** Even if the accident happened in this other state?

**PROFESSOR REES:** No, we never use somebody else's common law because, after all, we are as capable as the next guy of knowing what the common law is or deriving it. That goes back a hundred years at least.

Now, as to statutes, and the decisions interpreting the statutes, we will use the other state's, but only if that state was one of the original thirteen colonies or an area administered by those colonies. What that does is in Ohio, for example, there is a strip across from Connecticut called the Western Reserve. It includes Cleveland, which is why you have Western Reserve University. That means that if you are in that area then you get the benefit of being in a colony or a colony's territory. But if you're in Cincinnati, as far as we know, those people aren't
civilized in Cincinnati, and we aren't going to listen to anything they have to say about law.

Now, you would think that with those sort of pro-forum rules, it would be easier to convince our courts to adopt interest analysis, but I'm one of those crazy academics that they won't listen to.

PROFESSOR POSNAK: I think someone should point out to them that it was a home boy who invented interest analysis in the first place.

**SCHULTZ V. BOY SCOUTS OF AMERICA, INC.**

[480 N.E.2d 679 (N.Y. 1985)]

PROFESSOR POSNAK: If we're ready, we're going to discuss Schultz v. Boy Scouts of America, Inc. This is when I thought the proverbial you-know-what was going to hit the old fan, but we've already had some controversy. Maybe we'll have a consensus on this one, although I doubt it.

Let me give you the grisly facts, and some people might say grisly result, too. The plaintiffs were residents of New Jersey, where their two children attended parochial school. A religious order that had its headquarters and was incorporated in Ohio supplied the teachers to this school in New Jersey. The school also sponsored a Boy Scout troop that the plaintiffs' children joined. One of the boys' teachers who was sent by this religious order, also served as scout master of the Boy Scout troop to which the boys belonged. The scout master/teacher/monk took the troop for a weekend trip to New York, and while they were there, he sexually abused both boys. The abuse continued when they got back to New Jersey and eventually resulted in one of the plaintiffs' children killing himself—a suicide.

The plaintiffs filed suit in New York against the religious order and the Boy Scouts, which had its headquarters in New Jersey, but subsequently moved to Texas.

The complaint alleged that both defendants were negligent in assigning this teacher/scout master to a position of trust with young boys. They also alleged that he had previously been dismissed from another Boy Scout camp for similar misconduct. The plaintiffs sought to recover damages for their personal injuries and the injury to their two sons, and, also, for the wrongful death of their son who committed suicide.

Under New Jersey law, but not New York, Texas, or Ohio, charities were immune. The internal law issue in this case is whether a charity is liable for the intentional torts of its employees. If New York, Texas,
or Ohio law applied the charity would be liable, but not if New Jersey law applied.

That’s the outline of this, and the court, by the way, decided to apply New Jersey law here. The parents could not recover. Now, let’s go to what the court should have done. Who wants to begin this?

PROFESSOR REES: Do you want me to start again?

PROFESSOR POSNAK: I think we have a routine now.

PROFESSOR REES: Okay. I start out, “We have adopted Brainerd Currie’s interest analysis as our choice-of-law method, (and I repeat the statement about finding policies and then interests where there are circumstances where it’s reasonable for those policies to be asserted).”

“The policy of New Jersey’s charitable immunity rule is to encourage good works by charitable organizations engaged in beneficial activities within New Jersey, even if, as in the case of the Franciscan Brothers, the charities are incorporated elsewhere. Since the Brothers operated a parochial school in the state, New Jersey has an interest in the application of its charitable immunity rule. New Jersey likewise has an interest in the application of its charitable immunity rule with respect to the Boy Scouts, which operated the troop in New Jersey and had its headquarters in that state.”

“The policy of our liability rule is compensation. Since neither of the plaintiffs nor their sons was significantly affiliated with this state, we have no interest in the application of our liability rule in this case. This is, thus, a false conflict case. Only New Jersey has an interest. According to Currie, if the court finds that one state has an interest in the application of its policies in the circumstances of the case and the other has none, you should apply the law of the only interested state. Judgment affirmed.”

PROFESSOR POSNAK: Okay. Let me ask whomever how is this different about how you come out on this case, how is it different from Grant versus McAuliffe, or Babcock versus Jackson? How is this case different?

PROFESSOR KAY: Well, I’d like to raise two points. First of all, I’d like to suggest that you forgot to remind the panel that the plaintiffs in this case had sued the Archdiocese in New Jersey and had lost because New Jersey then applied its charitable immunity law. That case I think is much more analogous to the Babcock case in that it’s a New Jersey case. All the parties are from New Jersey, and the injury occurred
elsewhere. New Jersey is applying its own law, which it would do even if this were a true conflict.

PROFESSOR POSNAK: So, what you're saying is that this might be a false conflict, but it's not nearly as clear that it's a false conflict as Grant or Babcock?

PROFESSOR KAY: I'm saying that, but I'm also suggesting that this is a case that many of the critics of interest analysis could use, and some have used, to point out the vulnerability of this approach to forum shopping. I mean, if there was ever a clear case of forum shopping, it's this case, where the plaintiffs have sued in New Jersey, have been unsuccessful, and now are trying to bring the very same claim all over again, which they can do, because neither the Boy Scouts nor the Franciscan Brothers were parties to the original case. They had the freedom to go to New York and start over again, which they did. So, I think that's one point that we might want to look at in terms of whether we want to stay with this theory or not.

I, myself, am very doubtful that this is a false conflict. I think it's a false conflict only if you are willing to argue that New York has no deterrent policy that would be applicable to any group that conducts activities in New York. From all we can tell this was an annual outing to New York by this group, and New York might very well have an interest if, as in many of the hypotheticals posed about the case, this Boy Scout Master had also molested a New York boy who lived nearby and may have gone on some of the outings. So, I think that there is a general deterrence policy and—indeed, some of the dissenters were arguing this—that policy might very well make this into an apparent true conflict at least, if not into an actual conflict.

As to that, I think that this case also raises the question of at what point do you determine what the interests are. As you point out, the Boy Scouts had relocated between the time the injury, the molestation, occurred and the time the suit was brought. Yet, the Court of Appeals of New York does take account of this change in corporate domicile. I think one question is whether we should say that we want only to look at what happened at the time it happened in terms of assessing the policies and interests. So, I just raise those as questions.

PROFESSOR REES: I think you should usually look only at the situation at the time of the occurrence. I'm a little bothered by the deterrence argument. I'm not sure that if you have, in effect, a rule that does not provide for charitable immunity, that is really a conduct-governing rule. In other words, it's true that New York's policy is a
policy of liability, but that only comes in here as compared to New Jersey's charitable-immunity rule. So, if you look at it as charitable immunity versus no charitable immunity, I think you can argue that there is not really a deterrence issue before the court. Certainly, if it were strictly a conduct issue, then deterrence would enter into it.

PROFESSOR KAY: It is the issue before the court, isn't it, because if you rule out the defense, which is an affirmative defense, what the plaintiffs are alleging is the liability for the conduct that occurred.

PROFESSOR REES: Well, yes. But what I'm saying is that this is perhaps akin to an automobile host-guest statute in that one state has the protective provision and the other one doesn't. In those cases we always assume that there was negligence or bad conduct, but that's not really the issue that we key into. We look at the result of the limiting law; so I would argue that here the contest is between charitable immunity versus no charitable immunity, and to change that into a conduct-deterrence rule is really looking at something that's not the direct issue here.

PROFESSOR POSNAK: But it's not as if New York doesn't have a law on this issue just because it doesn't have a charitable-immunity statute. New York does have a law. The law is that you can recover against the charity for the negligence of the charity's employees.

PROFESSOR REES: Well, they both have a rule that you can recover against somebody who commits a tort. It's just that if a defendant is a charity in New Jersey, that blocks the otherwise applicable recovery rule. But I think that the deterrence argument is weak.

PROFESSOR POSNAK: I agree with you. That's why I said this isn't so clearly a false conflict. Another problem I see with this case if one concludes that New Jersey has the only interest, then that's going to lead to the "stinky law" applying, not the law that Professor Leflar would consider the better one. This contrasts with Babcock v. Jackson and Grant v. McAuliffe, where the state with the only interest had the good law, the better law.

Justice Knowles wanted to make a comment that we should have made earlier to give you a little context and explain something about the alternatives to interest analysis.

PROFESSOR KNOWLES: Sure. It occurred to us that not everyone in this room had the wisdom to take Conflict of Laws, either if they are
students now or some time in their history, so it might be helpful to put this debate in context.

The disposition of a choice-of-law question could follow a number of paths. We have been talking about one path which, Herma, is it all right to call it interest analysis, or...

PROFESSOR KAY: It's fine with me.

PROFESSOR KNOWLES: Okay. Good. Interest analysis, the father of which was Brainerd Currie, whom we are honoring today. We should perhaps tell you that it was a substantial change from prior theories that guided choice-of-law decisions. The first, most prominent one to which the Georgia courts adhere, with the caveats that Judge Rees told us about earlier, is Restatement One, that is the First Restatement of Conflict of Laws published by the American Law Institute, which embodies a vested rights theory of choice of law.

To grossly simplify, it's that the law of the place where the cause of action began clothed the plaintiff, or the defendant for the defense, with that cause of action, and that law should not be displaced. For a tort, it's where the last act necessary to create liability occurred. For contract, it is the last act necessary to create a contract. That place created the cause of action, and, therefore, its law must govern. That's Restatement One.

Subsequent to that, the American Law Institute reexamined its views of choice of law and promulgated Restatement Two, which a number of states have adopted. Restatement Two embodies a much more flexible principle which says, basically, that you should choose the law of the jurisdiction with the most significant contacts with the matter under litigation.

Unfortunately, one of the major criticisms of Restatement Two is that it doesn't tell the court how to weigh or vary the contacts, and there was significant criticism of that approach. But it does give the court a way to decide a case based on the relationship among the parties, the facts creating the litigation, and the jurisdictions. So, that was a different kind of function that the court would be performing than under Restatement One.

The next step in this evolution was a suggestion that courts should look at the interests that the states have in the issue before the court and apply the law of the state that cares the most about it, or is the most interested, and that's what we have been talking about this morning.

There are other theories. The better-law theory of Professor Leflar, with whom Judge Felix is a co-author, has a number of considerations
that the court should weigh in deciding which is the better law and then apply that after using those what are called "choice-influencing considerations."

That's the context in which interest analysis came upon the scene and has been debated ever since. We thought that background might help you understand what the fight is about.

**PROFESSOR POSNAK:** One more thing I'd like to add is that the Second Restatement actually incorporates as one of its more important considerations the interests of the states. It's not a completely competing approach with Brainerd Currie's interest analysis.

**PROFESSOR KNOWLES:** Right.

**PROFESSOR POSNAK:** It incorporates a lot of what Brainerd Currie had to say. But let's get back to the grisly facts of the Boy Scout case. Justice Felix?

