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CONFLICT OF LAWS:
THE NEW APPROACH TO CHOICE OF LAW:
JUSTICE IN SEARCH OF CERTAINTY,
PART TWO*

JAMES AUDLEY McLAUGHLIN**

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I. THE MODERN APPROACHES TO CHOICE-OF-LAW DECISIONS

The average judge, when confronted by a problem in the conflict of laws, feels almost completely lost, and, like a drowning man, will grasp at a straw.

Benjamin Cardozo to Walter Wheeler Cook.¹

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* Part one of Professor McLaughlin's article appears at 93 W. VA. L. Rev. 957 (1991).
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¹ Walter Wheeler Cook, The Federal Courts and the Conflict of Laws, 36 Ill. L. Rev. 493, 528 (1942). This was of course stated in the hay day of lex loci by a champion of lex loci and vested rights theory. It is resonant with the verse by Thurman Arnold quoted in note 65 below. Only in hindsight does the vaunted certainty and clarity of lex loci appear; it is of a piece with "golden eras" and "the good old days."
The new approach to choice of law gives little in the way of straws “to grasp at.” That is its beauty: no illusions — the difficult choice must be made. But if the aim of choice of law is kept firmly in mind, and if all doctrine is thought of as an approach to analysis to achieve that aim (and not a formula, rule or other formalistic litmus test), then a life raft and compass can be found and straws need not be grasped at. The aim is simple: pick the law that makes the most sense in the multistate context of the dispute before the court. The approach to “making sense” of the choice-of-law dilemma is more involved, but has a simple foundation: consider the point of view of all the people (including people as a polity) who have an interest in the just resolution of the dispute. The various approaches proposed since the judicial discovery of lex loci’s moribund condition can be synthesized into one approach which is best exemplified by a functional use of the Second Restatement. The burden of this article is to defend this assertion.

A. The Approach Within the New Approaches

As is well-known, there are many new approaches to choice of law. My thesis is that within those approaches there is for the most part a commonality of purpose and technique sufficient to talk about a single modern approach. Several of the theories appear to emphasize one factor to the total exclusions of others. Some, like the pure Currie conception of interest analysis, wrongly assess a particular factor such that it is better to speak of two or three of the approaches as but phases in the development of the modern approach, rather than as alternative formulations of the modern approach. But, for the most part, the approaches actually used by courts are but various formulations of one basic modern approach.

In arguing that there is only one modern approach, I will first survey the various formulations in somewhat chronological order; I will then identify their commonality and then briefly explore the reasons there seem to be so many approaches or, in other words, why there are so many formulations of the modern approach. I

2. Restatement (Second) of Conflict of Laws (1971) [hereinafter Second Restatement].
attempt to answer this last question by identifying the welter of available constructs by which to structure an approach. All this is a prelude to reformulating the modern approach and arguing that the Second Restatement, if viewed as an approach, not a doctrine, is the best readily accessible formulation of the Modern Approach.

1. A Survey of Modern Approaches

The first formulary deviation from *lex loci* was called either "grouping of contacts," "center of gravity," or both at once. The "contacts" apparently were the material elements of the case and instead of relying only on the last contact as the vested rights theory demanded, the idea was "to group" elements in their various "loci" to see which state had the weightier group. Another way of talking about not relying on the last element in time is to use the metaphor, "the center of gravity." "Gravity" refers not to seriousness but to the weighting of each state's contacts to determine the real center of the cause of action; the metaphor suggests the viewing of the whole claim as a thing and determining which state the cause of action "balances" on. Both "grouping" or "centering" suggest a kind of quantification: Identify discrete contacts; identify each with a state; count each state's contacts; and the one with the most contacts prevails. This was quickly seen as a new kind of formalism and one easily manipulated. Moreover, merely identifying and counting contacts did not well serve even the original purpose of finding the state "most closely associated" because of the "significant acts of the parties."²

The nature and quality of each contact must be evaluated in order to truly assess association. Identifying and "counting" contacts implies each counts as one, when we know that some are much more significant than others. Moreover, what counts as a single countable contact is, to say the least, problematic, a matter of ar-

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3. Barber Co. v. Hughes, 63 N.E.2d 417, 423 (Ind. 1945), may be the first court to use the phrase "center of gravity" and apply it citing ELLIOTT CHEATHAM, ET AL., *CASES ON CONFLICT OF LAWS* (2nd ed. 1941) and HARPER & TAINTOR, *CASES ON CONFLICT OF LAWS* (1937). Rubin v. Irving Trust Co., 113 N.E.2d 424, 431 (N.Y. 1953), used the phrase "the most significant contacts with the matter in dispute." See also Auten v. Auten, 124 N.E.2d 99 (N.Y. 1954).

bitrary labeling. For example in Haag v. Barnes, the court obviously eager to uphold the paternity child support agreement which was valid in Illinois and not in New York, lists and numbers four contacts which boil down to the father's being domiciled in Illinois and the desperate, unwed mother having to go there to get his support for the birthing of their child. The fact that the "liaison" with the mother was exclusively in New York where she was domiciled and that both she and the child to be supported were living in New York at the time of the law suit were dismissed by Judge Fuld as of "far less weight and significance" than the numbered Illinois contacts. The fact that the state of New York had, at trial time and prior to that, almost exclusive interest in seeing that the child was well provided for, was ignored by the court.

Actually, the result in Haag makes good sense, but only if both the expectations of the parties (assuming the parties to be the mother and father) and an adequate provision for the child are also considered. Since the dispute is ultimately about adequacy of provision for the child and settled expectations of the father, it makes sense to consider them even where the formal issue is the enforceability of a contract according to its terms, which, again, formally turns on whether Illinois or New York law applies. Indeed, the court in Haag does consider expectations as part of its choice-of-law analysis (as part of the traditional doctrine of party autonomy), but does not fit "expectations" talk with other factors to make one coherent analysis. Moreover, Judge Fuld does tack on to the end of his opinion explicit notice of the court's opinion that the settlement on the child ($275 per month in 1962 dollars until age sixteen) was rather generous (at least by the all-male-clubby standards then prevailing). Again, he does not explain how this fact of adequate support fits into the analysis of choice of law. It is more on the order of "oh by the way, the result here is pretty good too"; although one has the distinct feeling that this "tail" wagged the "dog."

5. 175 N.E.2d 441 (N.Y. 1961).
6. "Party autonomy" is a doctrine going back to the last century, Pritchard v. Norton, 106 U.S. 124 (1882), that allows the parties to a contract to choose the law that will govern the contract, within reason.
Extended mention is here made of *Haag* because it is a classic case of the court noticing prominently the three factors that determine what makes sense (polity interest, expectations and judicial justice) but still talking as if some modified version of vested rights obtained. "Grouping of contacts" or "center of gravity" is here called a "modified version of vested rights" because it both pretends to a rule that is jurisdiction seeking only and focuses on the material elements of the claim. Since it does not focus on the last material element alone, it can be called "modified."

The commentators were quick to offer alternative approaches once a bona-fide judicial breach in *lex loci* was made. In *Babcock v. Jackson*, the first pure tort claim to break with *lex loci*, Judge Fuld mentions several places the "most significant relationship test" of the tentative preliminary drafts of the Second Restatement of Conflict of Laws. The Second Restatement did not emerge in its definitive version until 1971. It uses rules, presumptions, and an analytic standard to find the law with "the most significant relationship" to the dispute. The test takes into account things other than the interests of states and, unlike pure (or Currie) interest analysis discussed below, it focuses for its presumptive rules on the place of the primary events involved in a legal dispute, somewhat like *lex loci*. Because it uses both rules and an analytic approach it has been called "schizophrenic." Nonetheless, it has gradually caught on and is becoming the dominant formulation of the modern approach.

However, initially (in the 1960's and 1970's), the most talked about approach was "interest analysis," especially a version invented by Brainerd Currie which involved two steps: first, a court must determine whether there is a "true" conflict, and second, if a true conflict is found, it must resolve it by some presumptive rule. Currie's "presumptive rule" was forum preference. Alternatively, the

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9. Brainerd Currie (1912-1965) was a Professor of Law at the University of Chicago and later at Duke University. His seminal article, which was said to have devastated *lex loci* doctrine, is *Married Women's Contracts: A Study in Conflicts-of-Laws Method*, 25 U. Chi. L. Rev. 227 (1958). In a
New York Court of Appeals has created a set of rules that amount to a lex loci delicti presumption in true conflicts cases in torts. Or one could use a "better law" presumption: if two states have a true interest in having their laws apply, pick the state whose law is somehow "better," hopefully in some objective way. Alternatively, a court could eschew the presumptive mode of escape from the dilemma and actually attempt to determine which of the two (or more) interested states has the greater interest, a process which Brainerd Currie curiously claimed was not in the legitimate province of courts.

