

# The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience

Herma Hill Kay†

Dating from the period when Chief Justice Roger Traynor gave distinction to its conflict of laws decisions,<sup>1</sup> the California Supreme Court has been the only state high court to adopt and elaborate in a consistent fashion the governmental interest approach to choice of law advocated by Traynor's friend and colleague, Professor Brainerd Currie.<sup>2</sup> After Traynor's retirement from the court in 1970, Justices Raymond Sullivan and Matthew Tobriner successively undertook the responsibility of articulating California's choice of law doctrine. A major innovation was introduced into this coherent body of case law in 1976 by the court's acceptance, under Justice Sullivan's leadership,<sup>3</sup> of Professor William Baxter's tool for resolving true conflicts, comparative impairment analysis.<sup>4</sup> Since that time, the comparative impairment formula has been used in three other cases: another from the California Supreme Court authored by Justice Tobriner;<sup>5</sup> and two from the California Courts of Appeal,<sup>6</sup> only one of which is officially published.<sup>7</sup>

---

† Professor of Law, Boalt Hall School of Law, University of California, Berkeley. B.A. 1956, Southern Methodist University; J.D. 1959, University of Chicago School of Law.

1. Traynor's contribution to the conflict of laws has been recognized in articles contributed to Symposia in his honor, e.g., B. Currie, *Justice Traynor and The Conflict of Laws*, 13 STAN. L. REV. 719, 721 (1961); Kay, *Conflict of Laws: Foreign Law as Datum*, 53 CALIF. L. REV. 47 (1965), and to discussions of his opinions, e.g., *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 551 (1968). The California Supreme Court's performance in this field has been compared favorably to that of the New York Court of Appeals. See D. Currie, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 595 (1968); Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 983-99 (1977).

2. Currie's major writing on conflict of laws is collected in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

3. *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 320-23, 546 P.2d 719, 723-26, 128 Cal. Rptr. 215, 219-22, cert. denied, 429 U.S. 859 (1976).

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

5. *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

6. *Cable v. Sahara Tahoe Corp.*, 93 Cal. App. 3d 384, 155 Cal. Rptr. 770 (2d Dist. 1979); *Duarte v. McKenzie Constr. Co.*, 152 Cal. Rptr. 373 (1st Dist. 1979).

7. The California Supreme Court denied a hearing in *Duarte*, but ordered that the opinion not be officially published. *Duarte v. McKenzie Constr. Co.*, 152 Cal. Rptr. 373.

Professor Leo Kanowitz, among others, has argued that the use of comparative impairment should be abandoned and that California should return to the doctrinal purity of governmental interest analysis.<sup>8</sup> After a brief review of what presently passes for comparative impairment analysis in California and an evaluation of the consequences of its annexation to interest analysis, this Article concludes that, if the California Supreme Court wishes to continue to use Currie's methodology to resolve choice of law cases, it should reject comparative impairment analysis as inconsistent with that approach.

## I

### THE PROBLEM: RESOLVING TRUE CONFLICTS

Those familiar with Currie's governmental interest analysis will recognize the terms. A "true conflict" denotes a choice of law case in which more than one state has a legitimate interest in applying its policy.<sup>9</sup> A "false conflict," on the other hand, is a case in which only one state has such an interest.<sup>10</sup> In many situations, the policies of two or more states may be inconsistent, and each state may even appear upon first examination to have an interest in implementing its policy in the circumstances at hand. Such situations do not, however, necessarily constitute "true conflicts"; without more, they are merely "apparent true conflicts."<sup>11</sup> A "more moderate and restrained interpretation of the policy or interest of one state or the other"<sup>12</sup> may reveal that only one of them has a legitimate interest in applying its policy,<sup>13</sup> in which

---

8. Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 HASTINGS L.J. 255 (1978).

9. B. CURRIE, *supra* note 2, at 107-10.

10. *Id.*; Comment, *False Conflicts*, 55 CALIF. L. REV. 74 (1967). In *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), a New York plaintiff, who was traveling as a guest in a car owned and driven by a New York defendant, was injured when the car struck a stone wall in Ontario. Ontario, but not New York, had a guest statute that would have prohibited recovery. Because Ontario had no interest in asserting the policy underlying its guest statute to prevent the recovery of a New York guest against a New York host, the case is viewed as a false conflict. It does not follow, however, that reversal of the fact pattern, so that the parties are residents of Ontario and the injury occurs in New York, also produces a false conflict. See *Kell v. Henderson*, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (Sup. Ct. 1965), *aff'd mem.*, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966) (applying New York law). This apparent anomaly has been enough to lead some observers to wish to abandon interest analysis entirely. See *Milkovitch v. Saari*, 295 Minn. 155, 171-72, 203 N.W.2d 408, 417-18 (1973) (Peterson, J., dissenting); *Conklin v. Horner*, 38 Wis. 2d 468, 486-91, 157 N.W.2d 579, 588-90 (1968) (Hallows, C.J., dissenting). Others have found the situation tolerable. Trautman, *Kell v. Henderson: A Comment*, 67 COLUM. L. REV. 465 (1967).