**PROFESSOR FELIX:** I'd like to propose two solutions. One, in line with Judge Kay's solution, is that there was prior litigation here, and the court identifies the New Jersey rule of nonmutual collateral estoppel, so that in subsequent litigation preclusive effect is given to the determination of an issue against a party to the earlier litigation. Plaintiffs have had their day in court, and the issue of charitable immunity has been resolved.

It's interesting, I think, that the court here invokes the Full Faith and Credit Clause, and one wonders what happened to the earlier Hart case [*Hart v. American Airlines*, 304 N.Y.S.2d 810 (1969)], in which the court treated the issue of the type of collateral estoppel to be applied in a multistate case as a question of choice of law. I think you'd still get the same result here, but I suspect the court invokes the Full Faith and Credit Clause—one, to shore up its decision and second, I think, in response to the fact that it finds that New York itself had no interest in the issue. That was stressed by the way in which the New York court handled the collateral estoppel in the *Hart* case.

The second solution to propose is, again, in line with Judge Kay's interest analysis. This is not a fortuitous automobile accident in New York. It's a tortious event in planned activity in New York on New York property. The question can be posed as, "Does New York have an interest in the issue of liability arising out of intentional misconduct in New York?" The crux of it, the liability of the master for negligent supervision, which I think necessarily extends into New York and satisfies enough New York interests so that the case can be disposed of
on the basis of New York law as the foreseeable law of an interested state.

PROFESSOR REES: Well, they planned the trip, but did they plan the tort?

PROFESSOR FELIX: Well, the tort itself doesn't have to be planned because the theory of the plaintiffs' case is negligent supervision.

PROFESSOR POSNAK: So, you would see it, Justice Felix, as a true conflict and apply New York's law. New Jersey clearly has an interest. I don't think anybody would dispute that. So, why would you apply New York's law?

PROFESSOR FELIX: No, I don't think that's necessarily a result-oriented approach, though I will speak to Professor Leflar's better law approach. Just to run through those factors, predictability of results is debatable, but I don't think the interstate or international system is adversely affected here. Surely, federalism isn't going to collapse if you apply New York law in this case. I think simplification of the judicial task is not at play here, unless you find it simpler to foreclose litigation than to apply otherwise easily applicable rules of law.

The court, I think, here treats the expectations of the parties as essentially participation in the political process in New Jersey. On the other hand, I think clearly the expectation of the plaintiffs would be that there would be redress for torts of this kind, and redress means that liability extends to the financially responsible party, here charged with negligent supervision of the intentional tortfeasor servant. On the other hand, I think the defendant has an expectation that the law of its state, recently affirmed by statute, would be around to protect it. As far as the forum's governmental interest, I would express it as I have just stated. The better rule of law, whether it be as a tie-breaker or as simply another consideration, I think clearly speaks to a rule of liability in a case like this, charitable liability. I think New Jersey is probably the only state in modern memory to re-establish charitable immunity. So, that's the way I think Professor Leflar would decide this case.

PROFESSOR KAY: Well, I don't think this is a particularly appropriate case to raise this question because it will come up later, but when we get to a case that I think all of us would agree is a true conflict, I hope you will enlighten us as to why we need a better rule of law.
PROFESSOR FELIX: I will speak in a representative capacity at that point.

PROFESSOR POSNAK: Judge Currie?

PROFESSOR CURRIE: Well, I want to dissent from the principal opinion applying New Jersey law here. There are a number of interesting questions raised by this case. It's tempting to get out of it by saying, "Well, the issue has already been resolved in related litigation in a New Jersey court." Of course, I believe in full faith and credit to judgments, and I believe in the application of the appropriate collateral estoppel rule, and I don't see the need for mutuality. So if we can get out of it that way, okay. I'm happy to follow the New Jersey judgment. But I'd rather talk about the conflict of laws issue in its pure form.

A second point of reference that we might use to resolve this case is the fact that we have this opinion from the New York Court of Appeals interpreting New York law not to apply. If we take that as a part of our background information, then that raises a question of the renvoi. The question is, "When you say you apply foreign law, do you mean that you would apply the substantive law of that state, the law that would be applied by that state in a domestic case, or do you mean you would decide the case as that court would decide it, with all its foreign elements?" Do you look to the whole law of New York? Do you look to the choice-of-law rules of the New York court?

Now, we don't have time, I think, in the context of discussing this one case to get into a full fledged discussion of this most perplexing angle of choice-of-law learning. American courts generally don't look to the choice-of-law rules of other courts, except in certain narrowly defined classes of cases. I wouldn't expect a New Jersey court to do so today, but there's an argument that it should on the basis of interest analysis. When the New York court says that it applies New Jersey law, that entails a decision by the New York court, as a matter of interpretation—and they do purport to be applying interest analysis—that New York law doesn't apply to this case. If New York law doesn't apply to this case, I as a New Jersey court or as a California court can't apply it because there isn't any New York law to apply. The authoritative judge of the scope of the New York law is the New York Court of Appeals. That makes it, again, too easy a case, and I don't want to talk about that.

I want to assume that we have no prior New Jersey decision and no prior New York decision. How should a court approach this case on a completely blank slate? I think we have a classic true conflict here. I believe that the purpose of the New Jersey law is to encourage people to
engage in charitable activities in New Jersey, and I'm not disturbed by the fact that this conduct in question here actually took place in New York because it grew out of a charitable activity in New Jersey. As for New York, I agree with Judge Kay that when New York makes charities, like everybody else, liable for the torts of their employees, one of the reasons it does so is to encourage people to act according to the rules of law that New York favors. One of the things that New York is trying to do with this law, it seems to me, is to discourage people from molesting children within New York state, and that's this case. So it looks like a true conflict.

What does a court do in the case of a true conflict? Well, if you've got a statute, you're a New Jersey court, and you've got a statute that says charities can't be held liable, once you conclude that the New Jersey statute applies to this case, you don't have any choice. You're a New Jersey court. You've got to follow the New Jersey Constitution. As a matter of separation of powers, you can't refuse to do what your legislature tells you to do just because there's another state that also has a law it would like to apply.

Now, if you've got a common-law rule, you have a little more flexibility. You made up the rule, you can determine its scope. Even in a statutory case, the fact that you take a look at the statute and conclude prima facie that it seems to apply is not the end of the story. This is one aspect of Brainerd Currie's interest analysis which people sometimes ignore. One of the reasons they ignore it is because the article in which he made this point most strongly, the Disinterested Third State article, came out after most of his work was collected into that wonderful volume of Selected Essays on Conflict of Laws. Most people today who try to find out what his theory was read the book. Goodness knows it's long enough that you don't want to go and read something else. You figure you've got it and you ignore this most important article in which he expressly endorsed Justice Traynor's Bernkrant opinion [Bernkrant v. Fowler, 360 P.2d 906 (Cal. 1961)], in which he says, "Wait a minute, there are additional factors that are involved in these interstate cases that are not involved in domestic cases," such as expectations, which we have been talking about all day. You should re-examine your conclusion that the local law applies in light of the interest of the other state, which is not a factor in a domestic case, and the expectations of the parties. Sometimes when you take a restrained and enlightened view of your own interest, considering these other factors, sometimes on second look you won't apply your own law after all, even though prima facie your deterrence purpose would be served if you did.
Now, I don't think we should worry too much about expectations here because everybody knows that in all states you're not supposed to go molesting children. But, of course, you'll say we're worried here about the expectations of the charity, and the charity has perhaps refrained from buying insurance, which would take money away from its charitable activities, in reliance on this New Jersey rule, so perhaps New York ought to be concerned with frustrating the expectations of the New Jersey charity here. But the New Jersey charity, on the other hand, deliberately chose to send its people over to New York; therefore, it should have known it might have had to deal with some of New York's rules, and it ought to have acted accordingly.

New York might also take the position, if our purpose here is deterrence, "We've got other ways of deterring this conduct. We've got criminal penalties against people who molest children. We've got civil remedies against the actual perpetrator." Maybe a New York court, taking this Bernkrant approach, could say, "All right, we've got enough deterrence, and we choose not to push our law so far as to trample on the equally legitimate interests of New Jersey."

If I wanted to write an opinion that reached the result the New York court reached in the Schultz case, that's the way I would write it, rather than the way the court wrote it, which I think was to miss the whole point of interest analysis. But I think as a New York court I would still say, "I'm sorry, even though there are other ways of deterring this conduct, the New York law recognizes a need for deterrence by imposing liability on the charity itself; therefore, I will apply New York law." From a New Jersey point of view, you might say, "Yes, we believe in protecting the charitable activities of people who are doing this sort of thing in New Jersey, but we're not going to push that policy so far as to interfere with the legitimate interest of New York in punishing and deterring unacceptable conduct within its borders." That's the way you would approach it if you applied Bernkrant and wanted to reach the result of applying foreign law.

But I think, having said all of that, my own view would be that this remains a true conflict. I wouldn't ask either state to sacrifice its interests in this case. As a New York court, I would simply apply the New York law.

Now, one final comment about the better law approach, and let's take it from the New Jersey point of view. I'm a New Jersey court confronted with this true conflict, and I think the New Jersey law is just terrible. I think people ought to pay for their wrongs. I don't like charitable immunity. Am I free to ignore it? Well, no, not if it's made by the legislature, for the reasons I gave before. That's a fundamental problem of separation of powers. If the New Jersey legislature tells you that
charities are immune, you've got to follow it. So, I don't think the better-law approach is at all acceptable when it comes to judicial nullification of legislation.

If you're talking about a common-law rule of charitable immunity that the courts made up, of course, they can change that. But if they don't like it, they should change it domestically, too. They should simply overrule all those old cases. There is no excuse for saying we don't like it, and therefore, we won't apply it to this foreign case, but we'll go on applying the bad law in New Jersey. I don't think they ought to apply it at all; therefore, I don't think the better law approach has any applicability to the conflict of laws. It's only a question of whether you're going to overrule your precedents domestically.

PROFESSOR POSNAK: I know Justice Felix wants to reply to that.

PROFESSOR FELIX: Well, first, I can see the mounting attack on better law. Prompted by your mention of insurance and taking as a model the way in which some states in purely local cases have abrogated their governmental immunity to the extent of insurance coverage, I would offer to the panel, as a possible solution, the application of New York law—that is, at least so that the Order of Minor Friars don't have to sell their hair shirts and sandals to pay a judgment beyond insurance limits—to limit the application of New York law to liability to the extent of insurance coverage.

PROFESSOR REES: Can you separate the wrong done in New York from the wrong done in New Jersey and hold them only responsible for the percentage of the wrong done in New York?

PROFESSOR FELIX: That could be a corollary I think.

PROFESSOR REES: This case is sort of unusual in that the occurrence was in both states, but primarily in New Jersey.

PROFESSOR FELIX: It would be difficult to allocate the damages I think.

PROFESSOR REES: Well, wouldn't a guess be better than nothing?

PROFESSOR FELIX: Usually it is.

PROFESSOR POSNAK: There is one thing—I'd like to see if you all agree with me about this. David said that in this case New York said
it was following interest analysis. Absolutely right. But did they also in other parts of this opinion say, they were applying New Jersey law because it was the common domicile of the parties? It's not clear to me what the New York court does. This, to me, is one of the worst written opinions in the choice-of-law area. I couldn't tell you what New York law is on choice of law after reading this. To me it could be like a throwback to the First Restatement in that they're going to have a rigid common-domicile rule. There is definite language in there that suggests that.