A "true conflict" is one in which each of two or more states has a genuine "interest" in having its law apply to the dispute. What gives a state a genuine interest in having its law apply is not difficult if one assumes Currie's definition of "interest." Currie's notion of interest sees any state law as a product of warring public interests in which some part of the public won and some part lost. The part that won got its interest protected, the part that lost did not. The particular public interest (i.e., an aggregation of private interests) sought to be protected by the law is the state's interest.

short piece, Notes on Methods and Objectives in the Conflict of Laws, 1959 DUKE L.J. 171, 178-79, he stated:
Foreign law would be applied only when the court has determined that the foreign state has a legitimate interest in the application of its law and policy to the case at bar and that the forum has none.
In the same article he declared:
Assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order.
This is a function that should not be committed to courts in a democracy.
In brief summary, Currie's position was as follows: If the forum and some other state have a true interest in having their law apply, then, according to Currie, there is no nonarbitrary or non-political way to decide which state has the greater interest, and therefore the forum should pick its own law; at least, forum law is familiar. Another way to put it is that in any case there is a presumption that forum law will apply, and the presumption can be rebutted only by showing that the forum has no interest in having its law apply and some other state does have an interest. If no state has an interest, apply forum law. If there are two (or more) interested states but neither is the forum, the forum should pick the foreign law most like its own.
11. See supra note 9. I say "curiously" because courts make and are expected to make such policy judgments as an integral part of their role as judges. Currie's position prescribing interest-weighing by judges was much criticized. One commentator states it "seems to strike at the heart of the judicial process." Michael Traynor, Conflict of Laws: Professor Currie's Restrained and Enlightened Forum, 49 CAL. L. REV. 845, 853 (1961).
For instance, state A adopts an automobile guest statute. The guest statute is a product of a contest between those who favor keeping insurance premiums lower (possibly insurance companies and host-drivers) and those who favor compensation for automobile guests when injured by merely neglectful host drivers. The premium-payer-host drivers (and insurance companies) win the political contest. Since it is assumed that politics is power, that is, the aggregate of private interests that marshalls the more power wins, and that power in democratic politics is votes and only domiciliaries vote, then state A is only concerned with domiciliaries who are insurance premium payers (or insurance companies insuring domiciliaries). Thus, state A with its guest statute only has an interest if the defendant (the insurance premium payer) is a domiciliary of state A. The fact that the accident may have happened in state A, or that the plaintiff lived in state A, would give state A no interest in having its guest statute apply. State A, as evidenced by its guest statute, has no "interest" in hurting guest claimants (i.e. in lowering the standard of driving care with regard to them or of not compensating them for their injuries); it simply has no interest in helping them i.e. it is indifferent to guests. The place of the accident is irrelevant because a guest statute is not a rule of conduct but of liability. By a parity of reasoning, if state B has no guest statute, then only if the plaintiff guest is from state B will it have an interest in having state B law apply.

Currie's version of "interest" has two clear consequences: party domicile will be of first importance and there will be many false conflicts. A "false conflict" is one which appeared on superficial first glance to involve a conflict, but which, after careful "Currie analysis," had none.12

Currie's interest analysis has been heavily critiqued and soundly criticized.13 The basic problem with his analysis is his very narrow

12. "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 might avoid conflict." Cramton, et al., supra note 9, at 203 (summarizing Currie).

notion of what gives a polity an interest in having its legal policy apply to a private dispute. Private disputes are ordinarily resolved by common-law principles of the polity. Such common-law principles are inferred by the dispute-resolving court either from prior positive announcement in judicial opinions of the polity, in legislative enactments (as with the Uniform Commercial Code or a guest statute), or from the less than positive voices of (1) constitutions, (2) the courts of other polities, (3) its own judicial dicta, (4) legal commentaries from restatements to law review articles, and (5) persuasive reasons as to sound policy and justice contained in lawyers’ briefs, law clerks’ summaries, and the deciding judges’ own private musings. I draw this out in some detail here, in part, to emphasize that knowing what the law of any state is at any particular time is no easy matter in most cases and on many issues. But I mainly want to emphasize here the fact that law, especially the law of private disputes, is not necessarily, and only, private interest promotion through politics-*cum-*power.

Every law comes into being on a claim of justice; politics floats in the rhetoric of justice; the common law is awash in justice. A proposed guest statute was presented to an enacting legislature not as a claim by a powerful voting block for lower insurance premiums or as a claim by wealthy insurance companies as a technique for greater profitability by lowering the risk of payment, rather it was presented as an instrument to avoid the *injustice* of friendly and probably collusive law suits which *unfairly* inflate the cost of insurance. This argument may have been augmented with a further claim that it is unjust for a guest to reciprocate for the free ride by instituting a law suit against the generous host for the host’s neglectful, but unintended, harmful behavior. Or, further, that since most automobile accidents involve more than one car, as between guests of the tortfeasor and third parties (in the other car) the third parties have a more just claim to the limited insurance resource because, unlike the guest, they had no prior knowledge of the tortfeasor and, thus, are innocent of the hint of assumption of risk. These are all claims of justice. Claims of justice are always made.

They are not mere window dressing. They do not merely make legislators feel better about action taken purely for self-interested reasons. Sure, the hardheaded political realist is right that self interest does play a large role in legislative and democratic decision-making, but it is far from the total explanation for majoritarian law, let alone common law. The ubiquitous rhetoric of justice is real. The disinterested votes must be persuaded. The ambiguously interested voter must be courted not alone with statistics about what her true interest is, but with arguments from fairness. Many numerically underpowered groups win their claims — women winning the right to vote being the most obvious example.

What does this mean for choice of law? It means that Currie’s interest analysis is badly flawed. If state A enacted its guest statute because it felt guest lawsuits for mere negligence were unjust, then it has an interest in having its vision of justice applied to suits where either the plaintiff or defendant are domiciled in state A and when either the plaintiff or defendant has had a significant presence in the state (such as being involved in an accident there, working there, or suing or being sued there). Moreover, if the reason for the polity’s substantive rule is more than “mere” justice, domicile or presence of parties may be, depending on the policy, of little importance, no importance, or dominant importance. The general name given to such nonjustice reasons for a rule is “policy.” These policy or “instrumentalist” reasons vary from influencing behavior in order to promote safety and well-being, to finding a ready source of compensation for those suffering catastrophic loss. The facts that give a state a “policy interest” in applying its law will, of course, be dependant on the particular policy attributed to the law. A nonguest-statute state may, for example, have attributed to it the policy of finding a source of ready compensation for auto accident victims. Such policy would be, further, readily inferable from a state requirement that all vehicle owners carry liability insurance that includes passengers. Then an injury in that state, or an injured party domiciled in that state, will give that state an interest in having its law apply to resolving a lawsuit involving the injury or the injured party. The in-state injury gives the state an interest because debts may occur there to heal the injuries and house the injured. The injured party domiciled in-state gives an interest to the domicile
because of the special concern the domicile has for the long-term welfare of its own domiciliaries. If the policy is designed to influence behavior, of course, the state where the offending behavior occurred will have an interest in having its law apply to influence (mostly deter) others while in the state.

All those potential interests greatly complicate interest analysis which started out confidently proclaiming that most apparent conflicts, if viewed rightly (i.e., deeply and carefully), were not conflicts at all. In fact, there was more conflict than Currie ever dreamed of in his stunted public-law-power-politics view of law. And while his implicit view of law was accepted by many commentators on conflicts of laws (if not many judges) another real flaw in interest analysis was quickly uncovered by judges: the determination in fact of a state’s interest in having its law apply was fraught with difficulty and uncertainty. Should all plausible purposes (even if only policy purposes are recognized) for a particular rule be counted as actual purposes of a polity in its enactment or adoption of the rule or should only those purposes count that the polity actually considered? This was the nasty problem which the New York court wrestled with soon after Babcock v. Jackson. Compounding this problem of determining purpose is the problem of determining the law of another polity, especially when the law is found in the other polity’s judicial decisions and not its legislative enactments. This is a problem always present in choice of law decisions. The tendency has been to take a legal positivist’s approach to cases: to read them as “case law:” as rules laid down by judges not unlike legislative enactments. This gives state A’s case law precedent a binding effect in state B when B chooses to use A’s law, that A’s case precedent would not have in state A. This distortion of the legal process seemed inherent

15. See supra note 9. For an excellent article that provides a thoughtful critique of Currie's interest analysis as much too narrow and parochial in its conception of policy, see Note, Comparative Impairment Reformed: Rethinking State Interests in the Conflict of Laws, 95 HARV. L. REV. 1079 (1982).


in the traditional system. The modern approach can minimize this problem. However, interest analysis, which aims at finding false conflicts, pushes toward finding foreign law that is positive and certain — a rule laid down as if by a precise legislature.