11. B. Currie, *The Disinterested Third State*, 28 L. & CONTEMP. PROB. 754, 757-58 (1963).

12. W. REESE & M. ROSENBERG, *CASES AND MATERIALS ON CONFLICT OF LAWS* 470 (7th ed. 1978).

13. *Id.*

case the "apparent" conflict is actually "false."<sup>14</sup>

Currie believed that true conflicts present "problems that *cannot be solved* by any science or method of conflict of laws,"<sup>15</sup>—that is, by the construction of a "system"—and, accordingly, adopted what he described as a "give-it-up" philosophy.<sup>16</sup> He concluded that, until Congress chooses to exercise the power granted it under the full faith and credit clause to determine the effect of one state's law in the courts of sister states, when a state court that is both the forum and one of the competing interested states is faced with a true conflict, it should choose its own law as the rule of decision.<sup>17</sup> He supported this conclusion with the argument that courts lack the necessary factfinding resources, and, at any event, in a democratic society, ought not to perform the legislative function of weighing the merits of the competing interests.<sup>18</sup>

The definitions proposed by Currie have been largely accepted by other writers,<sup>19</sup> as has his false-[problem-]versus-true-conflict dichotomy.<sup>20</sup> But his proposal that the interested forum should apply its own law in true conflicts cases, together with its supporting argument, has proved to be more controversial. Yet in their haste to demonstrate the shortcomings of this aspect of his work, most of Currie's critics have brushed aside or ignored the fact that he viewed his forum law proposal as merely a temporary solution that would enable busy judges to deal with their caseloads until reflective scholars could provide them with more satisfactory approaches.<sup>21</sup> Currie's untimely death in 1965 prevented him from further exploring "other means"<sup>22</sup> for solving true

14. Comment, *supra* note 10, at 90-91.

15. B. CURRIE, *supra* note 2, at 107-10.

16. *Id.* at 121.

17. *Id.* at 117-20, 125-27.

18. *Id.* at 181-83, 271-82.

19. See, e.g., D. CAVERS, *THE CHOICE OF LAW PROCESS* 72-75, 96-102 (1965); Horowitz, *The Law of Choice of Law in California—A Restatement*, 21 U.C.L.A. L. REV. 719, 723 (1974); Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181, 183-90 (1977); Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 667-68 (1959). But see A. EHRENZWEIG, *A TREATISE ON THE CONFLICT OF LAWS* 348-51 (1962); A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 76-79 (1965); Brillmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); McDougal, *Choice of Law: Prologue to a Viable Interest-Analysis Theory*, 51 TUL. L. REV. 207, 241-42 (1977).

20. See, e.g., R. LEFLAR, *AMERICAN CONFLICTS LAW* 187-89 (3d ed. 1977); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 201-04 (1971); Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEXAS L. REV. 141 (1967); Baxter, *supra* note 4, at 8-9; Sedler, *supra* note 19, at 183-90.

21. B. CURRIE, *supra* note 2, at 121.

22. *Id.* ("It would be constructive if legal scholars were to give up the attempt to construct systems for choice of law—an attempt that cannot result in the satisfactory resolution of true conflicts of interest between states, and that is very likely to result in the creation of problems that

conflicts, and the avenues he identified—congressional action or interstate compacts<sup>23</sup>—have not been seriously examined by others.<sup>24</sup>

But other commentators were unwilling to await congressional action. In 1963, Professor William Baxter put forward the possibility of a federal solution to true conflicts through the use of federal courts.<sup>25</sup> Baxter accepted Currie's analysis up to the point of applying forum law but thought that Currie had stopped too soon. In Baxter's view, "[t]he same analysis by which Currie distinguishes real from false conflicts cases can resolve real conflicts cases."<sup>26</sup> His notion was that interested states had not merely internal policy objectives as Currie had said, but also external objectives—the desire to have other states respect the value judgments embodied in the state's internal policy where the focal point of that policy was directly at issue in an interstate case.<sup>27</sup> Where the external objectives of two states were in conflict, Baxter proposed resolution through the use of a comparative impairment principle: "[t]he principle is to subordinate, in the particular case, the external objective of the state whose internal objective will be least impaired in general scope and impact by subordination in cases like the one at hand."<sup>28</sup>

Recognizing that the process of resolving choice of law cases in this fashion is essentially the political one of "allocating spheres of legal control among states,"<sup>29</sup> Baxter drew back from assigning this function to state courts acting under state law. To do so, he suggested, would be like letting a member of one or the other baseball team act as umpire.<sup>30</sup> Instead, he proposed that this function be assigned to federal

---

do not otherwise exist, and that are badly resolved by the system. It would be constructive if the energies thus released were directed to the solution of the true problems by other means, for by the use of other means they may be solved.")

23. *Id.* at 121-27.

24. A constructive beginning was suggested in Comment, *At the Intersection of Jurisdiction and Choice of Law*, 59 CALIF. L. REV. 1514, 1545-47 (1971).

25. Baxter, *supra* note 4.

26. *Id.* at 9.

27. *Id.* at 17.

28. *Id.* at 18.

29. *Id.* at 22.

30. *Id.* at 23. Professor Donald Trautman, who agrees in general with Baxter's appeal to federal law as the source of decisional authority in conflicts cases, apparently is not disturbed by the prospect of placing the elaboration of a federal common law of choice of law into the hands of state court judges. Instead, he sees the state judges' resort to federal authority as a means of freeing them "from any compulsions they might otherwise find in local law to prefer local law or local residents and to provide them with the intellectual equipment needed to justify assessment of the strength of local policy and of the policy of other concerned jurisdictions." Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 L. & CONTEMP. PROB. 105, 128 (1977).

law, urging that *Klaxon Co. v. Stentor Electric Manufacturing Co.*<sup>31</sup> be overruled and that the comparative impairment principle be adopted both as the standard for applying the Rules of Decision Act and the full faith and credit clause.<sup>32</sup> The determination of which state's law must initially be deemed controlling in a given choice of law case would thus be made under federal standards developed and monitored by the federal courts.<sup>33</sup>