PROFESSOR REES: Well, weren't they purporting to follow Judge Fuld's rules here? But those rules are not really interest analysis. They start out as if they were, but they really aren't.

PROFESSOR POSNAK: Exactly. That's what I mean.

PROFESSOR KAY: I don't have the court's opinion before me, but I gather some others of our group do, and I thought that the reference to common domicile was where they cited the Korn article, which did come to that conclusion. It's not clear whether they are adopting it or whether they are simply tipping their hat to someone from NYU.

PROFESSOR POSNAK: — to Lea Brilmayer perhaps. She's from NYU also. Justice Felix?

PROFESSOR FELIX: Just a word on Neumeier v. Kuehner [286 N.E.2d 454 (N.Y. 1972)], which is Judge Fuld's farewell to the guest-statute cases. Over a series of guest-statute cases arriving at the court of appeals, Judge Fuld finally had his say and announced three rules for guest statute cases which would dispose of any further resort to the New York Court of Appeals and leave manageable disposition of guest-statute cases to the lower courts.

The first is the common-domicile rule with perhaps a little bit of qualification. As generalized, it becomes a common-domicile rule for all later choice-of-law cases subject to the further qualification in Schultz of the distinction between rules of conduct and rules of allocation of loss, which we have been debating back and forth. This is the first rule which the court invokes in the case against the Boy Scouts, the common-domicile rule.

The second of the three rules is a kind of no sword, no shield combination where a plaintiff may not bring a plaintiff-protective rule into a state where the accident occurred when that state's law would protect the defendant. On the other side of the coin, the defendant may
not bring the shield of his domiciliary-protective rule when he causes injury in a state which would have a rule to protect a plaintiff.

Then, in the suit against the Franciscans the court invokes Neumeier three, which is a rule presumptively to apply the law of the place of injury when the parties are of different domiciles unless certain further considerations are present. The opinion goes through those further considerations and still finds that New Jersey law should apply. It's not the strongest part of the opinion, but it does illustrate the generalization of the Neumeier rules with further attention to this distinction between conduct-regulating and loss-allocating rules.

So, that seems to be where New York is now, although there is a later Cooney case (Cooney v. Osgood Machinery, Inc., 612 N.E.2d 277 (N.Y. 1993)) perhaps giving further emphasis to the law of the place of injury.

**PROFESSOR REES:** I wonder what Judge Posnak's view of New York's interest here is? The reason I ask that is that eight years ago you seemed to say that they had no interest [Choice of Law: Interest Analysis and its "New Crits," 36 AM. J. COMP. L. 681 (1988)]. Is that still your view?

**PROFESSOR POSNAK:** This is the case that tested my belief in Brainerd Currie's admonition that in false conflicts you always apply the law of the state with the only interest. I concluded that it was stretching it to find that New York had an interest. But you have brought up some better arguments. There was a dissenter in this case who did feel that New York had an interest, and it's a reasonable argument. But I personally don't think that a law that allows one to recover against charities was meant to deter. I don't think that was the purpose and unless there was some indication from New York's legislative history or case law to the contrary I would conclude that the only policy behind a law that does away with charitable immunity is to make the plaintiff whole, and I don't think these plaintiffs are sufficiently affiliated with New York to come within the ambit of this law. So, you've got me. I think that New Jersey had the only interest. Therefore, as much as I hate to say it, I think New Jersey law has to apply. Even though I believe in the better-law factor playing a part, I don't believe in it playing any part in a false conflict, which is contrary to Professor Leflar's views. I take a little bit from everybody and schmerek it together.

**PROFESSOR KAY:** Well, I do agree with my brother, Judge Currie II here, in his view that there is an interest on the part of New York. You know, I guess it's because I live in California, which is also a state
that attracts people for vacations and to hold conferences and so on, and the idea is that, like it says in the old English song, "You can do a lot of things at the seashore that you can't do in town." We would be just as happy not to have these folks coming to California to escape their repressive laws and to kick up their heels. New York does have a policy of deterring this kind of conduct, and they want to deter it from charities as well as from anybody else.

While the purpose of charitable immunity is probably well stated as that of preserving the charity's assets so that the good can be spread among a lot of people, rather than that one victim gets to recover a lot of the charity's assets, I guess New York could take the position that tort victims shouldn't have to bear that cost. I think we can go back to the comment that was made this morning quoting Brainerd Currie's observation that if he couldn't be honest as a lawyer, he couldn't be honest as a preacher either. I guess, New York's notion is that if a charity is going to engage in this kind of tortious conduct, then we really don't want to support it by granting immunity. I think that is an interest on the part of New York.

So, I've never been comfortable characterizing this case as a false conflict. While I think I would tend to agree with David that it is, at least initially, an apparent true conflict—and as you know I've spilled a lot of ink on that step in the analysis, and I think Brainerd Currie's article on "The Disinterested Third State" did mark quite a shift in his theory. I think that ultimately this one shouldn't be resolved by a New York court by applying New Jersey law. So I, too, would apply New York law here.

I also think that the soundness of David's rejection of the better-law approach is shown by the fact that, as I understand it, there was an effort by the New Jersey legislature to repeal the charitable immunity statute after this case was decided, but that effort got nowhere. So, the New Jersey legislature, at least, still stood by the policy of charitable immunity even in the face of these facts, an outcome which underscores the obligation of a New Jersey court to do what it did, but which leaves a New York court free to do something else.

PROFESSOR REES: I still think we ought to split off what happened in New York on one weekend from what happened in New Jersey over a long period of time. I can agree with you as to an interest in that weekend, but I think we probably ought to make some kind of apportionment. Are you going to use that as the crutch on which to hang the —
PROFESSOR KAY: No, no. I'm sure that any trial lawyer could come up with enough psychiatrists who would testify that what happened that weekend in New York was the triggering event that led to the suicide.

PROFESSOR REES: That's right, it did begin it; yes. Okay.

PROFESSOR POSNAK: Any other comments? Professor Felix, do you want to defend the better law, or do you want to wait to do it? I'm sure it's going to come up again in a clearer true conflict.

PROFESSOR FELIX: Let's wait until then.

PROFESSOR POSNAK: This, to me, is questionable. I think reasonable people could differ as to whether this is a true conflict or a false conflict—that is, New Jersey clearly had an interest, and New York might also have had one.


LILIENTHAL V. KAUFMAN
[395 P.2d 543 (OR. 1964)]

PROFESSOR POSNAK: This is Lilienthal v. Kaufman. In this case the defendant from Oregon went to California and entered into a joint venture to purchase binoculars for resale. He had already done the same thing in Oregon. He had a fetish for binoculars, I guess. Anyway, he entered into a joint venture to purchase binoculars for resale in California. The plaintiff loaned the defendant money for this joint venture. The defendant, in return, executed promissory notes in California to the plaintiff for repayment of the money the plaintiff had advanced the defendant. The plaintiff didn't know, and had no reason to believe, that the defendant had been declared a spendthrift by an Oregon court and placed under a guardianship. When the plaintiff tried to recover on the promissory notes in an Oregon court, the guardian declared the notes from the defendant to the plaintiff to be void.

Under Oregon law they would be void. Spendthrift's contracts are not enforceable. But under California law, even though he was a spendthrift, they would enforce his promissory notes. Okay, does somebody want to start the analysis while I do the artwork?

PROFESSOR REES: Okay. Again, "We have adopted Brainerd Currie's interest analysis. Under interest analysis when the court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws
and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies.

"The policy behind our spendthrift law is to protect the spendthrift's family from financial hardship and to protect this state from the expense of supporting the spendthrift or his family. Since the defendant spendthrift and his family are citizens of this state, we have an interest in the application of our spendthrift law. It is California's policy that any creditor, and especially a California creditor, should be paid even though the debtor is a spendthrift. Thus, California has an interest in the application of its law in this case."

"Thus, this is at least an apparent true conflict. According to Currie, if the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict."

"Although it might be argued that our policies should be narrowed in scope to include only cases where both parties are residents of this state, we do not believe it would be appropriate to do so. The adverse effect on this spendthrift's family and on this state that might result by enforcing a contract against a spendthrift citizen of our state would be the same regardless of the domicile of the creditor. Thus, this is a true conflict."

"According to Currie, upon reconsideration, if the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum. We are aware that many scholars are critical of Currie's forum law solution to true conflicts. But as Dean Kay has said, 'The forum law solution is the one most consistent with Currie's view that conflicts law is state law and that state court judges are and ought to act as conscious agents of state policy.' Judgment affirmed."

I would also like to add that I wonder about that Californian. I mean, does he loan money to total strangers on deals that come in? I mean that Kaufman could just as well have been protected by some provision of California law. He could have been functionally bankrupt.

**PROFESSOR POSNAK:** Whether he checked was not in the opinion.

**PROFESSOR REES:** I know he checked, but I'm saying checking or not checking, I can understand the dentist, I think, in the first case, which was a case between the same spendthrift and another citizen of Oregon. The dentist might have been financially unsophisticated. Maybe this guy is too. We don't know what his business was.

**PROFESSOR KAY:** Well, I don't want to sway you with what Professor Cavers refers to as nonrecord facts.
PROFESSOR REES: Okay.

PROFESSOR KAY: But, in point of fact, one of my students knew the plaintiff in this case quite well, and got the story of the litigation from his point of view. In fact, the two men knew each other while they were in college together in California. So, when Lilienthal greeted Kaufman in California, there was a prior social relationship. It wasn't just as though somebody had walked in off the street and asked for a loan.

PROFESSOR REES: Oh, very good.

PROFESSOR KAY: Or very bad.

PROFESSOR POSNAK: Does anybody want to take a different view or concur with Oregon law applying?

PROFESSOR FELIX: Your mention of Cavers brings to mind the fun of reading Cavers's *A Choice of Law Process* in which he assembles a court with Brainerd Currie as one of the judges and goes into further details of, as you call it, off the record facts. That really is something you in the audience all ought to read. (DAVID CAVERS, THE CHOICE-OF-LAW PROCESS (1965)).

I would just offer a couple of asides on the case. One, on the assumption that California had a long-arm statute, I would think of a malpractice action against the plaintiff's attorney. Second, if California did not have a long-arm statute, I would go to the California legislature and try to get them to pass a long-arm statute speaking to these facts and leave the words of the statute as words to the wise, the plaintiff's attorney, which brings up the issue of forum shopping and the availability of an attractive forum whose choice-of-law approach would lead to a desirable result for the plaintiff.

PROFESSOR POSNAK: Justice Currie?

PROFESSOR CURRIE: I'd like to take up the last suggestion, the long-arm statute from California, and we get the defendant down to California. What does the California court do in this apparent true conflict situation? In my view, the California court applies Oregon law, too, because this is a false conflict. It's not an apparent true conflict for the reasons suggested by our universal opinion writer.