But the unsettled nature of a foreign polity’s law governing a particular issue (i.e., the relative indeterminacy of foreign law) is a factor in determining whether it makes sense to use foreign law. In Offshore Rental Co. v. Continental Oil Co.,¹⁸ Justice Tobriner of the California court purported to use a comparative impairment approach to resolve “true conflicts” (rather than Currie’s forum preference) and then relied on California’s relative lack of commitment to its “key employee” rule to decide that California’s interests would not be impaired much, if any, by not applying its rule. The court found this lack of commitment in the fact that no case squarely recognized a “key employee” rule, no recent case even paid lip service to such a rule, and, further, that the key employee rule was a bad rule that no one ought to be committed to — the rule was out of the “main stream” and “archaic.” In other words, “Louisiana has a better rule, let’s use it.”

The Tobriner reasoning in Offshore is suggestive of an alternative that has won both some judicial adherents and much criticism: Leflar’s “Better Law Approach.” Two articles¹⁹ by Professor Robert A. Leflar attempted “to focus upon the true reasons that underlie choice-of-law adjudication: the basic choice-influencing considerations that actually lead, or should lead, the courts to one result or another . . . .”²⁰ His “choice-influencing considerations” are then both descriptive of actual practice, i.e., what really influences courts in choice of law, and prescriptive of ideal practice, i.e., what ought to influence them. He then lists and discusses five factors, the most interesting and controversial of which is “application of the better rule of law.”

¹⁸. 583 P.2d 72 (Cal. 1978).
²⁰. Leflar, Conflicts Laws, supra note 19, at 1585.
A number of courts have adopted Leflar's system. After all, his better-rule-of-law factor purports merely to recognize openly what was done covertly:

21. Wallis v. Mrs. Smith's Pie Co., 550 S.W.2d 453 (Ark. 1977); Fuerste v. Bemis, 156 N.W.2d 831 (Iowa 1968); Milkovich v. Saari, 203 N.W.2d 408 (Minn. 1973); Mitchell v. Craft, 211 So.2d 509 (Miss. 1968); Clark v. Clark, 222 A.2d 205 (N.H. 1966); Conklin v. Horner, 157 N.W.2d 579 (Wis. 1968). Several leading commentaries besides Leflar have advocated that consideration of the quality of the laws a court is choosing among be a factor in the choice: RUSSEL T. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 328 (2nd ed. 1980); Albert A. Ehrenzweig, "False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law, 53 VA. L. REV. 847 (1967). Although Professor David Cavers later recanted (and repented) any allegiance to a "better law" point of view, DAVID F. CAVERS, THE CHOICE OF LAW PROCESS 9-10, 75-81 (1965), what he rejects is the wholesale use of the "better law" approach, i.e. that a court when it has a choice ought always (or even usually) simply to pick the better law. Nonetheless, if I read Cavers correctly, the quality of the law of each candidate polity is relevant to choice of law if not dominant. Certainly Professor Cavers earliest and probably most influential article written in 1933 resonates with consideration of the quality of the law being chosen. David F. Cavers, A Critique of the Choice-of-Law Problem, 41 HARV. L. REV. 173 (1933) [hereinafter Cavers, A Critique]. Cavers' thesis was that the problem with choice of law (and the soon to be published RESTATEMENT OF CONFLICT OF LAWS (1934)) is that it is jurisdiction selecting not law selecting. Listen to a passage:

Should enterprising publishing houses in state B be penalized in their extra-state business, because of the anachronistic legislation of that commonwealth? The rhetorical nature of these questions is evident. Obviously, on this hypothesis, the law of state A should be applied, not because it is the lex domicilii or the lex loci contractus or because all contracts should be sustained if a law can be found to turn the trick, but because its application here so clearly produces an eminently sensible result.

Cavers, A Critique, supra, at 190.

Be that as it may, in the course of this evaluation, the courts opinion as to the desirability of limitations upon the contractual capacity of infants and married women will inevitably enter. Any effort to exclude it would operate only to distort the intellectual processes of adjudication. This factor in the decision may, of course, render of consequence the choice of forum. Judges in state B or in state C, having laws similar to B's, may not attach the same importance to the limitations on wifely capacity that would be encountered in state A. Such differences are inevitable; it is important only that they be frankly encountered. Today, as in the past, their influence may not appear on the surface of opinions, but, if the uncertain course of decision characteristic of most conflicts problems is evident, such influence had not been wanting. Moreover, a recognition of the necessity for a thorough understanding and appraisal of foreign law should tend to diminish the parochial "affectation of superiority" which now leads the forum so frequently to reject foreign law.

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The end-product of this process of analysis and evaluation would, of course, be the application to the case at bar of a rule of law, derived either from the municipal law of the forum or that of some foreign state if proof of the latter law were duly made. The choice of that law would not be the result of the automatic operation of a rule or principle of selection but of a search for a just decision in the principal case.

* * *

What consequence the adoption of either rule will have in a given case will depend not on the rule but on the domestic law of the jurisdiction thereby selected. Until a specific case is considered in which the rules work different results, any estimate of their operation must in a large measure be conjectural.
Everyone knows that this [a content-blind jurisdiction selection process] is not what courts do, nor what they should do. Judges know from the beginning between which rules of law, and not just which states, they are choosing.\(^{22}\)

The public-policy exception to *lex loci* as actually used by the courts (not as originally formulated) is a kind of better-law rule;\(^ {23}\) the supplemental "rule of validation" for contracts is a kind of better-law approach;\(^ {24}\) the Second Restatement contains a kind of better-law principle among its "Choice of Law Principles." Section 6(e) provides for consideration of "the basic policies underlying the particular field of law." If the basic policy of tort law is to protect (by compensation) against catastrophic loss, then as between two rules section 6(e) pushes toward the one more readily providing for compensation, which is thus the better rule from the standpoint of the basic values of the tort system.

The reason the better-law factor is not more openly used is that it appears to presage the death of choice of law. Since a state's own law is, so far as its judges can control it, the best that law can be, better law seems like naked forum preference, *lex fori* triumphant. Moreover, picking the better rule seems too overtly like legislating, something courts are not supposed to do especially in a modern positivist democracy.

Two quick responses: a) the "better law" is not determined by the subjective value choices of the judges, but rather by the discovery of an "objective" "better rule" from sources extraneous to the judges, in the time-honored, rule-of-law fashion; b) the better-law factor is but one of several factors to be taken into account. In many cases, either rule will be acceptable, and neither truly better, in which case it will not be a factor at all. It might be added that where a forum knows and likes its own rule, but knows the foreign

\(^{22}\) Leflar, *Conflicts Law*, *supra* note 19, at 1587 (alteration in original).


\(^{24}\) ALBERT ARMIN EHRENZWEIG, *CONFLICTS IN A NUTSHELL* § 54 (3rd ed. 1974):
The resulting Rule of Validation (*lex validitatis*) is in accord with the general principle, prevailing in many other areas including the conflicts law of wills and trusts, that "if the court has a reasonable choice . . . between applicable systems of law, it should choose that one that results in legal 'validation'." Corbin, *Contracts* § 548 n.9 (Supp. 1971) (in turn citing the author).

*Quoted in Cramton, Conflict of Laws, Cases-Comments-Questions, 162 (4th ed. 1987).*
law only through an old case or a dubious statute, which the courts of the foreign state would probably overrule or ignore if they had the forum case in their courts, it makes sense for the forum to apply its own law, unless it has no connection to the law suit except that of being the forum of adjudication.