But Baxter stopped short of suggesting that the comparative impairment principle itself was binding on the states as a matter of state law. Instead, he proposed that when a federal court determined which state's objectives would be more impaired if its policies were not implemented, thus concluding that its internal law should be applied, the forum court should initially refer to that state's whole law, including its conflicts laws. Those conflicts laws could, of course, simply reflect the federal comparative impairment analysis. If they did not, however, the state would be left to its own, perhaps misguided, devices, and could well decide that foreign law should provide the rule of decision.<sup>34</sup>

This discussion suggests that Baxter did not contemplate, indeed, that he even rejected, the use of his comparative impairment principle by state courts as a matter of state law without the overarching standard provided by its presence as part of federal law. The California Supreme Court's adoption of the principle therefore appears to be premature and possibly even unauthorized. Baxter's concept was largely neglected by other commentators and courts<sup>35</sup> until 1974 when Professor Harold Horowitz suggested that it was already part of California law,<sup>36</sup> citing as illustrative of its use several California cases decided before Baxter's Article was published.<sup>37</sup> Horowitz thus effectively severed Baxter's concept from its foundation in federal law. Only two years later, Justice Sullivan, citing Horowitz and Baxter interchange-

---

31. 313 U.S. 487 (1941) (requiring federal courts in diversity cases to follow the conflict of laws rules prevailing in the states in which they sit).

32. Baxter, *supra* note 4, at 41-42. *Contra*, Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 L. & CONTEMP. PROB. 732 (1963).

33. Baxter, *supra* note 4, at 42.

34. *Id.*

35. R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS* 296 (2d ed. 1975).

36. Horowitz, *supra* note 19, at 743-47.

37. *People v. One 1953 Ford Victoria*, 48 Cal. 2d 595, 311 P.2d 480 (1957); *Ex parte Archy*, 9 Cal. 147 (1858); *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (2d Dist. 1972). Although *Kasel* was decided after Baxter's Article appeared, the comparative impairment method was not discussed in the opinion. As I have suggested elsewhere, I do not agree that *People v. One Ford Victoria* can be rationalized along comparative impairment lines. See R. CRAMTON, D. CURRIE & H. KAY, *supra* note 35, at 377. Justice Traynor, the author of *People v. One Ford Victoria*, subsequently indicated that he viewed the case as a false conflict. Traynor, *supra* note 19, at 672-73.

ably,<sup>38</sup> expressly adopted comparative impairment as part of California's state law of conflicts.

## II

### THE CALIFORNIA SOLUTION: COMPARATIVE IMPAIRMENT

#### A. *The Supreme Court Leads the Way: Bernhard and Offshore Rental*

##### 1. *Bernhard v. Harrah's Club*

The events that precipitated the introduction of comparative impairment analysis into California conflicts law took place in Nevada and California in the early morning hours of July 25, 1971. On the preceding evening, two California residents, Fern and Philip Myers, had driven from their home to Harrah's Club, a gambling casino in Nevada, to partake of the refreshments and entertainment it offered. Their amusement consisted of overindulgence, and by the time the Myers left to drive home, they had reached "a point of obvious intoxication rendering them incapable of safely driving a car."<sup>39</sup> Driving in this condition in California, Fern Myers allowed the car to cross the center line, where it collided head-on with a motorcycle operated by Richard A. Bernhard, a California resident. Bernhard filed suit in California, alleging that the negligence of defendant Harrah's Club in continuing to furnish alcoholic beverages to the Myers while they were in a state of obvious intoxication was the proximate cause of his injury.

The cause of action alleged by plaintiff had been recognized by the California Supreme Court in *Vesely v. Sager*,<sup>40</sup> a purely domestic case involving injury to a California plaintiff in California by a California tavern that had continued to serve alcoholic beverages to an intoxicated patron in violation of a California criminal statute. A similar effort, undertaken in *Hamm v. Carson City Nuggett, Inc.*,<sup>41</sup> to have the Nevada Supreme Court imply a civil cause of action from a criminal provision in a local case had, however, failed. In order for plaintiff to recover his alleged \$100,000 in damages against Harrah's Club, the trial court would have had to apply California law. This it refused to do. Instead, it sustained defendant's demurrer, which claimed alternatively that Nevada law applied as that of the place of wrong and that

38. *Bernhard v. Harrah's Club*, 16 Cal. 3d at 319-21, 546 P.2d at 723-24, 128 Cal. Rptr. at 218-20.

39. *Id.* at 315, 546 P.2d at 720, 128 Cal. Rptr. at 216.

40. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (interpreting CAL. BUS. & PROF. CODE § 25602 (West 1964), amended to repeal *Vesely*, 1978 Cal. Adv. Legis. Serv., ch. 929, § 1, at 792).