I don't feel for the expectations of a California merchant who would lend money without inquiring as to the credit-worthiness of the debtor. Yes, it is true that in this particular case there was an inquiry, and it
didn't turn up the necessary information, but that's going to happen domestically too. I think the California interest in protecting the expectations of California creditors is not seriously harmed by the application of Oregon law in this case; therefore I would use the Bernkrant analysis and say, "Since any creditor can protect himself in ninety-nine percent of the cases by looking into the credit-worthiness of the person who is asking for credit, California's interest in protecting those expectations is not seriously damaged."

From the Oregon point of view, it seems to me Judge Rees is quite right. The Oregon law is a blank piece of paper if all you have to do to evade it is to go across the line to California. Therefore, using what Professor Baxter called a comparative impairment approach, which is another name for the Bernkrant analysis of restrained and enlightened interpretation, I call this ultimately a false conflict case and would urge not only the Oregon court, but also the California court to apply the Oregon law and protect the spendthrift.

PROFESSOR POSNAK: Does anybody disagree with the application of Oregon law here? Professor Felix, you must. I do, but I don't want to hog the conversation.

PROFESSOR FELIX: Well, we could go through an analysis based on Leflar's choice influencing considerations. It would require, I think, a finding that California is an interested state, and then would argue that the Oregon spendthrift rule is, to use a phrase borrowed from Elliot Cheatham, a drag on the coattails of civilization. If you have someone who is a spendthrift, you should probably lock him up or perhaps put a scarlet "S" around his neck as he goes through life, taking captives down the road to insolvency as the dissent says here.

But let's be serious. Professor Leflar's justification of the better-rule consideration as one of five considerations is that courts in local cases are always engaged in choosing a preferable rule, be it contributory negligence, or comparative negligence, or other choices, and that this motivates courts in conflict-of-laws cases as well, where they have some leeway to do so. In a case called Cipolla v. Shaposka [267 A.2d 854 (Pa. 1970)], one of the judges writing an opinion there treats the better rule-of-law consideration as a tiebreaker, which would require you to reach a point of take either one, flip a coin, or take the better rule of law.

I think criticism of this approach is fair in situations where the court overlooks what Judge Currie has pointed out—if you like the rule of law that you're choosing just go ahead and change your own. This, indeed, has happened in a number of cases in which a court has departed from the First Restatement approach, adopted a new approach, and changed
its own rule at the same time. The better rule-of-law consideration is not beyond criticism, though I think Professor Leflar would have much more to say in its favor than I just have.

**PROFESSOR POSNAK:** But even without the better law, don't Professor Leflar's other choice-of-law factors and considerations clearly point to the California law here: promoting interstate commerce, comity, furthering reasonable expectations? Even without the better-law factor isn't there an argument here that California's law ought to apply?

**PROFESSOR FELIX:** Yes, I think those arguments can be made, but this raises another point, I think, expressed earlier here. How specific do you want to be in the facts? How much do you want to go into knowing whether the prospective creditor has adequately investigated and should be tagged with a poor investigation or simply have to run the risk that every once in a while an investigation isn't successful? This, I think, is a pervasive problem in interest analysis—how fact-specific the investigation should be in determining whether an interest exists in a particular case.

Similarly, the impact of an accident upon local creditors is a statement at one level of generalization. Now, do you have to go beyond that and look for actual bills in the case or actual medical services rendered on the spot, so as to anchor that interest in the contact state? I think different people see that differently.

**PROFESSOR REES:** Should the California creditor be penalized for failing to specify California law in the notes that Kaufman signed?

**PROFESSOR FELIX:** Well, that's an element of business planning that he has learned after this case.

**PROFESSOR KAY:** But why would it matter?

**PROFESSOR KNOWLES:** Before a California court.

**PROFESSOR KAY:** Well, but even under David's analysis, as I understand it, the California court would recognize that the Oregon policy is so fragile here that it would be totally undermined if it were interpreted to give way to a policy of that kind. If you are really going to protect spendthrifts—that is, if you want to protect the families of spendthrifts, which is presumably the policy here—by definition, you're not going to let the spendthrift step across the state line and sign a paper waiving all his rights because that just means that he's going to
be allowed to reinvest himself with the power to make contracts, which is what the spendthrift declaration has taken away from him. So, I think even if you are going to make the business planning argument, that's the result you have to come to.

Since we're into nonrecord facts, I also learned from my student that Mr. Kaufman was motivated to undertake a cross country spending spree after this case was litigated. He was finally caught, prosecuted for writing false checks under many different names, convicted, and put in prison, where he was an exemplary prisoner and served as the chaplain's assistant. Some years later, after his discharge from prison, he wound up at Mr. Lilienthal's office again and said that he was about to go into the used car business in Northern California, and asked for another loan, which Mr. Lilienthal gave him—this time not expecting to be repaid.

PROFESSOR KNOWLES: See what having a court that adheres to Restatement One does for us in Georgia? We don't have any of these colorful stories about cases.

I'd like to make a pitch for California's interest in this, though I do it with some trepidation. It seems to me that it's important to note that California, in addition to its residents' contracts being enforced, as the place of contracting, has an interest in contract enforcement that is shared with Oregon. Now, Oregon has chosen to carve out a small exception, but it has not chosen to require any kind of notice. It's not clear from the opinion, anyway, if it's part of the statutory scheme that the guardian has an obligation to put other parties who might contract with this spendthrift on some kind of notice. So, it seems to me that California and Oregon sharing the interest in the validation of contracts, parties expectations that contracts are valid, place of contracting, place of payment presumably, argue for a rather strong California interest, especially in the face of Oregon doing nothing to assist people who come across this small exception that it has carved out to the validation of contracts and their enforceability.

So, I think I would argue, despite all these good arguments about Oregon having to enforce its statutory scheme, presumably, if the legislature felt strongly enough about it they would have had this thing make some sense to people from out-of-state. As far as we can tell from the opinion—not being privy to off the record facts—they've done nothing about that. It seems to me that kind of behavior puts citizens from all the other states at extreme risk when doing business with Oregonians. As the opinion says, surely the Oregon legislature didn't intend that result—to dissuade people from doing business with its citizens. So, I
would argue that a court would be justified in finding that California had the greater interest, sharing as it does those Oregon interests.

**PROFESSOR POSNAK:** I agree with that last point you made. That's my main problem with applying Oregon law here. I think, and this just isn't theoretical, that it really could discourage Californians from lending money or generally doing business with Oregonians in California.

**PROFESSOR REES:** Well, don't we have to publicize the decision in California in order to get that debate?

**PROFESSOR POSNAK:** Don't you think this type of decision would have gotten out pretty fast in the banking community in California?

**PROFESSOR REES:** Well, maybe not into the hands of people like Lilienthal.

**PROFESSOR KNOWLES:** Who was not a full-time banker, I take it.

**PROFESSOR POSNAK:** Okay, anybody else? Shall we go to the audience? I'll call on Hal Lewis first this time.

**HAL LEWIS:** This is kind of a follow up, I guess, to Judge Knowles's questions directed to Judge Currie. I'm trying to put together your position in *Schultz* with your position in the modified *Lilienthal*, with California as the forum. As I understand the way you look at these two cases, with each as a true conflict, that New York has an interest in protecting the defendant from the tortious activity, at least within New York's borders, that overrides New Jersey's immunity to that degree; and that California also has an interest in the enforcement of contracts which does not except spendthrifts; and that California's interests based on the *Schultz* rationale would also override the Oregon policy to the extent that we're talking about California's transactions. The distinction I heard in your discussion of the cases was that the plaintiff in the California/Oregon situation is better able to avoid the consequences of the other state's affirmative defense?

**PROFESSOR CURRIE:** I like that. That's putting it in the terms of economic analysis that my colleagues at Chicago would approve of. It's another justification for the comparative impairment approach that Professor Baxter champions. It's because I haven't yet seen a way to do that in the *Schultz* case that I reach a different result there. I don't see
any way of saying that one state should yield to the other on the basis of a comparative impairment approach in Schultz. I do see it in Lilienthal. That's obviously highly subjective.

The application of this interest analysis is the sort of thing that people are going to differ about all the time, just as they differ about the interpretation of statutes or the scope of the common law in domestic contexts.

HAL LEWIS: Are you using any weight to preference for forum law in the event of true conflicts when reaching these results?

PROFESSOR CURRIE: Absolutely. If you have gone through all these mechanisms of restrained interpretation and comparative impairment, and conclude that your own law applies, then, as a matter of a separation of powers, if it's statutory you've got to apply it; yes, sir.

HAL LEWIS: Now I know why I didn't understand your view first off because when I took Professor Baxter for antitrust, I didn't understand anything.

PROFESSOR REES: Professor Baxter is an example of somebody who invented a system to solve true conflicts and then left the field.

PROFESSOR KAY: Well, I probably shouldn't add anything to what I've written about this, but I of course, think that the Baxter approach is not the same as the moderate and restrained reinterpretation in the Currie analysis because Baxter is trying to find objective ways to go about resolving true conflicts. Baxter himself said that this can't be done by the states whose laws are in conflict. It can only be done by a federal court, and everybody forgets that part of the analysis, but it was central to his argument. Those of us who stayed up pretty late last night watching the Atlanta Braves play baseball will understand his analogy: Baxter said it would be just like letting a referee from one baseball team call the strikes if you let the state court whose law was in conflict decide whether or not it was going to be more or less impaired. It has to be done only by an impartial federal court.

So the California Supreme Court, which is the only court that I know of that really tries conscientiously to apply Baxter's approach, treats it as though it is a mechanism for solving true conflicts, which, of course, it isn't. If you decide that there really is a true conflict, there's no solution open to the forum except to apply its own law if you're going to follow the Currie analysis. So, I think that this approach is maybe so
sophisticated economically that it isn’t helpful in terms of the ordinary true conflict case.

PROFESSOR POSNAK: David?

DAVID OEDEL: Yes. I should say that I studied under a student of Dean Kay’s and used a very much older edition of Currie and Kay, so if I get this wrong, it’s my fault and nobody else’s. But it’s my understanding that one of the principal reasons for pursuing interest analysis as opposed to the Restatement, the First Restatement in particular, was that there was a lot of almost palpable manipulation that took place under the First Restatement and that it was to cut down on some of the judicial discretion. But now I’ve heard you disagree about Lilienthal, and I heard you give what seemed to me to be a perfectly plausible explanation of a disinterested third party in the Schultz case and then come out the other way. I guess I’m wondering if you ever really achieved the reduction in discretion that is hoped for in true conflict cases?

PROFESSOR CURRIE: I don’t think that Currie would have told you that uniformity and predictability and reduction of discretion were the principal aims of his new analysis. What he did say was that although these had been the dominant considerations, or among the dominant considerations in the traditional learning, which he was rejecting, they had not been achieved; therefore, they are not a reason for holding onto the traditional learning. You can’t argue against the new analysis on the ground that it’s uncertain, because the old one was uncertain.

Restatement One came out in 1934 and it pretended to be restating the conflict-of-laws principles of the United States. But those principles were much more complicated and much more untidy than the Restatement acknowledged. It was trying to force everything into a straight jacket, which the courts had never respected. One of the principal objections to the old learning was simply that it didn’t achieve the uniformity and predictability, that was its stated goal. These are wonderful goals if you can achieve them.