Several scholars have spawned what appear to be neo or quasi lex loci theories of choice of law, a classificatory label to which they would no doubt object. Some of these theorists are called “neo-territorialist” and believe in “enlightened territorialism;” others, in the same vein, talk of “vestedness” or “political rights” of defendants. Whatever their name or aim, what these various theories have in common is a reaction against the excesses and shortcomings of interest analysis. I have catalogued above some of the shortcomings of interest analysis: its too narrow view of the purpose of law and laws, and its almost glib assumption that a polity’s precise purpose can be gleaned from the same sources from which a polity’s rules are gleaned. The neo-lex-loci theorists are, of course, also reacting against those two shortcomings of interest analysis, but they are also reacting against another failing of interest analysis: its failure to take account, in a coherent fashion, of party expectations. This failure coherently to take account of expectation involves both undervaluing party expectations and misevaluating such expectations.

Each of the theories of the leading neo-lex-loci theorists is concerned about the rights and expectations of defendants in civil law-

25. Foster v. Leggett, 484 S.W.2d 827 (1972), provides an example. An Ohio accident, Ohio has a guest statute, Kentucky has none and there are significant Kentucky connections to the case. Kentucky chose to apply its own law. Had it applied Ohio’s guest statute, it would have been applying a law that Ohio would declare unconstitutional two years later. Primes v. Tyler, 335 N.E.2d 373 (1974), aff’d, 331 N.E.2d 723 (Ohio 1975). Had Kentucky chosen to follow Ohio law it would have led to the absurdity of Kentucky applying an Ohio law that Ohio would not have applied (even if Ohio law applied) because Ohio would soon declare its guest statute a bad law that it was no law at all.


28. Professors Aaron Twerski, Perry Dane, and Lea Brilmayer.
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32. Id. at 370-371; Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985); The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' International Shoe Co. v. Washington, 326 U.S. at 319. By requiring that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,' Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment), the Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit,' World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).
33. David F. Cavers, Cipolla and Conflicts Justice, 9 Duq. L. Rev. 360, 366 (1971); Twerski, supra note 26, at 382.
34. 281 U.S. 397 (1930).
35. The application of an otherwise acceptable rule of law may result in unfairness to the litigants if, in engaging in the activity which is the subject of the litigation, they could not reasonably have anticipated that their actions would later be judged by this rule of law. A choice-of-law decision that frustrates the justifiable expectations of the parties can be fundamentally unfair. This desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice-of-law decisions under the Due Process Clause. Allstate Insurance Company v. Hague, 449 U.S. 302, 327 (1981) (Stevens, J., concurring).
The problem with heavily weighing general notice of the imposition of a private legal duty is that few people rely heavily, if at all, on the precise contours of private legal duty except when engaging in behavior with obvious legal consequences such as transferring property or making contracts. In the torts arena, one relies on one’s moral sense, local custom, and posted rules. That is why the restriction on *ex post facto* laws does not apply to the private law arena of torts and why the common law follows the moral sense of the community when not distorted by legal positivism or conceptualism. In addition, the Dane and Brilmayer theories treat all law as if it is public law controlling behavior and as if it is entirely justice oriented. Interest analysis makes the opposite mistake of treating all law as if it is entirely policy oriented. But the rules for settling private disputes, for doing justice between private persons with the state as neutral arbiter seeking that the private disputants go on peacefully, are both backward-looking and forward-looking; the rules are concerned with doing justice, with public welfare, and with being done with the dispute.

The other problem with these defendant-oriented theories is less connected with their being defendant-oriented (interest analysis is too plaintiff-oriented) than with their being too abstract. Abstraction of this sort sacrifices real sense to elegant reasoning and nice coherence. *Lex loci* gave us all the “nice coherence” we could ever want. Nice coherence does not allow sufficient room for situation-sense for the complex of facts and law that inform the sense of justice in the individual case. Too much must be ignored as irrelevant which does not “feel” irrelevant. *Elegantia juris* leads to new conceptualism. Rough coherence is all that can be hoped for, or aimed for, given the match of our frail intellects with the complexity of fact, language, and value that is justice under law.

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37. Situation-sense is a key word in Karl Llewellyn’s explanation of how good courts decide cases. See KARL N. LLEWELLYN, THE COMMON LAW TRADITION, DECIDING APPEALS 121-57, 200-12, 268-70 (1960).
38. All of this means that the ideal is not “certainty” at all, in any of the senses in which that term is commonly applied to matters legal. The true ideal is *reasonable regularity* of decision. If there is *regularity* there is continuity enough . . . . The *reasonable* aspect of
Nonetheless, the new defendant-oriented theories are a welcome antidote to interest analysis. It is not absurd to suggest that rights analysis can be combined with policy analysis no matter how vehemently each camp might protest.

2. Common Elements in the Modern Approaches

Among the new approaches that have actually been used by courts, there is one overriding concern: to look at the whole problem and to apply the law that makes the most sense given the whole situation. To look at a conflicts case on the whole, the courts have taken account of the interests of the law-declaring-polities, of the parties to the dispute, and of the dispute-settling forum. In the Second Restatement, seven factors are listed that account for these three basic elements: 39 polity interest is articulated as "(b) the relevant policies of the forum" and "(c) the relevant policies of the other interested states and the relative interests of those states in the determination of a particular issue"; party interests are recognized in "(d) the protection of justified expectations" and "(f) certainty, predictability and uniformity of result"; and the forum court's interest, qua court, is represented in "(f) certainty, predictability and uniformity of result"; "(e) the basic policies underlying the particular field of law;" "(a) the needs of the interstate and international systems," and "(g) ease in the determination and application of the law to be applied." Because a court's interest is in doing justice under law in an efficient, accessible, and accepted way, it is interested in predictability and justice, simplicity and completeness.

Leflar's "Better Law Approach," which he would, no doubt, prefer being called something else, has five basic factors which can

the regularity, on the other hand, holds out full room to adjust any complex of tension to the hugely variant needs of whatever the relevant type-situations may be . . . And if the court is to do a job which is reckonable at all . . . then . . . the court needs to have as tools at hand not a single one or even three, but well-nigh the whole Croesus-wealth of our American authority techniques to choose from. Neat cabinetmaking is both easier, more likely and more reckonable when the workbench is well-stocked.

Id. at 216-17.

also be efficiently regrouped under the more intuitive "polities, parties, and courts" suggested here. He accounts for party interests with "predictability of results" and, to a lesser extent, with his factors of "maintenance of interstate and international order," "advancement of the forum's governmental interests" and "application of the better rule of law." The polities' interests are accounted for in "maintenance of interstate and international order" and "advancement of the forum's governmental interests" and "application of the better rule of law." A court's own interests are accounted for not only in "simplification of the judicial task," but also in "predictability of results" and "application of the better rule of law." 40

"Interest analysis" and "rights analysis," if combined, account for a polity's and a party's interests but not a court's. But few if any states ever adopted interest analysis straight up.

3. The Difficulty of Reaching a Consensual Approach

Why do there appear to be so many modern approaches, indeed, almost as many as there are commentators? Although, as I have suggested, all the approaches have common elements, they differ because legal scholars and jurists differ about the formal aspects of law and political theory. Some are positivists, some realists, some neo-naturalists. Further, overlapping those general categories are formalist/conceptualist and instrumentalist/functionalist. Theories of political action vary from extreme majoritarian individualism to civic republicanism. 41

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41. A huge debate rages among political and legal scholars about what animates political and legal action. For two recent, accessible and brief discussions of lawmaking and the nature of the political state, see Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405 (1989); Richard H. Fallon, What is Republicanism, and Is It Worth Reviving, 102 Harv. L. Rev. 1695 (1989). My meaning for the terms here used is quite modest: majoritarian individualism means the public good is determined solely by counting selfish individual preferences; civic republicanism posits that there is a public good separate from majoritarian preferences that resonates with the moral nature of humankind and is discoverable through public dialogue and an ambiguous hierarchy of public decisionmakers.
With the above categories in mind then, it is not surprising to find those who want choice-of-law to be a set of rules laid down and others who, believing that rules for this area of law would be either impossibly complex (and prolix) or impossibly simple (so vague as to decide few cases), want only guidelines for analysis. Some see the politics that creates law as competing claims of justice, others as competing claims of self-interest, others as both. If one believes that law suits are the application of legal rules of behavior to discrete past behavior to sort out liabilities, then one will likely focus on finding the jurisdiction (or sovereign) whose legal rules are to be applied. In other words, legal positivism leads to jurisdiction-selecting-choice-of-law doctrine. On the other hand, if one believes that lawsuits are the settlement of present disputes about past, present, and future events and require the application of a myriad of principles of justice, policies of social convenience, and positive rules to reach a proper resolution of the dispute, then one will likely focus on finding the particular law, principle, or policy that should apply to each identified issue. Thus a realist or neo-naturalist will not select jurisdictions (and ignore the jurisdiction's internal law until after the jurisdiction is found), but will look at the myriad of principles, positive rules, etc., pressing for application and consider as relevant to the choice of law the source of each principle, rule, etc., and source would include not only spatial location, but the location within the hierarchy of democratic lawmakers. And whether the judge is "making up or creating" the solution (the realist) or "discovering" it (not mere logomachy, this distinction) she is not "jurisdiction selecting" but "law selecting."