41. 85 Nev. 99, 450 P.2d 358 (1969) (interpreting NEV. REV. STATS. § 202.100 (1967) (repealed 1973)).

the California criminal statute had no extraterritorial application.<sup>42</sup> The California Supreme Court reversed, and, in the process, expanded the civil cause of action against California taverns based on the criminal statute to include a new common law suit based on negligence against out-of-state taverns that solicited the patronage of California residents through advertising within the state.<sup>43</sup>

Justice Sullivan handled the choice of law question in terms of Currie's governmental interest analysis up to a point. He noted that California and Nevada had divergent policies regarding the imposition of civil liability upon tavern keepers for damage done to others by their intoxicated patrons. Moreover, each state appeared to have an interest in applying its own law: use of California law would permit recovery by a Californian injured in California, and application of Nevada law would protect a Nevada tavern keeper whose acts in Nevada would not have given rise to civil liability in that state. Sullivan concluded that "[i]t goes without saying that these interests conflict."<sup>44</sup>

So far, so good. In his very next paragraph, however, Justice Sullivan went astray. Although he had identified what was at most an apparent true conflict, he declared that the court was faced for the first time with "a 'true' conflict."<sup>45</sup> Noting the debate over the proper method for resolving true conflicts,<sup>46</sup> Sullivan correctly stated Currie's original view that the forum in such cases should apply its own law.<sup>47</sup> He further recognized the significance of Currie's later suggestion that the forum should reexamine its policy when an apparent conflict of interest had been revealed by preliminary analysis.<sup>48</sup> But he then mistakenly stated that this process of reexamination could, consistent with governmental interest analysis, be performed under Baxter's principle of comparative impairment, and concluded that California's interests would be more impaired if Nevada law were applied than would Nevada's if California law were applied.<sup>49</sup>

This fusion of governmental interest analysis with comparative impairment is not supported in the writings of any of the three scholars

---

42. 16 Cal. 3d at 316, 546 P.2d at 720, 128 Cal. Rptr. at 216.

43. *Id.* at 324-25, 546 P.2d at 726-27, 128 Cal. Rptr. at 222-23. The California Supreme Court subsequently expanded its common law cause of action to include redress against social hosts. *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978). This development led swiftly to legislative repeal of the entire doctrine, including the civil liability of taverns originally implied from BUS. & PROF. CODE § 25602 (West 1964) (1978 Cal. Stats., ch. 929, §§ 1-2, at 792-93).

44. 16 Cal. 3d at 318-19, 546 P.2d at 722, 128 Cal. Rptr. at 218.

45. *Id.* at 319, 546 P.2d at 722, 128 Cal. Rptr. at 218.

46. *Id.*

47. *Id.* at 319, 546 P.2d at 722-23, 128 Cal. Rptr. at 218-19.

48. *Id.* at 320, 546 P.2d at 723, 128 Cal. Rptr. at 219.

49. *Id.*

on which Sullivan relied most heavily. First, implicit in Sullivan's application of comparative impairment in implementing Currie's reexamination step is his belief that true conflicts can be resolved; comparative impairment does not distinguish between apparent true conflicts and true conflicts, but purports to resolve both. This position is fundamentally inconsistent with Currie's view that true conflicts cases cannot be solved by the construction of systems.<sup>50</sup> Currie proposed the moderate and restrained interpretation step only to reduce the number of true conflicts cases, not to resolve those that remained intractable. For the latter cases, he specifically adhered to his "give-it-up" philosophy.<sup>51</sup> In contrast, Baxter conceived and presented comparative impairment as a source of exactly the sort of normative criteria for disposing of true conflicts cases that Currie declined to seek.

Nor did Baxter lead the court into this error. At the time he formulated his comparative impairment proposal, Currie's refinement of governmental interest analysis by the addition of the step of moderate and restrained interpretation had not appeared in print.<sup>52</sup> Thus, Baxter obviously could not have intended the comparative impairment principle to be used in the way Sullivan employed it: to perform the moderate and restrained interpretation.<sup>53</sup>

Finally, while Professor Horowitz's 1974 "Restatement" of California conflicts law may have led Sullivan to believe that comparative impairment analysis could be used to perform the moderate and restrained reinterpretation called for by Currie, Horowitz himself did not recognize Currie's reexamination step as a separate stage of the analysis and did not even mention it in his Article. Unlike Sullivan, Horowitz defined a true conflict as any case in which the initial identification of the interests of the involved states failed to reveal a false conflict. He would, accordingly, bring Baxter's principle into play at the stage at which Currie would have employed moderate and restrained interpretation. In his heroic effort to reconcile the Horowitz "Restatement" with Currie's method, Sullivan used Currie's terminology, but functionally applied only Horowitz's theory. He superimposed Baxter's

---

50. See note 22 *supra*.

51. *Id.*

52. The Article in which the concept was first discussed appeared in 1963. B. Currie, *supra* note 11, at 757. Currie formally added the new step to his method in 1964, in a summary of his approach prepared for inclusion in the then current edition of W. REESE & M. ROSENBERG, *supra* note 12, at 469-70. He had hinted at the idea earlier. See B. CURRIE, *supra* note 2, at 368 (reproducing an article originally printed in 1959). But if Baxter did not have the benefit of Currie's refinement, neither was Currie aware of Baxter's suggestion. The two articles, both published in late 1963, must have been in press at the same time.

53. Indeed, as noted above, *see* text accompanying notes 30-33 *supra*, Baxter rejected the use of his comparative impairment principle by state courts as a matter of state law without its prior application by a federal court as part of federal law.

technique on interest analysis at a point earlier than that at which Currie was ready to resort to the use of forum law. Thus, although Horowitz did not suggest the fusion of Baxter and Currie that Sullivan wrought, his refusal to distinguish between apparent true conflicts and true conflicts laid the conceptual basis for Sullivan's error.<sup>54</sup>