But in many cases the old analysis required the sacrifice of legitimate policies without promoting any competing substantive policy. There were absurd results in many cases. We’ve seen some of them today, and we’ll see some more later on, and the courts wouldn’t tolerate them. The courts took advantage of looseness of the joints even in this rigid system. They cheated. They would characterize tort cases as contract cases. The question of vicarious liability we were talking about earlier—we all treat that as a tort question, of course—is also a question of a contractual
relationship between the principal and the agent. Some courts took advantage of that ambiguity when they didn’t want to apply the law of the place of the wrong, to call it a contract matter and apply some other law.

Other courts, well, you take *Grant v. McAuliffe*—one of the worst opinions ever written. It is one of the crookedest opinions ever written, reaching a result that we all endorse. The court at that point was afraid. It didn’t have the courage of its convictions to come out and say what it was really doing was interpreting the two laws in terms of their purpose and finding only the California law applied. The judges pretended they were bound by the old learning, and then they cheated on it and called the question of survival of action a question of procedure. It wasn’t. And they talked about public policy in a way that was totally unacceptable.

Courts were cheating on the old system all the time. If there’s something wrong with the system, you ought to throw it out. This is legal realism again, right? Let’s look at what the judges really were doing and let’s have them talk about what they’re really doing. If they invoke public policy, what that means is they’re afraid that the traditional system is frustrating the legitimate interest of some state here, and that shouldn’t be allowed.

And so, the beauty of the Currie analysis is that it brings all these concerns out of the closet—as he said, and as other people have said. It brings them to the front line where one can analyze them and criticize them on their own merits. Yes, there’s room for disagreement, and we all disagree, but at least we’re talking about the right issue.

**PROFESSOR POSNAK:** We’re not being hypocritical, which is one of my main problems with the First Restatement. It forced judges to reach a result that they intuitively knew was ridiculous or follow the law. That’s not a good position to place judges.

One other thing, David. I’d like to defend Justice Traynor in the *Grant* opinion. I know what you’re saying, but I think it’s somewhat unfair because interest analysis was not invented at that time. I think he knew in his gut why California law should apply, but he couldn’t articulate in those terms because your father hadn’t come up with it yet.

**PROFESSOR CURRIE:** And he, himself, said later, “If I had known then what I know now, I would have written a different opinion, and I would have reached the same result.” This was a transitional case from the time when people knew there was something wrong and couldn’t yet articulate what it was. That’s the good thing about the Currie theory, I think. It looked behind all of these cases that were rebelling against
the traditional learning, figured out what was wrong with the old system, and made an attempt to develop a coherent system that would deal with the real concerns that underlie choice of law.

PROFESSOR POSNAK: Yes, that's right. Everybody criticized the First Restatement. But what Brainerd Currie did that nobody else did, he came up with an alternative. It's one thing to criticize, and that is an important step along the way, but at some point you've got to offer what should replace what you're criticizing. Professor Oedel?

DAVID OEDEL: Yes. I just wanted to see if I could understand sort of the general contours of this doctrine that you're going to be employing in your new jurisdiction. I first wonder if what you were doing is in essence presuming that any particular rule of a state or nation's law is involved by policy, public laws being kind of a well-reasoned argument about public interest. If you are presuming that, first, is that a plausible presumption, but second, what kind of proof could you offer in your forum as to whether such a policy exists? Can you offer extrinsic proof of that? If you do allow such extrinsic proof, would you also allow evidence that would rebut the presumption that there is a good public interest behind a particular law—for instance, rebuttal based on more cynical public choice kinds of rationales for legislative or other action?

PROFESSOR POSNAK: That sounds like an invitation to somebody from the Chicago school.

PROFESSOR CURRIE: Yes. As you probably know, I have colleagues who talk in terms of public choice in explaining legislative action and who would be very skeptical about the whole endeavor we're engaged in. My answer to that is indicated by something I said this morning. There is nothing new in what Currie is doing in choice-of-law cases except to apply it to choice-of-law cases. He's saying that you do in a choice-of-law case just what courts have done since the time of Blackstone with domestic cases. You ask what is this law trying to do and you see if this case comes within the purpose of the law. There is a lot of subjectivity in making that decision and a lot of disagreement as to what materials you can look at. Of course, you accept arguments on both sides and refutations and rebuttals as to what the purpose is and how it applies to this case. Of course, you reach different results. But this is nothing different from the ordinary processes of interpretation, construction, and application of any law in a domestic case. All of the same problems that we've been dealing with for years there, we deal
with here. This is no panacea, but it's no harder here than it is in any other situation.

Now, I'll give you Blackstone's example. You have a law against blood-letting in the streets of Bologna, and a man falls down in a fit. A surgeon comes and opens his veins because that was the accepted medical treatment at the time, and he is prosecuted for blood-letting. Would you convict him? I had a student one time who said yes. And I said, "Well, what do you conceive to be the purpose of this law?" The student said, "I think it's a sanitary measure designed to keep blood out of the streets." If you believe that, then it's just as bad from the standpoint of this law when it's a surgeon, as when it's a cut-throat. But I don't believe that was the purpose of the law. It seems to me you can't understand and interpret the law without trying to figure out what its probable purpose is. You make mistakes, but you try. The same thing is true in conflict of laws.

PROFESSOR POSNAK: Ted?

TED BLUMOFF: I want to follow up just for a minute because you already talked about hypocrisy and cheating, and that's what I remember about the critique about the First Restatement. But when reasonable people can so obviously disagree, my question is are we avoiding outcome determination or are we simply dressing it up in a new language that looks like it's less cheating and less hypocritical, but we can still get the outcome we want as a judge?

PROFESSOR KAY: Can I respond to that? I think David put his finger on this a minute ago when he said that what the Currie analysis tries to do is to get people to discuss what the real issues are rather than trying to force the discussion into some other channel because that's the way the system tells you that you have to do it. Whenever you are dealing with any reasonably complex question of interpretation, you are going to have people of reasonable minds differing. I don't think that's the same thing as manipulating a system that you think is wrong in order to make it produce an outcome that you think is right. I think doing away with the subterfuge is what interest analysis is all about.

Now, I know that there have been a lot of commentators critical of this analysis who say, "Well, you really are cynically manipulating the definition of the policy or the formulation of the interest in order to get to the result that you're reaching and to make it appear as though it's the only logical outcome." But I think that all you can say in response to that is that we hope that we have people of reasonably good will and intelligence deciding these cases, and we hope that they're doing the best
job that they can. This approach is not designed to stifle that creativity; it's designed, in effect, to build on it.


PROFESSOR FELIX: I would just add one further comment that was touched on in the earlier session this morning. I think it's always appropriate to see what a law does. What are its functions, whether you want to consider economic functions or other functions. If a law clearly functions to protect the defendant from, let's say, unlimited liability, I think we can impute to that law a purpose just along those lines.

ROSENTHAL V. WARREN
[475 F.2d 438 (2d Cir. 1973)]

PROFESSOR POSNAK: Let's move on to another case, Rosenthal v. Warren, that is generally considered a true conflict. And it is in those kinds of cases—true conflicts and unprovided-for cases—primarily where the modern commentators differ. The vast majority of courts would in a false conflict, if they decided there was a false conflict, apply the law of the only interested state. That's pretty much universal except for those few courts left who follow the First Restatement, like Georgia. Most of them follow interest analysis in one form or another. But this is where the big disagreement comes in. How do you resolve the true conflict or—and what we're going to talk about later—an unprovided-for case? A true conflict is one in which two states have been found to have an interest. How do you decide which law to apply? Unprovided-for cases are the ones people rarely think about, and we'll get into those later. An unprovided-for case is one where neither state has an interest. What do you do there?

Let's talk about Rosenthal v. Warren now. Rosenthal was a New Yorker who went to Boston. I guess they don't have any good hospitals in New York, or maybe he went to Harvard. Anyway, he lived in New York, and he went to Boston to be operated on by a world-renowned surgeon, but the operation was unsuccessful anyway, and he died in the Boston hospital.

His wife and executrix, also a New York resident, seeks recovery in New York against the world-renowned Massachusetts doctor and the Massachusetts hospital. Massachusetts limits damages to $50,000. That's the most you can get in this kind of case if everything happened in Massachusetts. New York, on the other hand, places no ceiling on damages. So, while I'm diagraming, if Justice Rees wants to continue.
PROFESSOR REES: Okay.

PROFESSOR POSNAK: It looks like we've fallen into a routine.

PROFESSOR REES: After first stating Currie's basic principle about policies and interests, I then provide, "The policy behind the Massachusetts limitation on wrongful death damages is evidently to prevent excessive judgments against Massachusetts tortfeasors. That policy is clearly applicable here. Thus, Massachusetts has an interest in the application of their law in this case."

"The policy of our state in not limiting damages is to provide full compensation to the family of the victim of wrongful death, at least where the victim and his family are domiciliaries of this state. Since the victim and his family are citizens of this state, we have an interest in the application of our law in this case."

"According to Currie, if the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict. Since our rule of unlimited damages is imbedded in the state constitutional prohibition against damage limitations, we do not believe that it would be appropriate to try to limit the scope of our rule in this case. Likewise, we do not believe that the scope of the Massachusetts limitation rule could be narrowed in this case. Thus, this is a true conflict."

"According to Currie, if upon reconsideration the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum. Thus, our rule of unlimited damages applies in this case."

PROFESSOR POSNAK: Who is ready to render an opinion? Justice Knowles, you've been quiet lately.

PROFESSOR KNOWLES: Unfortunately, if you wanted an argument, I concur with Judge Rees.

PROFESSOR REES: Fine with me.

PROFESSOR POSNAK: Anybody have anything to say? It is similar to the Lilienthal case, but can anybody distinguish it or does anybody care to argue for New York law?

PROFESSOR KAY: I don't think it's similar to Lilienthal. A law limiting damages certainly doesn't have the unique quality of the Oregon
spendthrift law. There are lots of states that limited damages for wrongful death, at least when such statutes were first enacted. It was seen as new legislation, it created a new cause of action, and the limit on damages was a compromise making the cause of action a little bit less painful to the defendant. It was a little like these caps on medical malpractice recoveries are today. So, I don’t think it has that sort of extreme “aura” about it.

You have a situation in *Rosenthal* where these two states have just come to different views about policy. As we know, New York’s rule against unlimited liability is in the state constitution, so it’s obviously felt pretty strongly. I think that a New York court ignoring its constitution would be in a pretty bad pickle.

**PROFESSOR CURRIE:** Well, I don’t want to disagree with your results, and I’m going to concur with the opinion of Judge Rees also. But, to reach the other conclusion would not be to ignore the constitution in my view, but rather to construe it not to apply to this case. You wouldn’t be ignoring New York’s constitution if you refused to apply it to an accident between two Saudi Arabians in Saudi Arabia. The question is whether this case is more like that than it is like a domestic New York case. The argument there is, again, the *Bernkrant* argument, or a modification of the Baxter argument. I bow, of course, to your reminder that he’s talking about what a federal court should do, but the process he goes through is similar to the *Bernkrant* notion, and that’s what I’m referring to when I use Baxter.