_Lex loci_ was pure jurisdiction-selecting. The new approach is by and large law-selecting, but some individual approaches are jurisdiction-selecting. Interest analysis must look at the content of the law to determine the interest a state might have in having it applied to the case, but it is little concerned about the hierarchial place of its source (constitution, statute or case) and not at all concerned

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about its content except as described above. Brilmayer’s rights approach is also jurisdiction-selecting in much the same way content may count in the determination as to whether “political rights” were created, but not otherwise.

Finally, viewing a polity’s interests varies with one’s view of politics as (on a continuum) from pure majoritarian self-interest aggregations (pure power) to pure civic republicanism (pure reason). One theory finds the public good in maximizing self-proclaimed interest by majoritarian counting, while the other finds it in counting and combining myriad (and countless) visions of the public good through public debate and deliberation. One’s assessment of a polity’s “interests” will vary as one’s foundational view of politics varies. It is therefore not surprising that there are various ways to assess a state’s interest and that the outcomes vary. The Curry approach is rooted in liberal individualism; the “least impairment” approach\(^43\) is rooted in reasoned deliberation, as are the better law approaches, including the Second Restatement.

Given the manifold ways of structuring law (by focusing upon dispute resolution, politics or both) it is no surprise that the new approach takes many forms. I will now look briefly at the underlying structure of the modern approach.

B. A Composite Approach

1. Finding the Law That Makes Sense

It is no secret that talking about “finding the law that makes sense” sounds like Karl Llewellyn and legal realism.\(^44\) So be it. It is also clear that “finding that law that makes sense” is no rule

\(^43\) For an excellent discussion of how the comparative impairment approach to interest analysis varies from Curry-style interest analysis, see Note, Comparative Impairment Reformed: Rethinking State Interests in the Conflict of Laws, 95 HARV. L. REV. 1079 (1982).

\(^44\) See KARL LLEWELLYN, THE COMMON LAW TRADITION, DECIDING APPEALS (1960); WILLIAM L. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973). Llewellyn was not a conflicts-of-laws theoretician, of course. His basic field of expertise was commercial law having been the original Reporter for the Uniform Commercial Code project. But his emphasis in his jurisprudential writing on law suits as dispute resolution is perhaps his greatest and most enduring contribution to American jurisprudence. See KARL LLEWELLYN, THE BRAMBLE BUSH (Oceana Publications, 1951) (1930).
and hardly an approach. It is a first step, however, and it sets the direction for the trek. “Makes sense” has a unique voice in choice of law because it requires the court to look outward from the disputes to gather two distinctive points of view, one of which occurs only in this context. The judge must “make sense” from the point of view of the polities that have an interest in supplying the law to settle the dispute. Only choice-of-law cases require this. The judge must also “make sense” from the point of view of the parties to the dispute. Although making sense from the point of view of the parties is not unique to choice of law, it does require an especially intense look at the locus of events and parties when reckoning with the expected expectations of the parties. In all this, the court should not neglect to look inward at its own needs in order to be a just dispute settler under law i.e., have the proper admixture of efficiency, predictability, objective justice, sound social policy, and finality.45

In judging a disputed choice-of-law claim, a judge ought to ask him or herself the following questions: “What would each involved state say about the application of its law to settle the disputed issue?”; “What would each party say sans advice from a lawyer (unless a lawyer’s advice played a part in the events and matter in dispute) as to what his or her expectations of the applicable law were (and, even, are) “What do I need in this case (and others like it) to be an efficient, predictable court?” Of course, the final daunting question is “how do I put the three answers into one coherent answer to the ultimate question: what law do I use in this case?”

2. The Point of View of Affected States

When the events of a dispute touch more than one state, a court must determine which state polities would want their law to deter-

45. These five elements are simply the common sense listing of what a judge ought to aim for: efficiency (act as quickly and economically as possible consistent with the task at hand); predictability (both the procedures and the substantive law to be used ought to be accessible to the attorneys for the parties); objective justice (the communities sense of justice as received by the judge in legislative enactments and prior appellate decisions); sound public policy (the utilitarian side of probing for the controlling purposes of law); finality (the dispute must be ended here authoritatively so that the parties can get on with their lives and so that the community will have one less source of friction).
mine all or some of the issues of the dispute. This “want” is bound to be a function of the following: (1) the general purpose of the law, \(i.e.,\) does it control primary behavior in order to protect police-power interests—a public law purpose—or does it fix liability in order to do justice—rectificatory justice, no doubt—as between the parties—a private law purpose; (2) the legislative source of the law \(i.e.,\) is it statutory or common law; (3) the clarity of the law \(i.e.,\) is there a form of words that can be authoritatively determined to be the rule of law or is the reduction of the law to a rule problematic or controversial; (4) the importance of the particular law to the polity \(i.e.,\) is it central to the polity’s jurisprudence or peripheral; are there signs of recent commitment to the law?; (5) the nature of the factual contacts with each state of the events of the case. These contacts can range from a party’s habitual or regular presence in the polity to the location in the polity of the vital facts of the dispute.

3. The Point of View of the Parties

The question here is both “what might the parties have actually expected as to the applicable law before the events giving rise to the dispute occurred?” and “what expectations as to applicable law might they have had after those events?” The first kind of expectation is a most important ingredient in fairness. Actual choices by the parties turn on it. Before the event expectations give rise to the equitable doctrine of estoppel and the moral imperative to be truthful. Expectations can be further subdivided. Before-the-event expectations can be divided into expectations of specific reliance and those of general reliance. An expectation of specific reliance is one which the party can point to as the predication of a concrete choice — the old “change-of-position-in-reliance-on” doctrine of estoppel. An expectation of general reliance is the belief that a certain fact exists (here, of course, the “fact” being the application of a particular state’s law) which fact, with many other believed-to-exist facts, forms the matrix of background facts that enter into the calculus of choice but is not an expectation of fact that can be demonstrated as a “but for” cause of a choice. In other words, an expectation of general reliance is an expectation of the kind that is generally
relied on in making choices but upon which no demonstrable reliance can be shown in the particular case. In our world of uncertainty, where choices are often made intuitively in whole or part, where the calculus of choice (if such it can be termed) is often unconscious, the honoring of general expectations about "states of affairs" is important to a sense of well-being. This "honoring" by the state is quite central to our notion of a just society; think of the proscription of ex post facto laws and of laws impairing the obligations of contract. Indeed, the procedural regularity guaranteeing the predictability of state coercion is what the late Lon Fuller called the "inner morality" of law.46

The content of "general expectations" does not, however, include every state of affairs present at the time of an event that might have been in the minds of the actors in the event. Only those states of affairs that might "properly" affect a choice should count. For example, consider an automobile driver in Indiana in 1990 who knows Indiana has a guest statute. The driver carelessly drives his car into a tree, gravely injuring his guest. The driver cannot claim "I might have chosen to drive more carefully in a nonguest statute state." Our response would be one of disbelief of the asserted fact (the human psyche does not work that way!) and disavowal of the immorality of such a predication for choice (the human mind ought not to choose that way). A general expectation needs to be both credible and moral (or reasonable). What it does not need is demonstrability as the "but for" cause of a choice.

The expectations after the main events of a dispute are of lesser importance than before-the-events expectations, but could be significant; in some instances they could even be specifically relied on, such as reliance on a particular statute of limitations. More likely these after expectations will be those of the party and his or her attorney. For example, an employee of a West Virginia coal company, who works at a Kentucky mining site while living in West Virginia, might well expect the protection of West Virginia labor laws designed to protect workers who an employer refuses to pay,

especially when he was hired in West Virginia for the Kentucky work and his employer now refuses to pay him. The former employee probably did not know about the West Virginia law prior to the default in paying his earned wage (i.e., prior to the primary events of the dispute), but only learned of the West Virginia law in exploring what he could do about the default in payment (from a lawyer or otherwise). However, the belief that West Virginia law would likely apply would play some part in the decision to sue in West Virginia. Although, the decision as to where to sue would be made ultimately by the attorney, the choosing of a West Virginia attorney might well be influenced by the expectation that this was a West Virginia legal dispute. Moreover, a party hires an attorney, the attorney’s decisions are the party’s decisions, and therefore the attorney’s expectations count as a party’s expectations.