Would *Bernhard* have been decided differently had Sullivan undertaken a moderate and restrained interpretation in the manner in which Currie intended that step to be performed? If the cause of action had been based solely on *Vesely v. Sager*,<sup>55</sup> which had simply created a civil remedy for violation of a criminal statute, the court would probably have been persuaded by the argument that California's interests in deterring unlawful conduct by tavern keepers and in compensating Californians injured within the State might have been limited to taverns subject to the California statute.<sup>56</sup> The case would thus have presented only a false conflict and Nevada law would have been applied. In recognizing the plaintiff's claim in *Bernhard*, however, Sullivan did not simply extend the holding of *Vesely v. Sager* to out-of-state tavern owners. Rather, he specifically expanded California tort doctrine to include a cause of action against tavern owners based on negligence; the claim no longer depended at all on the criminal statute forbidding tavern owners to serve obviously intoxicated patrons.<sup>57</sup> Given his expansive interpretation of California's common law policy, Sullivan could hardly narrow its reach in a way that would avoid a conflict; to do so would nullify the policy. Thus, a true conflict did exist in *Bernhard*, but the California policies and interests that sustained it were of the court's own making.<sup>58</sup> Based on the court's change in the California law of negligence, Currie's conflicts approach would have

---

54. It is unclear whether Horowitz intended that cases like *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961), which Currie offered as illustrative of moderate and restrained reinterpretation, B. Currie, *supra* note 11, at 757, should be solved by the use of comparative impairment. He is critical of Traynor's use of false conflict terminology to describe the result in *Bernkrant*, instead citing the case as an example of a "false false-conflict," in which a true conflict was resolved by the forum's subordination of its own interest. But he does not offer *Bernkrant*, as he does several other cases, as illustrative of comparative impairment analysis. Still, to the extent that Horowitz thinks a true conflict was present in *Bernkrant*, he would presumably wish the case to be decided under principles he deems appropriate. I do not agree that *Bernkrant* presented a true conflict. See text accompanying notes 146-47 *infra*.

55. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

56. Note, *Choice of Law for True Conflicts*, 65 CALIF. L. REV. 290, 293-94 (1977). See also *Blamey v. Brown*, 270 N.W.2d 884, 888-91 (Minn. 1978) (holding that while Minnesota legislature did not intend its Civil Damage Act to apply to out-of-state liquor vendors, a cause of action existed against such defendants under Minnesota common law).

57. 16 Cal. 3d at 325, 546 P.2d at 726-27, 128 Cal. Rptr. at 222-23.

58. In defending his position that courts should not "weigh" interests, but instead should use the processes of construction and interpretation, Currie pointed out that these processes tend to make explicit the considerations actually motivating the courts, thus inviting legislative correction of the result. B. CURRIE, *supra* note 2, at 604. The subsequent fate of Sullivan's explicit cause of

yielded the result that the court's analysis produced: application of California tort law.

Although he achieved a result consistent with interest analysis, by eschewing straightforward use of Currie's moderate and restrained interpretation, Sullivan fundamentally altered Currie's method by embedding comparative impairment in the California law of conflicts. As the discussion of subsequent cases will show, his use of comparative impairment at what Currie would call the apparent true conflict stage has led both the California Supreme Court and intermediate courts following its lead to be overly hasty in identifying true conflicts. Indeed, the courts have seemed anxious to bring comparative impairment analysis into play as quickly as possible. The unfortunate results of this haste will be discussed below.

## 2. Offshore Rental Co. v. Continental Oil Co.

The California Supreme Court applied comparative impairment analysis a second time in *Offshore Rental Co. v. Continental Oil Co.*,<sup>59</sup> this time speaking through Justice Tobriner. The plaintiff in that case, a California corporation with a branch office in Texas, sent its vice president, Howard Kaylor, from Texas to Louisiana, there to confer with the representatives of Continental Oil, a Delaware corporation, about the lease of oil drilling equipment. Kaylor was injured through the negligence of Continental's employees while on its premises in Louisiana. After Kaylor had been compensated by Continental for his own personal injuries, Offshore Rental brought suit in California to recover the damages it had sustained occasioned by the loss of services of its valued "key" employee.

The source of Offshore Rental's potential cause of action lay in a relatively obscure section of the California Civil Code which permits recovery for "[a]ny injury to a servant which affects his ability to serve his master, other than seduction, abduction or criminal conversation."<sup>60</sup> The section had been designed to permit a master to recover actual pecuniary loss resulting from the disability of his domestic servants.<sup>61</sup> The California Supreme Court, however, had never consid-

---

action at the hands of the California legislature is an apt illustration of this point. See note 43 *supra*.

59. 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

60. CAL. CIV. CODE § 49(c) (West 1954).

61. *Id.* Historical Note at 213. The section, absent its qualifying phrase, was part of the Field Code of 1872, *id.*, California's first major codification following the adoption of its constitution of 1849 and the achievement of statehood in 1850. See generally Van Alstyne, *The California Civil Code*, in CAL. CIV. CODE 1, 4-17 (West 1954). As originally enacted, the provision was part of a section declaring that the rights of personal relations forbade the abduction, enticement, or seduction of close family members and servants. CAL. CIV. CODE § 49(c), Historical Note at 213. In 1939, the statute was drastically revised to reflect the then current desire to eliminate blackmail

ered the question whether the section should be extended to remedy economic damage to a corporation that has been deprived of the commercial services of a key employee.

A somewhat similar provision in the Louisiana Civil Code grants a master legal redress for the "beating and maiming" of his servant, but limits recovery to the master's "own damage arising from the loss of his service."<sup>62</sup> Unlike its California counterpart, the Louisiana statute had been construed to determine its application to injuries suffered by key employees. A Louisiana court had determined, in a domestic case, that the cause of action applied only to "indentured servants, apprentices and others who are bound in the service of an individual for a specific period of time," not to "free servants" who hire out their labor for agreed-upon compensation.<sup>63</sup>

With Louisiana's domestic policy so clearly declared on the point at issue, the question arose whether California's policy conflicted. The issue was squarely raised by the pleadings, and California's adoption of governmental interest analysis required its resolution as a matter of conflicts law. This could obviously be done only by performing the interpretive task already accomplished in Louisiana: deciding whether section 49 extended to losses occasioned by injuries to key employees.