The argument would be, “Wait a minute. Sure, New York would like to see this New York family adequately compensated for its harms inflicted through the negligence of this physician, but what about the expectations of the surgeon who is operating in Massachusetts? Shouldn’t we be concerned about that? We don’t want unfair surprise if somebody is relying on Massachusetts law.” But, again, I solve that problem by looking at the nature of the rule. We’re not talking about the standards of conduct that govern how that Massachusetts surgeon conducts his operations. Massachusetts, too, insists upon great care in performing a surgical operation, and he’s going to be following the same rules and trying to do a good operation whether or not this damage limitation applies. You’re not going to surprise him in the field of primary conduct. You’re just talking about what the remedies are.

I don’t think that it’s very likely that Massachusetts is trying to encourage doctors to act carelessly when it limits the damages it has to pay for wrongful death. So I don’t think his expectations are going to be interfered with in the way that is important for the conflict of laws; therefore, I would say that I would not expect New York to surrender its
strongly held policy, whether in the constitution or elsewhere. People ought to get full recompense for injuries of this nature. I wouldn't expect Massachusetts to sacrifice its policy either because I think this is the kind of case for which the Massachusetts law was designed. So I think you have a true conflict even after trying to do your best to resolve it one way or another. You can't Bernkrant it, you can't Baxter it, and each court is going to apply its own law, and that's untidy.

This is one of the other bases for criticizing interest analysis—that it leads to forum shopping. That means you have a different result in the same case according to where the action is brought, and that is intolerable. It is particularly intolerable in a federal system.

But, again, to ask the New York court to sacrifice New York interests in the hope that in some other case down the road Massachusetts will sacrifice its interest for the benefit of New York, and we can have uniformity, is unrealistic, I think. New York is going to favor New York's interest whenever there is a conflict—not whenever, as we see in the Schultz case, but in many cases.

The only answer to this has to be Baxter's answer—we've got a federal system here, where is the federal government? Isn't there anything in the constitution that resolves conflicts between states? If not, we've got a very deficient constitution, and we've not said a word about that yet, except on the rather tangential issue of discrimination and privileges and immunities.

But what about the Full Faith and Credit Clause? Why is it not the function of the Full Faith and Credit Clause, which requires one state in an appropriate case to respect and enforce the laws of another, to resolve these true conflicts which cannot be resolved by the states themselves, which are biased? Why doesn't the Supreme Court look at this case and say, "Well, we think in Lilienthal, California's interest isn't so great, and we ought to require every court to enforce Oregon law?" And if we conclude that there's no rational way of saying one state's interest is more impaired than the other, or less important than the other, why isn't it the most important consideration at that point uniformity, predictability, and the absence of forum shopping? And why shouldn't the Supreme Court impose any old rule—an arbitrary one like alphabetical order, as my father once suggested—because there is no rational way of resolving this conflict and you've got to have uniformity?

The Supreme Court has refused to play that role. The Court has basically said so long as there is an interested state it can apply its own law. The Court has abdicated its function in this area.

Now, I can say that very strongly because I'm not on the Supreme Court, and I don't have the daunting responsibility of deciding which state's law will prevail in one of these cases. I can't tell you rationally
which state's law should apply. For that reason, my father said that the
answer is not for the Supreme Court to do it, but for Congress to do it
in enacting legislation to implement the Full Faith and Credit Clause,
which it has power to do and which it has stubbornly or negligently
refused for two hundred and seven years to do. I think there is no
excuse for that.

I would like to see Congress enact some rules, and I would be happy
to have them be perfectly arbitrary—place of the wrong, if you will—but
only once you conclude that there is a true conflict. Congress has
abdicated its function.

PROFESSOR POSNAK: There are no votes in it. I think Justice
Felix had his hand up.

PROFESSOR FELIX: I think what makes this case tolerable is that
the application of New York law—or if you like the exposure to greater
liability—is made foreseeable by the fact that you have a world famous
doctor and a hospital that caters to an international clientele. I think
it would be a much more difficult case if the death had been caused by
the negligence of a paramedic on a back road after an automobile
accident involving a New Yorker. I think there is some problem here
which has been pointed up in the case law. What happens to the
Massachusetts provision that up to $50,000 in damages will be
determined according to the fault of the wrongdoer? Do we have here an
occasion of what’s called dépecage, namely, the application of different
laws to different issues in the case? This is a criticism that has been
levied against this case. It appears that the notion of fault, or degree
of fault, is ignored.

On the point of constitutional law, I’d be interested to know how many
conflict teachers also teach constitutional law, just to see if they treat
the subject of the constitutional issues as they arise in the conflict-of-
laws course also in a broader context. I quite agree that the constitu-
tion, obviously the Full Faith and Credit Clause, gives Congress the
power to implement the clause, and this would extend to choice of law.

For the Supreme Court to do it, I think, would be a reversion to what
appeared to be happening in pre-Erie days where the Court was
fashioning a kind of federal common law of choice of law. You have the
paradox that if what we said about state choice-of-law statutes would
also apply to acts of Congress regulating choice of law, federal legislation
might not be a good idea. Not that it doesn’t have the power, but what
would be the results? The Court is better suited, obviously, to do
common law decision-making, but is restrained by its self-view. This
was expressed in a jurisdictional context in the Wolff case [Omni Capital
International v. Rudolph Wolff & Co., [484 U.S. 97 (1987)], where it refrained from creating a judicial long-arm provision in order to give personal jurisdiction in the case; the Court deferred both to state authority and to the authority of Congress.

PROFESSOR REES: Since you raised the dépecage issue, if you allowed the New York court to take the New York no-limit rule, together with measuring damages by the extent of the wrong, you would remove any limit. New York has a limit. The limit is damages are measured by loss to survivors, which is why Kilberg [Kilberg v. Northeast Airlines, 172 N.E.2d 526 (N.Y. 1961)] actually was settled for less than the amount of money they were fighting over there. So, both states have a way of limiting wrongful death damages—Massachusetts by a dollar amount and New York by measuring the loss to the survivors. So, if you were to take the two unlimited parts of that and put them together, you would have potentially really unlimited recovery.

PROFESSOR POSNAK: Justice Knowles?

PROFESSOR KNOWLES: I'd like to speak to two points. One is the notion that Congress or the Court, the United States Supreme Court, should step in and decide these issues. I think that puts way too high a price on the value of certainty and predictability, which Americans have learned to live without in many areas. As long as the state's choice is within rational bounds, it seems to me that there's a lot to be said for letting the state make this choice because I've always ascribed this to the fact that the medical establishment in Boston is a much more significant part of its economy than the medical establishment is in New York. So, they managed to convince the Massachusetts legislature of the utility of this limitation, while New York doctors and hospitals weren't able to do that for whatever reason. The constitution was then amended to include this provision.

I don't see anything so harmful to American society to have those differences that I would want Congress to intervene. I really think we've learned to live with a certain amount of uncertainty and difference in our legal system, and that may not be bad. I hate to harken back to the old phrase of the states as "laboratories of democracy" because it's very hard to think of examples of things that I would approve of that the states experimented with, but I'm sure there are some someplace. So, the notion of a Congressionally imposed statute in this area is troublesome to me.

The second point I wanted to speak to, though, was that this seems to me an excellent case to point out to Georgians here how this would have
been handled under Restatement One by a Georgia court—Massachusetts being one of the thirteen colonies; right?

PROFESSOR REES: Yes.

PROFESSOR KNOWLES: Under Restatement One, everything that matters here happened in Massachusetts. There would have been no discussion in an opinion of the policies involved, the force of the constitutional limitation, but the only things that counted—and this is a little responsive to Ted's criticism of our criticism of it—under Restatement One were that the operation was in Massachusetts and he died in Massachusetts. The last act necessary for the tort was in Massachusetts, so his rights, or his heir's rights, such as they are, arose in Massachusetts and must be limited by Massachusetts law.

Now, we are very conscious of the fact that a court faced with a result like that might have seen it as unjustly limiting the widow's recovery from this wealthy New England institution and might have tried to find a way to recharacterize it. As Judge Kay said, they would call it a contract or something else to find another way. In this case, I don't see a way out if you're using Restatement One analysis. So, the result under Georgia law, which Judge Rees is the expert on, would be that the Massachusetts limitation would apply. Is that correct?

PROFESSOR KAY: What about the public policy defense?

PROFESSOR KNOWLES: But the Georgia courts are so wedded to the vested rights, Restatement One. The public policy exception—do you want to explain that?

PROFESSOR KAY: They don't have a public policy exception? I guess the grandfather of all public policy exception cases, was Cardozo's opinion in Loucks v. Standard Oil Co. [120 N.E. 198 (1918)] from New York, where the New York court states the test as being that we will not apply the law of a state that "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." I suspect that the Georgia court could have, if it were following that approach, declined to apply the Massachusetts law.

PROFESSOR REES: Yes, I'm sure.

PROFESSOR KNOWLES: If Georgia had it in its constitution perhaps, but —
PROFESSOR REES: I'm sure that Georgia would be willing to look at that exception. I'm sure they have. We don't have many conflict cases that are reported.

PROFESSOR POSNAK: That's because the lawyers don't bring it up.

PROFESSOR REES: That's right. They don't seem to realize they have conflict cases half the time.

PROFESSOR KNOWLES: But the public policy exception provides that if the law which the court, by Restatement One or other analysis would have to apply, offends a fiercely held, strongly held, public policy of the forum, they won't do it, which has been seen as a very convenient escape hatch.

PROFESSOR POSNAK: They were supposed to just dismiss the case, but what most of them did was just go ahead and apply their own law, which wasn't part of the First Restatement.

PROFESSOR KNOWLES: But I don't think Georgia would do that.

PROFESSOR FELIX: Just to speak to Judge Rees's concern about unlimited liability here, we could again fashion a trans-state rule on the model of caps on liability to charitable immunities or in the model of the abrogation of governmental immunity and limit liability to the extent of insurance coverage here. The court makes a point about insurance as having in view not simply Massachusetts as a place for claims to arise.

PROFESSOR POSNAK: I was going to bring up the fact that the defendants may really have relied, and not just theoretically, but really relied on this limitation of damages in purchasing their insurance. I'm sort of troubled about frustrating those expectations by applying New York law.

The other thing that I really want to ask is if anybody else is bothered by this, assuming neither the hospital or the doctor solicited patients in New York. Even though the surgeon was world renowned, it seems to me there should be some weight given to the fact that the plaintiff, or the plaintiff's decedent, went to Boston, while the defendants merely stayed home. I think that traditionally this has counted for something in some choice-of-law cases. Does anybody want to respond?

PROFESSOR KNOWLES: But they did fundraise in New York because the guy was served when he was there.
PROFESSOR POSNAK: Well, let's assume that they didn't.

PROFESSOR REES: Well, still, if you know that you have a certain number of patients from New York, however they got there, shouldn't that put you on notice that you might be liable for more than the Massachusetts limitation?