How, and how much, to count the party’s after expectation is problematic, just as we earlier saw that after-acquired domicile is problematic.47 There is, naturally, fear of bootstrapping, of manipulating the events after the facts to set up expectations to influence the ultimate outcome of the dispute. But, as with after-acquired domicile, careful sifting of the facts ought to uncover disingenuous and manipulative claims of expectation. In any event, after expectations probably ought not to count very much in the calculus of choice of law and would be a fool’s means of trying to manipulate the outcome of a legal dispute.

4. The Point of View of the Court

The court deciding the case has some obvious interests: efficiency, fairness of the process, justice of the resolution, and finality. These judicial interests will push a court toward the familiar doctrine or rule as against the unfamiliar, the tried and true, over the innovative, the mainstream over the avante garde, and the simple rule over the more complex. These factors will push the court to use its own procedures without having to classify a rule as either procedural or substantive.

One's own procedures will be familiar and, in most instances, will have no discernable effect on the resolution of the dispute.\textsuperscript{48} Procedure is merely the way the ball is put into play but does not determine its bounce. The more a rule goes beyond formalities, the more polity and party interest will come into play. For example, a statute of frauds problem is no mere formality no matter how the statute is worded. Nor is a statute of limitations a mere formality. But with regard to most "purely" procedural rules, including form of action, proper parties, pleading, discovery, evidence, and enforcement, the forum judge can safely follow his own tried, true, and familiar rules. Moreover, the parties expect to follow local rules as to "procedures" so their after expectations are thereby protected.

Even as to issues traditionally thought to be purely substantive, the court's interest in efficiency, fairness, justice, and finality can play a decisive role in choice of law. When polity and party interests appear evenly balanced between two or more states, then the judge might properly pick the simpler, more conventional, and less archaic rule, \textit{i.e.}, the more modern rule. In short, he can pick the "better rule."

5. Combining the Points of View: Some Illustrations of "Making Sense"

There is no formal way to combine the three points of view. The proper combination depends on each particular situation. Nonetheless, in most situations, the very notion that we are picking a \textit{law} from several candidate \textit{laws} will cause us first to be concerned with each lawmakers point of view. Choice of law presupposes legal positivism; law is some sovereign’s promulgated rule. It is natural therefore to be concerned with each sovereign’s will, in each polity’s interests first. The second consideration is the party’s interests; it’s

\textsuperscript{48} Hanna v. Plumer, 380 U.S. 460 (1965), makes the useful suggestion that "outcome determinative" as a test for substantive law (in the context there of causing a federal court not to apply a rule of F.R.C.P. under the doctrine of Erie v. Thompkins) must mean so determinative of outcome that it could well have influenced an attorney in her forum choice.
their dispute. Finally, the court's own interests break ties in substantive situations. In procedural situations, the opposite ordering takes place.

In order to see how this might play out in actual situations, let us look at several cases from one jurisdiction. These are by no means paradigmatic cases. They are, more or less, randomly chosen cases used merely to illustrate choice-of-law analysis within the above suggested framework — a framework for finding the law that it "makes sense" to apply. Remember that in the real world of judging and judicial opinions a simple intuition that it "makes sense" to apply (say) the law of Ohio, rather than West Virginia to the issue of interspousal tort immunity in this case, may be all that caused the choice by the judge. In that event, the judge's corresponding explanation for his or her choice may be no articulate explanation at all but only a statement of his or her conclusion. Of course, lawyers cannot, or at least ought not, rely on such judicial intuitions going their client's way. They want to influence that choice. So the holistic intuition, the grasping of all the variety of facts and values as one whole picture, must be made linear and discursive. Not only all the facts and values that create the whole picture, but also an explanation of the various parts and what they together should mean is necessary. In some of the following cases, the courts' explanations seem purely intuitive. I have attempted to analyze the ingredients of the intuition.

The first sample case is New v. Tac & C Energy, Inc.,\textsuperscript{49} a law suit over breach of an employment contract where extra damages (more than mere loss of contract expectations) were sought under a West Virginia "labor law." The labor was performed entirely in Kentucky, but both the plaintiffs and the employer were West Virginia domiciliaries, the contract was made in West Virginia at the employer's office, and the paychecks were made in West Virginia and delivered in Kentucky. Moreover, the plaintiffs lived in West Virginia during the duration of the contract, driving to work each day from West Virginia to Kentucky.\textsuperscript{50} Thus the court's remark that

\textsuperscript{49} 355 S.E.2d 629 (W. Va. 1987).
\textsuperscript{50} The Brief of Appellants, states that "Jimmie and Shirley New are residents of Mingo County,
they were "only in Kentucky for the duration of the job" is somewhat misleading. That characterization of the facts sounds as if the plaintiffs actually moved to Kentucky and lived there during the two years of the contract. The fact that Jimmie and Shirley New maintained their West Virginia residence and commuted to Kentucky every day is a vital fact in the case.

How does one go about deciding whether West Virginia or Kentucky law applies to this dispute. Start with each affected polity's point of view. West Virginia has an interest in having its law apply because the aggrieved parties were members of the West Virginia community during all the pertinent times of the dispute. They had a home in West Virginia, and their life outside of work was centered in West Virginia.

It would seem especially important to West Virginia that its laws designed to guarantee that earned wages and benefits be promptly and fully paid be applied to a member of the West Virginia community. The wages provide for people presently living (eating, sleeping, and buying necessities) and spending those wages in West Virginia. These are not abstract "domiciliaries" temporarily living and spending wages in another place. Moreover, the fact the employment contract was made and negotiated in West Virginia (in the News' living room) gives West Virginia some interest in seeing that its terms are adhered to. Any polity has some interest in faithful adherence to promises solemnly made in the community it governs. Promise keeping is part of the moral life of the community; promises of wages for work are especially important to that moral life. Furthermore, the promisor was an active member of the West Virginia community. West Virginia certainly has an interest in seeing to it

West Virginia. They have been West Virginia residents all their lives." Because the concept of residency is often used to mean the more technical domicile, the above quoted statement does not make entirely clear that during the duration of the employment contract the News lived in West Virginia and commuted daily to Kentucky. A telephone conversation with Mr. Bradley J. Pyles, the plaintiffs' attorney and author of the brief, confirmed that the News did make a daily commute to Kentucky from West Virginia. The West Virginia Supreme Court's statement of the facts does not make clear that they understood that the News made a daily commute. A student note criticizing the result in New assumed the News lived in Kentucky while working at the Kentucky mine site. Linda M. Gutsell, Note, Conflict of Laws Resolution in Employment Contracts: The West Virginia Approach, 92 W. Va. L. Rev. 459, 482 (1990).

51. See Gutsell, supra note 50, at 482 n.122.
that members of its community who make promises within the community adhere to them, especially promises of wages for work. A state polity that provides for a civil penalty to deter such promise breaking surely would want it applied to a promise made within the state by a state domiciliary to another state domiciliary.

Kentucky also has an interest because the work for which the wages (including benefits) were paid was performed in Kentucky. It has an interest, as manifested in its laws, of seeing that wages are faithfully paid for work done in Kentucky. However, since neither the plaintiff nor the defendant is an active member of the community, except for the working day (not insignificant, of course), Kentucky's interest in these wages and these promises is less than the usual case and certainly much less than it would be if the wage earner were living temporarily in the state and, therefore, a fulltime (if temporary) member of the community.

On balance then, it would appear that West Virginia has at least a slight edge in interest in having its law apply. That is a judgment that feels somewhat subjective and one might honestly feel quite ambivalent about it. The psychological dissonance might be resolved by using a conceptualistic litmus test (one of the straws Cardozo suggested judges grasp for) such as a place of making or place of performance rule. I suggest two things for resolving the dissonance: first, proceed with the analysis which requires looking at the party and court points of view and second, if still uncertain or not entirely certain, give it your best judgment and go on with it. Most of the time, after careful analysis, a judge will be able to make a confident choice. When he or she cannot, then either choice makes some sense so you cannot be far wrong.