But this was not the course followed by Justice Tobriner. Instead, he chose to "*assume, for purposes of analysis,*" that the California statute did provide an employer with a cause of action for negligent injury to a key employee.<sup>64</sup> Having assumed the content of local policy, Tobriner then proceeded to use this hypothetical California law as the basis for performing the conflicts analysis. Observing with meticulous precision the different steps in governmental interest analysis, Tobriner examined the policies underlying the laws of Louisiana and California,<sup>65</sup> determined that those policies were not the same, decided that each divergent policy would be furthered by its application to the particular case, and concluded that a conflict existed.<sup>66</sup> At this juncture, Tobriner, like Sullivan before him, departed from governmental inter-

---

by abolishing causes of action for alienation of affections, criminal conversation, and seduction of persons over the age of legal consent. See generally R. ROVERE, HOWE & HUMMEL: THEIR TRUE AND SCANDALOUS HISTORY 111-19 (1947). Today, it retains only the admonition against the abduction of children, seduction of persons under the age of consent, and injuries to servants affecting their ability to serve their master.

62. LA. CIV. CODE ANN. art. 174 (West 1973). A Louisiana court has traced this provision, which first appeared in the Code in 1825, not to the Code Napoleon but to Blackstone's Commentaries. *Bonfanti Indus., Inc. v. Teke, Inc.*, 224 So. 2d 15, 17 (La. Ct. App.), *writ refused*, 254 La. 779, 226 So. 2d 770 (1969).

63. *Bonfanti Indus., Inc.*, 224 So. 2d at 17.

64. 22 Cal. 3d at 163, 583 P.2d at 724, 148 Cal. Rptr. at 870 (emphasis added).

65. *Id.* at 163-64, 583 P.2d at 724-25, 148 Cal. Rptr. at 870-71.

66. *Id.* at 164-65, 583 P.2d at 725-26, 148 Cal. Rptr. at 871-72.

est analysis in that he failed entirely to use Currie's step of moderate and restrained interpretation after his "preliminary analysis" had identified an apparent true conflict. Instead, he proceeded as if faced with a true conflict.<sup>67</sup>

Unlike Sullivan, however, Tobriner did not merge the step of moderate and restrained interpretation with the use of comparative impairment analysis. He simply abandoned the intermediate step and put the Baxter-Horowitz approach to its intended use: resolving true conflicts cases, rather than minimizing their occurrence.<sup>68</sup>

Having undertaken this task, however, Tobriner greatly expanded the factors set out for comparative impairment both by its creator, Baxter, and its subsequent proponent, Horowitz. Baxter's original model had been that of a negotiating session between the lawmakers of States *X* and *Y*, in which each group was prepared to give up "unwanted spheres of control for desired spheres."<sup>69</sup> Agreement might be reached on a normative basis only if it resulted in the "maximum attainment of underlying purpose by all governmental entities."<sup>70</sup> Horowitz, expanding on this model, identified two different "elements" that could be used to determine which state's policy would be less impaired if it were subordinated: (1) the "intensity" of each state's interest in having its policy prevail; and (2) the "fit" between the state's policy and the means it had chosen to advance that policy.<sup>71</sup> To this calculus, Tobriner now added another factor, borrowed from the proponents of functional analysis, Professors von Mehren and Trautman:<sup>72</sup> the strength with which the state's policy is held.<sup>73</sup> Tobriner then buttressed this factor with a "current vitality" test derived in part from Professor Freund's earlier suggestion that "archaic and isolated" laws may with reason be forced to yield in conflicts cases to policies that are "more prevalent and progressive."<sup>74</sup> Tobriner modestly attributed this test to Baxter;<sup>75</sup> in fact, however, it fundamentally reshapes the Baxter ap-

---

67. *Id.* Expanding the California policy to its outermost limits is hardly an example of moderate and restrained interpretation.

68. *Id.*

69. Baxter, *supra* note 4, at 10.

70. *Id.* at 12. This standard was thought necessary to permit resolution by adjudication rather than by negotiation.

71. Horowitz, *supra* note 19, at 753-54.

72. A. VON MEHREN & D. TRAUTMAN, *supra* note 19, at 377. For a brief synopsis of the "functional approach" and a comparison of that approach with interest analysis, see Kay, Book Review, 18 J. LEGAL EDUC. 341 (1966).

73. 22 Cal. 3d at 165, 583 P.2d at 726, 148 Cal. Rptr. at 872.

74. *Id.* at 165-66, 583 P.2d at 726, 148 Cal. Rptr. at 872 (citing Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1216 (1946)). Von Mehren and Trautman also accord priority to laws that are "emerging" over those that are "regressing." A. VON MEHREN & D. TRAUTMAN, *supra* note 19, at 377.