PROFESSOR FELIX: You're not letting them in the hospital until they can show their ability to pay.

PROFESSOR KNOWLES: Right.

PROFESSOR CURRIE: I think it's a legitimate consideration, yes, and something that has to bother us in all these cases. The stay-at-home party shouldn't be put upon by having to learn some other body of law. We see this a lot in the personal jurisdiction area in similar kinds of cases. The question is can you be sued back in New York when you've been staying at home in Massachusetts and just treating patients there. The answer typically given there is no, sorry, the stay-at-home party doesn't have to travel. Maybe it should be, to some extent, the same way in choice of law because these are related questions.

But, again, I think it goes mostly to the question of expectations. So, you have to examine to what extent one has a legitimate expectation under these circumstances, when you know that the person is coming from out-of-state because you make him or her register on entering the hospital. Under these circumstances, to what extent do you have a legitimate expectation of the application of your own local law, Massachusetts law, with respect to the particular issue in this case? There, your insurance consideration is important and could justify a decision not to apply the New York law.

PROFESSOR REES: Should any attempt be made to warn the New York patients who are thinking about going to Massachusetts?

PROFESSOR POSNAK: I'm surprised they don't include this fact in the consent forms that patients fill out.

PROFESSOR KNOWLES: Well, there is another escape device and that's the procedural-substantive one. I think it's in Kilberg, in fact.

PROFESSOR POSNAK: You're talking about under the First Restatement?
PROFESSOR KNOWLES: Yes, under the First Restatement.

PROFESSOR POSNAK: It characterizes damages as procedural?

PROFESSOR KNOWLES: Damage limitation, which is just procedural, and the forum always uses its own law on procedural issues.

PROFESSOR POSNAK: Any other comments? I'm going to call on David first this time.

DAVID OEDEL: I have a general question about your sort of referring to the Walton case this morning. I wonder if you all would want to endorse this conflict scheme, the interest analysis and conflict scheme, in the international context along the same lines as you would apply it in the domestic context? In particular, I was interested in Professor Currie's discussion this morning about the presumption, or you were suggesting that in our tidy federal system one state doesn't presume to seek out territorial application of its law. But I wonder if in the international arena that is as true? It seems that, for instance, we're trying to place our electrical property regime on all sorts of bases around the world, and we actually are interested in a very extra-territorial application of all principles.

PROFESSOR POSNAK: Antitrust being one.

DAVID OEDEL: Yes, and there's a good reason for that. But, anyway, the basic question is do we use the same interest analysis for international controversies as for domestic?

PROFESSOR CURRIE: I believe we should. One thing that's different, of course, is that you don't have the Full Faith and Credit Clause to require you to apply foreign country law the way you sometimes do with sister state laws. But otherwise it seems to me that the question in the international context is exactly the same: What is the scope of the American law, whether it be federal law, as in the antitrust cases, or state law, as in cases like Walton? It requires, again, interpreting the law in light of its purpose and the contacts that are relevant to the achievement of that purpose.

It's interesting that the Supreme Court of the United States in these international conflict cases involving federal law has never talked the same way that it talks in interstate conflicts cases. Long before most state courts accepted an interpretation approach to domestic conflicts cases, the Supreme Court was viewing an international conflicts case as
a matter of the interpretation of the federal statute involved: Does the antitrust law reach conduct in Great Britain that has effects in the United States? The judges were a step ahead in the international area of where they were in the domestic cases, in my view, because I believe that interpretation of the statute is what you ought to be doing.

But then in the interpretation of the statute, the Supreme Court has fallen behind, it seems to me, in that it doesn't talk in terms of the purpose of the law and whether that purpose will be served by applying the law to the case at bar. If we look at recent Supreme Court cases having to do with the international scope of federal laws, there is one having to do with the fourth amendment; there is another one having to do with discrimination in employment. It seems to me that both of those cases slighted the clear American interest in having the law applied. The purpose of the American law would have been served in both cases by applying the law beyond United States borders.

I wrote an article long ago about this in the context of the National Labor Relations Act and those foreign-flag ships that were a means of doing nothing but evading the application of our law, a case where all the parties were really Americans, and the policy of the law applied. It seems to me our Supreme Court has been much too cautious in applying American law to cases with foreign contacts where the purpose of our law would have been served.

Now, having said that, it is certainly true that you want to be very careful in the international cases, perhaps more so than in interstate cases, about not unduly offending foreign nations. But that shouldn't be the only consideration; it should be filtered into the interest analysis the same way Justice Traynor in the *Bernkrant* case filters in other states' interests and expectations. It should not be a substitute for interest analysis. You shouldn't resolve these questions by rigid rules about the place where something happened the way the Supreme Court tends to do.

**PROFESSOR POSNAK:** Something reminded me of something Justice Kay or Justice Currie said this morning. There was a lot of criticism, and there still is a lot of criticism of interest analysis in Europe. But it also has had a substantial influence in Europe. They still basically follow the older approach, but there are some exceptions now. You're supposed to apply the law of the state where the injury happened unless it doesn't make sense, basically, and I think what they're talking about is that it doesn't make sense in terms of the interests. So, it's not as if this doctrine is completely foreign to foreign countries. Justice Kay would know more about that than I. Is that a fair statement?
PROFESSOR KAY: I think it is having some influence. In fact, I had a visit from one of my LL.M. students, who is now teaching in East Germany, who said that he felt that the time he spent at Berkeley hearing about Currie's approach has really had an influence on what he now sees developing there.

PROFESSOR POSNAK: Any questions? Hal?

HAL LEWIS: I'm always struck, looking at Rosenthal and Lilienthal, at the disjunction between the premises of our constitutional personal jurisdiction doctrine and what we see here. When in Rome, do as the Romans do. There is a reason that's a bromide, and that is, I think, that most people understand that if you go to Thailand, or Rome, or Massachusetts, you're subject to their rules of primary conduct. Of course, we have exactly the opposite kind of result in Lilienthal and in Rosenthal. The acting party leaves their home state, seeks gain in one forum or another in a different state, then comes home and uses their own state as a forum and avoids the application of the other state's law. So, our primary conduct in the choice-of-law area, the common expectations of most people, are kind of flipped around.

With personal jurisdiction, on the other hand, we impute to everybody, if they are subject to suit in the place where they performed the activity that they're sued about, under a contacts theory. While I think this is more empirically questionable, if you asked people, "If you go on vacation and get sued for your conduct out there and come home, do you actually have to defend the suit out there?" I think most people would say, "No, I'm subject to whatever laws govern in that state that cover my conduct, but if they want to sue me, they would sue me at home," going back to traditional context of personal jurisdiction before contact analysis.

To me this is just all the more reason why it would be great to have some constitutional limits on choice of law because it would force the Supreme Court, at least, to consider harmonizing the premises on which full faith and credit would restrain choice of law, and due process would restrain personal jurisdiction.

PROFESSOR CURRIE: You are quite right in pointing to the disjunction here, and it really doesn't make much sense. That is, the Supreme Court has been quite assiduous, it seems to me, in protecting the legitimate expectations of a stay-at-home party from being dragged to some unexpected forum with which he or she has no contact. Whereas if it comes to protecting a legitimate expectation with respect to application of the law of a place with which the party has no greater contact, the Supreme Court is then less attentive. It seems to me, in the
words of one of our colleagues, Linda L. Silberman, that is to assume that the defendant is more concerned with where he'll be hanged than whether. I think that's upside down.

**PROFESSOR FELIX:** On the other hand, though, scrutiny of the jurisdictional question has the effect of foreclosing an opportunity for an unfair choice of law. Further, the two-step analysis of the minimum contacts doctrine is first, do you have minimum contacts, and second, the fairness factors. There is, but not in a choice-of-law sense, interest analysis expressed in the fairness factors. It has to do with providing a forum, but there is included in that analysis some attention to substantive concerns.

**HAL LEWIS:** Wouldn't you feel, though, that those second level factors get pretty scant scrutiny in most domestic as opposed to international —

**PROFESSOR FELIX:** In domestic jurisdictional cases?

**HAL LEWIS:** Yes. But if you have a fair enough connection between the foreign defendant's contact with the forum and the claim, it's a rare case where a strong case of claim relatedness is going to be overcome by those factors of actual inconvenience to the defendant and the foreign state interest.

**PROFESSOR FELIX:** My impression is that jurisdiction is found more often than it's not, but, also, that there are a number of cases in which the court declines jurisdiction on a minimum contacts theory, and I know of at least one state which has expressly adopted the two-tier approach and the five fairness factors. That indicates to me an intention to follow the Supreme Court.

**HAL LEWIS:** Well, it occurred to a number of us that personal jurisdiction was arguable in both of these cases, *Lilienthal* and *Rosenthal*. Maybe that is no accident.

**PROFESSOR FELIX:** Yes. And, also, I think in *Rosenthal* —

**PROFESSOR KAY:** Not in *Lilienthal*.

**PROFESSOR REES:** Not *Lilienthal*.

**PROFESSOR KAY:** He came to Oregon to sue.
HAL LEWIS: I was thinking of the hypothetical in California.

PROFESSOR FELIX: Yes. Right.

PROFESSOR POSNAK: But in Rosenthal they raised money there.

PROFESSOR KNOWLES: They raised money there and served him there.

PROFESSOR POSNAK: They had substantial contacts.

HAL LEWIS: I guess we have a question about whether raising money there is totally an unrelated kind of contact and is of the continuity and magnitude that would ordinarily be required for the subjection to jurisdiction on an unrelated claim.

PROFESSOR POSNAK: Ted?

TED BLUMOFF: I wanted to raise a question about this expectation issue, and this is really a take off on something Professor Felix said. With a world-renowned surgeon who is only treating patients from maybe fifty states and fifty different companies, they may very well adjust their insurance coverage knowing that they're treating people not only all over the country, but all over the world. But the family doctor who treats sick little Susie on vacation, and Susie is from New York, that doctor's expectations of limitations of $50,000—if you assume there is jurisdiction in New York, which may be a problem—would strike me as very important in the way he or she would plan their practice, what they charge, and everything to meet their insurance bills. It's very troublesome with that doctor.

PROFESSOR FELIX: The court in Rosenthal briefly purports, at least, to be relying on Neumeier v. Kuehner which had recently been decided. I think, in the time that has passed, I think today the court would have trouble in applying Neumeier to get the same result.

TED BLUMOFF: But what's really troubling to me is that you might have two Massachusetts defendants in the New York court who are getting different treatment based upon who they are and their expectations. That is kind of troubling. Maybe even from an equal protection standpoint it's troubling to treat these two doctors differently.
PROFESSOR FELIX: Well, you may be arriving at an instance where due process and equal protection point in different directions.

PROFESSOR POSNAK: That was Douglas Laycock's theme in one of the articles he wrote which I disagree with, but I don't want to get into that unless somebody else does. Any other comments? Okay, let's go on.