But let us go on to the parties point of view in the case. The parties could have put a clause in the contract designating the law controlling resolution of a breach. That is always helpful. They did not. We must reconstruct what the parties probably thought (as reasonable parties, natural parties, and ordinary people) about which law would control the dispute. The News might well have had a general expectation before the fact that they were protected by West Virginia law since they were living in West Virginia and made the
contract in West Virginia with West Virginians. But there is nothing to indicate that they gave choice of law any thought, nor that they had any idea what West Virginia labor law provided. The general expectation of the employer might have been quite different, as an employer would be aware of various Kentucky rules they had to comply with in order to mine coal in Kentucky. Again there is nothing to indicate that the employer actually knew about the particular laws involved here or had given choice of law any thought.

However, after expectations are somewhat indicated by the News hiring a West Virginia attorney and by that attorney’s filing of a law suit in West Virginia. That alone is a weak push in the direction of West Virginia law. The employer must have known that if he was going to be sued for its breach, it would likely be in West Virginia. So there are some not very strong after expectations pushing in the direction of West Virginia law.

The point of view of the court interested in efficiency, fairness, justice, and finality would add only slightly to the tilt toward West Virginia. Indeed, the West Virginia trial judge in this case thought that the most efficient, fair, just and final thing he could do was to dismiss the case for want of jurisdiction on the notion that he had no authority to apply Kentucky law which he felt controlled the case. Curiously, the West Virginia Supreme Court of Appeals said nothing about the rather strange idea that subject matter jurisdiction is tied to choice of law.\footnote{The West Virginia Supreme Court blandly stated: “The circuit court granted the defendant’s motion for summary judgment on the ground that it did not have jurisdiction over a wage dispute arising in Kentucky.” See New, 335 S.E.2d at 630. Surely the Court found something amiss with the idea that choice of law issues are jurisdictional. It said nothing.} Ironically, the trial court’s implicit finding here is that for a West Virginia court to apply Kentucky law is inefficient and perhaps unfair because, after all, only Kentucky’s Supreme Court knows exactly what Kentucky’s law means by dint of the fact that they have the final say as to what it means. The same can be said for the West Virginia Supreme Court of Appeal’s reading of its labor law. There is then some push toward the use of forum substantive law in every case. The more important the substantive law is to a polity, the more it states deliberately legislated
public policy, then the more important it is that it be read and applied by its own courts.

All in all then, it makes sense to apply West Virginia law to New v. Tac & C Energy, Inc. It's a fairly close case. If one reads the Restatement (Second) of Conflicts section 196 as creating a presumption in favor of the place of rendering the services, then the presumption is rebutted — barely. If section 196, and other like sections are merely suggestive, that is, if one starts with the place of performance of the services of a service contract as only probably decisive, but makes the significant relationship analysis with no presumptions, then it is easy to pick West Virginia as the state with the more significant relationship. Had the persons rendering the services actually moved for the duration of the period to the state where the services were to be rendered, the case becomes very close indeed.53

For another example involving contracts, let's look at Lee v. Saliga,54 another West Virginia case. In Lee, insurance was bought and paid for in Pennsylvania, whose law does not require physical contact with an uninsured motor vehicle of the "hit and run" variety. Indeed, Pennsylvania had specifically held it to be against its public policy for the private parties to agree in the insurance contract to an actual physical "hit" before the run.55 West Virginia, by statute, requires a physical hit before the run in order to qualify for uninsured motorists coverage.56 The accident at issue happened in West Virginia as follows: the insured stopped precipitously when she saw a car backing up at her on an off ramp on an interstate, causing the car behind the insured to smash into the insured. The negligent backer, of course, ran—no hit but a run anyway. Under West Virginia law there would be no recovery under the uninsured motorists provision. Under Pennsylvania law there could be. Whose law should apply? Pennsylvania has a statutorily announced policy that hitting is not required. It is a fairly recent policy. It obviously stems from the modern notion that catastrophic loss should be socialized not

53. The student note cited in note 50 above did assume such move and thought it quite significant in faulting the Supreme Court for its choice of West Virginia law. Gutsell, supra note 50, at 482.
54. 373 S.E.2d 345 (W. Va. 1988).
only to protect the individual suffering the loss, but also to protect his or her family and others in his or her support orbit. It is therefore willing to risk some fraud on insurance companies and the attendant higher costs of insurance.57

Would Pennsylvania want its policy to apply to this case? A member of the Pennsylvania community, her dependent and, apparently, two other Pennsylvanians will be the direct beneficiaries of her protective policy. Moreover, the insurers sold the policy of insurance in Pennsylvania, and Pennsylvania, as a polity, is hostile to such restrictions as physical contact on uninsured motorist coverage. Of course, Pennsylvania would like its policy to apply to this case.

What about West Virginia, would it want its policy to apply? West Virginia policy is not to allow uninsured motorist coverage on a non-hit-but-run negligent cause of an automobile mishap. It no doubt believes such claims can be too easily fabricated, and the resultant fraud is both unjust to the insurance company and the premium-paying public; unjust in that the fraud increases premiums thus diverting money from other uses in West Virginia. West Virginia’s contact here is that the incident giving rise to the insurance claim took place in West Virginia. Moreover, West Virginia is the forum for settling the dispute. Insofar as West Virginian’s hit-but-run rule is based on protecting against the injustice of fraudulent claims, it has some slight interest as a forum for the just resolution of disputes to have its law apply. The fact that the dispute arose in West Virginia adds little here because the real dispute is between an insured and the insurer over the meaning and operation of a clause in the contract. The West Virginia accident only triggered that contract dispute. West Virginia’s interest boils down to an abstract interest in not allowing its courts to be used to create a risk of perpetrating a fraud. The actual parties to the contract, the premiums paid, the contract language used, have no effect in West Virginia. This is what the Currie interest analysis proponents would call a “false conflict” case: Pennsylvania has an interest in having

57. Webb, 323 A.2d at 743.
its law apply, West Virginia has none, therefore the apparent conflict of laws is really false because only Pennsylvania has a legitimate claim to have its law apply. Even with the broader notion of state interest espoused here, it is clear that Pennsylvania has the much stronger interest.

What of party expectations? No choice-of-law clause was put in the contract, so perhaps the parties had no expectations with regard to the controlling law. On the other hand, surely the Pennsylvania insured, buying a policy of auto insurance in Pennsylvania from an agent operating in Pennsylvania to protect against a risk centered in her home state, would be in general reliance on the protection of her home state laws. With regard to that insurance policy the insured would believe that any rights created by the contract were rights created by Pennsylvania law. The insurer would certainly have the same general expectations as to duties under the policy sold in Pennsylvania to a Pennsylvanian.

What of the court’s interest? The Pennsylvania rule is easy to find and, according to the Pennsylvania courts, other means than requiring a physical collision ought to be used to protect insurance companies against fraud.58 Therefore the court’s interest in an efficient, fair resolution of the dispute is satisfied. All in all, Lee v. Saliga is an easy case.

Another easy case is Paul v. National Life,59 a West Virginia case on all fours with the seminal Babcock v. Jackson.60 The only difference is that in the almost thirty years since Babcock, guest statutes have become not “better,” but rather “worse” law.61

Here is what is nominally a dispute between the estates of two friends and an insurance company over the financial consequences

58. Id. at 742.
60. 191 N.E.2d 279 (N.Y. 1963).
61. They are “worse law” in two senses: the steady trend has been away from guest statutes and since 1973 at least thirteen guest statutes have been declared unconstitutional so that by the objective measure of acceptance by American courts and legislatures, guest statutes are much worse law than they were when Babcock v. Jackson was decided in 1963. Moreover, as between guest statutes limitations and no such limits, the no limits rule is increasingly thought by courts to be the “better rule,” i.e. guest statutes are “worse law.” See Paul v. National Life, 352 S.E.2d at 552-53.
of an accident in Indiana that killed both friends. The friends were from West Virginia and travelling from West Virginia when the tragic mishap occurred on an interstate highway in Indiana. Indiana is a guest-statute state. The trial court, seeing no evidence of willful conduct in the discovery record and believing West Virginia to be true to \textit{lex loci}, dismissed the case.