75. 22 Cal. 3d at 166, 583 P.2d at 726, 148 Cal. Rptr. at 872. ("In sum, the comparative

proach by permitting courts to make exactly the type of "super-value-judgments" that Baxter, agreeing with Currie, had rejected.<sup>76</sup>

Employing his newly fashioned test, Tobriner's opinion moved swiftly to the conclusion that Louisiana's law should govern. That State's action in "discarding the obsolete concept of recovery for loss of a servant's services"<sup>77</sup> had placed it solidly in the "mainstream" of the majority of states that also reject recovery.<sup>78</sup> Assuming that California law would permit recovery, its interest in applying such an "unusual and outmoded" law was "comparatively less strong" than Louisiana's interest in advancing its "prevalent and progressive" law.<sup>79</sup> Following several paragraphs in which he showed the result also to be consistent with the views of Professors Ehrenzweig<sup>80</sup> and Cavers,<sup>81</sup> Tobriner concluded that "Louisiana's interests would be the more impaired if its law were not applied."<sup>82</sup>

Because the outcome of this case under governmental interest analysis should have turned on the court's interpretation of the policy underlying the California statute, it is not clear whether a different result would have followed from the correct use of that approach. Had Tobriner found the statute inapplicable to injuries suffered by key em-

impairment approach to the resolution of true conflicts attempts to determine the relative commitment of the respective states to the laws involved. The approach incorporates several factors for consideration: the history and current status of the states' laws; the function and purpose of those laws." *Id.* at 166, 583 P.2d at 727, 148 Cal. Rptr. at 873).

76. Baxter, *supra* note 4, at 19. Indeed, the very passage quoted by Tobriner from Freund, *see* notes 74-75 *supra*, is itself cited by Baxter as an example of the type of super-value judgment that comparative impairment analysis would avoid. Baxter, *supra* note 4 at 18 n.39.

77. 22 Cal. 3d at 167, 583 P.2d at 727, 148 Cal. Rptr. at 873.

78. *Id.* at 167-68, 583 P.2d at 728, 148 Cal. Rptr. at 874.

79. *Id.* at 168, 583 P.2d at 728, 148 Cal. Rptr. at 874.

80. *See* note 19 *supra*.

81. *Id.*

82. 22 Cal. 3d at 168-69, 583 P.2d at 728-29, 148 Cal. Rptr. at 874-75. As Professor Friedrich Juenger has also recognized, Tobriner's opinion would have found clearer conceptual support had it directly attributed its approach to Professor Leflar's "better law" theory. Juenger, *Leflar's Contributions to American Conflicts Law*, 31 S.C.L. REV. 413, 421-22 (1980). *See also* Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966) [hereinafter cited as *Leflar I*]; Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966) [hereinafter cited as *Leflar II*]. With respect, all that Tobriner really showed was that the court considers the hypothetical California law "a drag on the coat tails of civilization." *Leflar I, supra*, at 299 (quoting Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 980 (1952)), which should not be applied in the face of Louisiana's "better law." Although this frank seizure of the opportunity afforded by conflicts cases to restrict the range of unpopular domestic laws has had its advocates, *e.g.*, A. EHRENZWEIG, *supra* note 19, at 353; A. VON MEHREN & D. TRAUTMAN, *supra* note 19, at 407, others have condemned the practice as intellectually dishonest and unbecoming for courts, R. WEINTRAUB, *supra* note 20, at 206-07 (disapproval limited to cases in which there is no true conflict); B. CURRIE, *supra* note 2, at 104-06. Still, Leflar's approach is certainly more forthright than Tobriner's similar seizure under the rubric of comparative impairment. By introducing this theory into California law so obliquely, Tobriner has confounded all efforts to keep separate the various scholarly approaches to choice of law.

ployees, the choice of law issue—and with it, plaintiff's lawsuit—would have disappeared. California and Louisiana would have been shown to have the same policy, that of denying recovery to corporate employers for losses incurred as a result of injury to key employees, and *Offshore Rental* would have been a “no conflict” case. Surely the wiser, more conservative approach would have been to exhaust this avenue before bringing to bear the extraordinary apparatus used here to “resolve” a hypothetical true conflict.

It is not obvious, however, that section 49 would have been given such a limited interpretation. Dicta in a 1933 court of appeals case had suggested that the section might apply to redress the loss suffered by a motion picture producer resulting from injury to an actress.<sup>83</sup> More importantly, in 1966 Professor John Fleming had demonstrated the theoretical and practical advantages to be gained in the law of torts by pouring modern content into the old container provided by section 49.<sup>84</sup> If California judges had determined, as a matter of local law, that Fleming's analysis should be taken up to provide a cause of action under these circumstances, it is by no means self-evident that Louisiana law would have been applied under the governmental interest approach. A potential conflict would have arisen from the different interpretations given the two similar statutes by the courts of California and Louisiana. Lying ahead would have been the difficult tasks of determining whether each state would assert an interest in having its policy applied to these facts, whether those interests conflicted, and, if so, whether the resulting apparent true conflict might be avoided through a more moderate and restrained interpretation of the policy or interest of either state. The attitude of the California judge who undertook these tasks would surely have been influenced by his or her prior determination that the existence of a cause of action in tort, justified by a modern rationale of recovery allocation,<sup>85</sup> was a full-fledged part of California's domestic law. Such a judge could not easily have resorted to the use of labels like “archaic” or “outmoded” to characterize section 49, nor would he or she have so quickly undercut, as a matter of conflicts law, California's newly discovered principle of tort law.

All this is not to say that a true conflict would have been unavoidable in *Offshore Rental* had a cause of action under section 49 been actually declared, rather than hypothesized, by the California Supreme Court. It is to suggest, however, that the probing of the reach of local

---

83. *Darmour Prod. Corp. v. Herbert M. Baruch Corp.*, 135 Cal. App. 351, 27 P.2d 664 (2d Dist. 1933).

84. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1485 (1966).