[Professor Kay departs]

**ERWIN V. THOMAS**

[506 P.2d 494 (OR. 1973)]

PROFESSOR POSNAK: This is an unprovided-for case—Erwin v. Thomas. Perhaps somebody in one of the opinions will explain what unprovided for means. That's also Currie jargon. Erwin and his wife were Washington state residents, and he was injured in Washington by the defendants who were from Oregon. Now, she's suing in Oregon for loss of consortium; Oregon recognizes a cause of action for a loss of consortium; Washington does not. So, as usual, we'll have Justice Rees render his opinion.

PROFESSOR REES: All right. After first stating that we have adopted Brainerd Currie's interest analysis and explaining about policies and interests, we then state: “The policy of Washington's rule that wives cannot sue for loss of consortium is evidently a belief that a negligent defendant has not harmed the wife as a result of injuries inflicted on her husband. But no Washington defendant is involved in this case. Thus, Washington has no interest in the application of its nonliability rule in this case.”

“The policy behind our rule that a wife can sue for loss of consortium when her husband is injured is that such a wife has suffered an injury herself, but the plaintiff wife here is not a resident of our state; thus, we have no interest in the application of our law to this case.”

“Thus, neither state has an interest in the application of its law to this case. Under interest analysis this situation is known as an unprovided-for or zero-interest case. Brainerd Currie's suggested solution is the application of the forum's law. As Currie said, the forum should apply its own law simply on the ground that that is the most convenient disposition.”

I then have a dissent, since I have mixed feelings about this. The dissenter says, “I would adopt Professor Larry Kramer’s position that there is really no such thing as an unprovided-for case. In this case his argument would be that there is simply no law which confers a right on this plaintiff to recover. Washington confers no such right at all, and
this state's right is only for the benefit of our own resident wives. Thus, the complaint should be dismissed for failure to state a claim."

PROFESSOR POSNAK: Justice Currie?

PROFESSOR CURRIE: The dissent is unanswerable. Kramer is right on this, just as he was right in Walton for exactly the same reason. The question, once the choice-of-law issue is raised, is "Is there any law that gives a right to relief here?" Washington law doesn't give a right to relief to a wife under these circumstances, regardless of where she's from. It never gives anybody in this position a right of recovery for loss of consortium. Oregon has a law that sometimes does give a wife relief in such circumstances, but it applies, according to its purpose, only to Oregon wives. No Oregon wife is involved here. Neither law gives relief. It's wrong to say neither law applies. It's just that neither law gives recovery, and the plaintiff can't win if no law gives recovery. It is a simple case.

PROFESSOR POSNAK: I have some trouble with that. Like a case of first impression, even though there is no law that supports the plaintiff, he doesn't necessarily lose. Moreover, even if the law is against the plaintiff—and I'm talking about a wholly domestic case—if that law is on the way out, he might prevail by getting the court to change the law.

PROFESSOR CURRIE: I'm perfectly happy to have either court examine whether the Washington rule against consortium should be overruled, but I'm assuming that that process has been gone through and that it has been concluded that Washington is not about to overrule its prior cases on this subject. After going through all of this, I conclude that neither law gives relief. It's the end product rather than the starting point of my analysis.

PROFESSOR POSNAK: My point is the plaintiff should not necessarily lose if no law gives the plaintiff a right to relief because the policy behind no law would be furthered if the defendant prevailed.

PROFESSOR REES: Federal Rule 12(b)(6).

PROFESSOR POSNAK: Yes. But what I'm saying is that's not necessarily true. This could be a wholly domestic case of first impression in this state —
PROFESSOR REES: Then the judge is going to have to decide if there is such a law. If you brought a suit for tripping over your own shoe laces in front of somebody's store and sued the store, you would probably get thrown right out under rule 12(b)(6), unless you could come up with some theory that the court would accept.

PROFESSOR CURRIE: When we say there's no law, we don't mean there is no precedent. There can be law without there being a precedent. We just haven't had occasion to declare the law yet. We can make up a rule, if you want to be legal realists about it. It's not that the law has always existed, but we create a law. It's after going through that process of asking whether we should create a right as a matter of Washington law that we conclude Washington policy does not favor recovery in a case of this nature; therefore, there is no law. It's not the absence of precedent, it's the absence of any Washington policy that demands relief in this case.

PROFESSOR POSNAK: So you're departing from your father —

PROFESSOR CURRIE: Again.

PROFESSOR POSNAK: Anybody else have any views?

PROFESSOR CURRIE: It's what you call a federal system.

PROFESSOR POSNAK: Justice Felix?

PROFESSOR FELIX: Well, without having Washington choice of law in front of us, I think the opposite result here would diminish forum shopping. The second point is that it's a kind of elementary departure from the lex loci delicti. I think one of the great contributions of interest analysis is to show that it's wrong to apply the law of a state that has no interest when there is a state that does have an interest. On the conclusion that Washington has an interest here in determining the rights of spouses, at least arising out of accidents occurring in Washington, here is an instance in which we identify an interest in the law of the place, an application of the law in the place of injury and no reason to apply Oregon law. So, I think you really don't have to go very far from lex loci delicti to reach a result for the application of Washington law here.

PROFESSOR POSNAK: So, you agree with the other two Justices that the Washington law ought to apply?
PROFESSOR FELIX: Yes.

PROFESSOR CURRIE: Now, we didn't either one of us say that.

PROFESSOR POSNAK: You didn't?

PROFESSOR CURRIE: That's what he said. We said no law gives relief.

PROFESSOR POSNAK: All right. So what happens, what should the judge do?

PROFESSOR REES: Dismiss, 12(b)(6).

PROFESSOR CURRIE: Defendant wins.

PROFESSOR REES: Failure to state a claim.

PROFESSOR POSNAK: How about this argument based on privileges and immunities? If the plaintiff were from Oregon she would win, and there doesn't seem to be any good reason for applying Washington law. Why shouldn't the Privileges and Immunities Clause require us to give the same favorable law to this Washington plaintiff that would have been given to an Oregon plaintiff?

PROFESSOR FELIX: It's not an absolute.

PROFESSOR POSNAK: No, I know, but here there is no good reason. It's not as if Washington had an interest. This is one way of solving what I see as a tie when you have an unprovided-for case. Neither state has an interest, and there doesn't seem, then, to be any good reason to discriminate against an out-of-stater just because she's an out-of-stater.

PROFESSOR CURRIE: You're saying this is not like the case I was talking about before, because in that case the reason for discriminating was to not trample on the interest of the other state. Here, the other state has no interest, and the question, therefore, is whether the absence of an interest of the forum state is enough to justify the discrimination. I wish Herma were still here because she's the one who, with the elder Currie, wrote the leading article on this subject. My recollection is that their conclusion was that the mere fact that the forum state did not have an interest in applying its law for the benefit of this particular out-of-state plaintiff was, as you are suggesting, not enough. So Currie,
therefore, would have been expected to buttress his argument for the application of Oregon's law in this case by the constitutional argument that you just made. I think all I can say is I'm not sure that the privileges and immunities argument ought to go that far.

PROFESSOR POSNAK: It could certainly happen. I don't think the argument has ever even been made. Comments? Are you people getting worn out? It's been a long day. We just have one more case—the Hurtado case.

HURTADO V. SUPERIOR COURT OF SACRAMENTO COUNTY [522 P.2d 666 (CAL. 1974)]

PROFESSOR POSNAK: We have the decedent, who was a Mexican resident visiting California, and he was killed in California by two California tortfeasors. His widow and children also were residents of Mexico and filed suit in California for damages for wrongful death. Mexico limits damages for wrongful death to less than $2,000. California has no ceiling on damages. Okay, whose law should the court apply? Justice Rees, do you want to start again?

PROFESSOR REES: Okay. I think, first, Dean Kay referred to this earlier and I've forgotten where I saw the suggestion, but somebody had suggested that maybe the reason for a $2,000 damage limitation in Mexico was to encourage tourism. If you kill one of our citizens, it won't cost you much, which is pretty gross if that's actually true.

PROFESSOR POSNAK: That policy would be furthered under these facts?

PROFESSOR REES: Again, after stating Currie's principle of policies that may lead to interests, "The policy of Mexico in limiting wrongful death damages is to protect Mexican citizens from the imposition of excessive financial burdens. Since Mexico's policy is applicable only to Mexican defendants, it has no interest in the application of its damage limitation in this case."

"The policy of this state in not limiting wrongful death damages is to provide full compensation for the survivors where they and the decedent are citizens of this state. Here, the decedent and survivors are not citizens of this state, and thus we have no interest in the application of our no-limit rule in this case."
“Since neither state has an interest in the application of its law, this is what Currie called an unprovided-for case. His preferred solution for such a case was application of forum law, since foreign law should be applied ‘only where some useful purpose would be served thereby.’"

“It might be argued that our no-limit rule is based on a policy of deterring conduct which results in wrongful death. But as Professor Russell Weintraub said, ‘If a driver does not drive carefully because of fear for his own safety or for fear of the safety of his loved ones and friends who are passengers, or for fear of the sanctions in the criminal law, is he likely to be made a more careful driver by the specter of unlimited recovery?’ We conclude that this is an unprovided-for or zero-interest case where we, as the forum, should apply our own law.”

PROFESSOR POSNAK: Any comments? Any dissents? Professor Currie?

PROFESSOR CURRIE: I dissent for the reasons that I suggested in my dissent in the Schultz case. I think that the wrongful death law does serve a deterrent purpose. I think it promotes safety on California roads, and this was a California accident, so I would apply the California law and give full relief in this case.

But one further interesting aspect of this case is that if I agreed that the California law did not serve a deterrent purpose here and did not apply, then I would have to ask whether there was a basis for full liability under Mexican law. Now, I'll not simply limit damages in accordance with Mexican law; the damage limitation doesn't apply. That doesn't mean that Mexico has no law applicable to this case. That means that Mexico's general policy of providing compensation for Mexicans who are injured by somebody else's negligence or killed by somebody else's negligence is applicable without limitation. Therefore one can argue that full relief should be awarded under the general Mexican tort law, which normally provides full recovery, without the inapplicable Mexican limitation of the amount of damages.

So, I think one can reach the result that whether California law or Mexican law applies here, arguably you get full recovery.

PROFESSOR POSNAK: Justice Knowles was shaking her head. Do you have a comment?

PROFESSOR KNOWLES: Well, I guess it comes back to David. Are you saying that you would reach that result because you have to find a law that provides the cause of action to withstand a 12(b)(6) motion?
PROFESSOR CURRIE: I'm asking Larry Kramer's question.

PROFESSOR KNOWLES: Right.

PROFESSOR CURRIE: Does any law give relief here? And I say, arguably, in this case, both do.

PROFESSOR KNOWLES: So instead of being an unprovided-for case we've got sort of an abundance of causes of action?

PROFESSOR CURRIE: A doubly provided-for case.

PROFESSOR KNOWLES: Right. Well, I think we reach the same result, so I won't belabor it. I think we've worn everyone down.

PROFESSOR POSNAK: Yes. Justice Felix, do you have a comment?

PROFESSOR FELIX: Well, in the interest of saving time and energy I will just say, Felix, J. concurs.

PROFESSOR POSNAK: Are there anymore questions or comments from the audience? Okay. Thank you all for attending.