Did Indiana have any interest in having its law apply to the case? Indiana surely has an interest in having its rules of driver conduct apply to anyone driving in Indiana. Are the rules of liability for breach of driver-conduct rules part of the driver-conduct rules? They would be if they imposed a sanction on the conduct but a guest statute is the grant of a specific immunity from such sanction. If this immunity was granted in order to encourage or permit conduct that would otherwise be forbidden then the liability would be tied to the conduct. But surely no one would attribute to Indiana a purpose to encourage or permit hosts to be less careful with regard to guest passengers than the usual standard of care required of all drivers. Thus, the liability rule here (a guest statute immunity) is completely detachable from the driver conduct rules. Why did Indiana grant the immunity? The cynical answer is that legislators wanted to protect liability insurance companies whose lobbyist took them out to dinner and sweet-talked them. A more plausible, less cynical, policy-type purpose is that the legislature wanted to protect insurance premium payers from "friendly (or even collusive)" law suits. A guest statute would be thus seen as a trade-off: lower premiums for less protection from catastrophic loss. Only members of the polity itself could be seen to make that tradeoff; it would be politically unfair to apply it to nondomiciliaries; and, in any event, Indiana would not intend its tradeoff policy to apply to nonmembers of the Indiana community doing the "trading-off."

To this point Indiana can be seen as having no interest in applying its guest statute to a case where neither party is from Indiana or has any ties to Indiana. What if the reason for the law is to avoid the unfairness (separate from the expensiveness) of the friendly or collusive lawsuits. After all, because little of the adverse effect falls on the driver, the real defendant in a car wreck case is the insurance company. In addition, some Indiana legislator might have
been persuaded to pass or retain the guest statute because of the felt injustice of a law suit against a friend kind enough to give her friend a ride — a principled decision to disallow "biting the hand that feeds you." Besides, one knows a host’s driving habits and rather assumes the risk (knowing what it is) of the driver’s carelessness.

Do these justice or deontological62 reasons for a guest statute give Indiana an interest in this case? The accident happened in Indiana. A dispute arises as to the distribution of the costs of the accidents. Indiana may have some slight interest in the just distribution of the costs but since most of costs fall outside Indiana, it has very little.

Does a polity have any interest in its version of justice being applied on the sole basis that the main operative conduct occasioning the dispute occurred within its boundaries? Such an abstract interest in a dispute between members of a different community where the resolution of the dispute will have no effect within the community (either to deter conduct or to distribute costs) is that of the bystander who, if he vigorously tries to impose his version of justice, will be thought an officious intermeddler.

So far, Indiana has essentially no claim to apply its law. One other reason has been proffered for guest statutes,63 this one based on justice and policy (or utility); since the limits on liability of most insurance often do not cover the full cost of many accidents, the more innocent victims ought to have first claim on the pool of insurance available as between guest and third-party victims; the third-party, having no knowledge of the driving personality of defendant-insured, is the more innocent (a justice argument) and besides, the third parties are more likely to be locals (a policy argument, weak as it is). A guest statute is, to say the least, a crude tool for protecting third parties. Why not have a rule that simply awards them

62. "Deontological" was originally synonymous with "ethical" but is now used to mean traditional non-consequentialist ethics which creates specific behavior-focused obligations and rights as contrasted to consequentialist (usually utilitarian) ethics.

priority? In any event, there is no third party in this case so that reason is out. So even given the most generous reading of purposes for guest statutes and interests in having them apply, Indiana can not reasonably care about having its law apply here.

The West Virginia interest is so plain we will skip it and go to the parties point of view. Obviously, neither the driver-host nor the passenger-guest had any specific expectations about either law applying. What about the insurance company defendant? Did it rely in charging premiums on a certain number of states (very few now) having guests statues to be applied in West Virginia under lex loci delicti for accidents in those guest-statute states? The burden would certainly be on the insurance company to prove such reliance,\textsuperscript{64} a reliance few would think reasonable. Besides, it's quite plausible that the guest victim generally relied on her friend being a responsible person who carried insurance, such if her friend had a momentary lapse and caused her injury she would be protected. She might be quite surprised to learn that no recovery could be had because they just happened to be in Indiana when the "lapse" occurred, which just happens to have this strange immunity called a guest statute. Expectations here would seem to favor applying West Virginia law.

Finally, we come to the court's own point of view. Applying either law is a simple familiar task that can be done quite efficiently. But \textit{justly} is another matter. Guest statutes are troglodytes of the law as was amply pointed out by Justice Neely in his opinion in \textit{Paul}. Many states have declared them unconstitutional. No state has passed one recently and many states have repealed them. Guest statutes are, then, based on trends in legislation and judicial treatment, objectively the "worse law," while ordinary negligence recovery for guests is objectively the "better law."

All in all, it would not have made one iota of sense to apply Indiana's guest statute to the \textit{Paul} case. Had the new approach of the Second Restatement been used (or any other new approach been

\textsuperscript{64} The kind of reliance referred to here is specific reliance, and it makes sense to require the one claiming such reliance to prove it. Specific reliance is the strongest kind of party expectation for choice of law purposes.
used, including the composite approach suggested here) the trial court would not have erred, and the whole appeal process could have been avoided. The only uncertainty here was caused by the hollowness of lex loci.

II. CONCLUSION: A LAWYER-DEPENDENT DOCTRINE

After careful analysis, the choice of law in most cases will be clear. In those where it is not clear either choice will make sense. In any event, the courts are dependent on the attorneys to develop the facts and the significance of the facts on which the choice will be made. If courts and lawyers would loosen up a bit, and not

65. The late Thurman Arnold, one of the more iconoclastic of the legal realists (he wrote The Folklore of Capitalism (1937) and The Symbols of Government (1935), but who, after a stint in Academia as Dean at West Virginia University College of Law, Professor at Yale Law School, and judge on the federal bench, founded the Washington law firm of Arnold, Fortas and Porter) waxed poetic when it came to Conflict of Laws as dished up by Joseph Beale (at Harvard law school). In Arnold's autobiography, Fair Fights and Foul, A Dissenting Lawyer's Life (1965), he remembers a poem written at the Harvard Law School in 1914, to which I have added a second verse, hopefully in something of the spirit of Arnold’s original. Here is Arnold's doggerel with my addition:

CONFLICT OF LAWS
CONFLICT OF LAWS with its peppery seasoning,
Of pliable, scarcely reliable reasoning,
Dealing with weird and impossible things,
Such as marriage and domicile, bastards and kings,
All about courts without jurisdiction,
Handing out misery, pain and affliction,
Making defendant, for reasons confusing,
Unfounded, ill-grounded, but always amusing,
Liable one place but not in another,
Son of his father, but not of his mother,
Married in Sweden, but only a lover in
Pious dominions of Great Britain's sovereign.
Blithely upsetting all we've been taught,
Rendering futile our methods of thought,
Till Reason, tottering down from her throne,
And Common Sense, sitting, neglected, alone,
Cry out despairingly, "Why do you hate us?
Give us once more our legitimate status."
Ah, Students, bewildered, don't grasp at such straws,
But join in the chorus of Conflict of Laws.
strain for certainty, they will get that “reasonable regularity” in choice of law necessary to a sound system of private dispute resolution. I have suggested that courts use the Second Restatement as an analytical tool to help achieve that reasonable regularity supplemented by the idea, firmly fixed in mind, that the aim of the process is to choose that law that it makes the most sense to use under the circumstances of the case before the court — “sense”

Chorus

Beale, Beale, wonderful Beale,
Not even in verse can we tell how we feel,
   When our efforts so strenuous,
   To over-throw,
   Your reasoning tenuous,
   Simply won't go.
For the law is a system of
   wheels within wheels
Invented by Sayres and Thayers and Beales
   With each little wheel
   So exactly adjusted,
   That if it goes haywire
   The whole thing is busted.
So Hail to Profanity,
   Goodbye to Sanity,
Lost if you stop to consider or pause.
On with the frantic, romantic, pedantic,
   Effusive, abusive, illusive, conclusive,
   Evasive, persuasive—Conflict of Laws.

Second Verse

If Arnold thought reason had gone from its throne
Clear back in '14, O now how he'd groan
For Babcock and Jackson had a terrible row
And seeds of new policy surely did sow.
The seeds were from plants nursed in academia's groves
And from '20 to '60 grew in great groves;
But, once out of the classroom and into the courts
The profuse little seedlings grew into sports.
Though the new growth was reason supplanting mere rites
When growing in Academe's neat little sites;
In real rows the neat rows fit nothing quite right,
And we often get darkness instead of new light.
But if light be our metaphor, mixed as it is,
Old light was dimmer and fuzzy as fizz;
Nothing it showed but shadow to fools
Who mistake simple outlines for the sureness of rules.
Now New light makes “sense” always the goal
And explores each case nuance with the Restated tools
So, Lawyers, relax, break up the old straws,
And join in the chorus of Conflict of Laws.
being informed by the points of view and sense of the polities, parties and the court.