85. *Id.* at 1485-98.

policy would and should have been carried out more sympathetically in such a case. As it is, the potential flowering of section 49 in the domestic law of torts has been chilled—perhaps permanently—by its premature exposure to Tobriner's "current vitality" test for resolving true conflicts. Nor, in my view, has the law of conflicts in California been improved by the concepts Tobriner found necessary to borrow from other theorists in order to subordinate this hypothetical, overly expansive, "archaic" law.

*B. The Courts of Appeal Attempt to Follow. Cable and Duarte*

The seeds of confusion sown by *Bernhard* and *Offshore Rental* began to sprout in the intermediate courts in 1979. Two cases, *Duarte v. McKenzie Construction Co.*<sup>86</sup> and *Cable v. Sahara Tahoe Corp.*,<sup>87</sup> attempted to resolve what the courts perceived to be true conflicts by the use of what was called comparative impairment.<sup>88</sup> In neither case were the terms used accurately nor was the governmental interest analysis applied correctly. The California Supreme Court subsequently affirmed the judgment in *Duarte*, but eliminated its precedential impact by ordering that the opinion not be officially published.<sup>89</sup> *Cable*, however, remains spread upon the reports. And while its result is correct, the necessity to comply with *Bernhard* and *Offshore Rental* forced its reasoning into a tortuous mold.

*1. Cable v. Sahara Tahoe Corp.*

On its facts, *Cable* is a variant of *Bernhard*. Plaintiff, Candace Cable, was a California resident who lived in the Lake Tahoe area and worked at the Sahara Tahoe Hotel in Nevada. On August 26, 1975, she was a passenger in the car of Louis Schaefer, a Nevada resident, bound for his home in a trailer park in Nevada. Schaefer, who had been drinking heavily at the Sahara Tahoe Hotel prior to the trip, lost control of the car in Nevada. Plaintiff suffered "catastrophic" injuries which resulted in her becoming a "public charge" in California.<sup>90</sup> Alleging that Sahara Tahoe had, through its employees, negligently continued to furnish alcohol to Schaefer well after he was obviously intoxicated, plaintiff sought to bring her case within the *Bernhard* rule.

---

86. 152 Cal. Rptr. 373 (1st Dist. 1979).

87. 93 Cal. App. 3d 384, 155 Cal. Rptr. 770 (2d Dist. 1979).

88. Two other intermediate appellate cases discussed by Professor Kanowitz are not analyzed here because the opinions do not make express use of the comparative impairment formula. See Kanowitz, *supra* note 8, at 281-86 (discussing *Hall v. Univ. of Nev.*, 74 Cal. App. 3d 280, 141 Cal. Rptr. 439 (1st Dist. 1977), *aff'd sub nom. Nevada v. Hall*, 440 U.S. 410 (1979), and *Beech Aircraft Corp. v. Superior Court*, 61 Cal. App. 3d 501, 132 Cal. Rptr. 541 (2d Dist. 1976)).

89. See note 7 *supra*.

90. 93 Cal. App. 3d at 387, 155 Cal. Rptr. at 772.

The trial court, deeming Nevada law applicable, sustained defendant's demurrer without leave to amend.<sup>91</sup>

Justice Potter of the court of appeal affirmed this judgment. As befits a member of an intermediate appellate court, he followed the methodology of Tobriner and Sullivan, rather than that of Currie. In the first two sentences summarizing his analysis, Justice Potter clearly revealed his understanding of the divergent path now taken in California: "This is a 'true' conflicts case. The 'governmental interest analysis,' therefore, requires a determination pursuant to the 'comparative impairment' approach."<sup>92</sup>

Having thus superimposed Baxter on Currie, the remainder of Potter's opinion alternately tracked *Offshore Rental* and *Bernhard*. He began: "If we assume that the application of California law would result in the imposition of liability upon defendant, the laws of California and Nevada are directly in conflict."<sup>93</sup> So much was gleaned from the lengthy passage quoted from *Offshore Rental* in which Tobriner had assumed that California law would impose liability, thus bringing its law in direct conflict with that of Louisiana.<sup>94</sup> Further comparison of *Offshore Rental* and the facts at hand led Potter to the "inescapable" conclusion that he faced a true conflict. Why? Because Nevada had a legitimate interest "in protecting its tavern keepers from ruinous exposure by needless multiplication of litigation," while California had an interest in the compensation of its incapacitated residents who would otherwise place a strain on its economy and tax revenues, regardless of the situs of the injury.<sup>95</sup> Still faithfully following the precedents of his supreme court, Potter concluded at once that "[t]he inquiry then becomes, as between California and Nevada, 'whose interest would be the more impaired if its law were not applied,'"<sup>96</sup> and proceeded to employ the tool of comparative impairment to resolve what he took to be a true conflict.

But an odd thing happened between the identification of this task and its execution. Having used Tobriner's analysis in *Offshore Rental* as his model for determining when a true conflict existed, Justice Potter then turned to *Bernhard* and Sullivan's blend of comparative impair-

---

91. *Id.* at 386, 155 Cal. Rptr. at 771.

92. *Id.* at 390, 155 Cal. Rptr. at 774.

93. *Id.*

94. *Id.* at 390-92, 155 Cal. Rptr. at 774-75. Tobriner, of course, assumed the content of California law in *Offshore Rental* as well as the fact that California would have chosen to apply its law to impose liability on the Louisiana defendant. *See* text accompanying notes 64-67 *supra*. The content of California's judicially created dram shop law was well known to Justice Potter in *Cable*.

95. 93 Cal. App. 3d at 392, 155 Cal. Rptr. at 775.

96. *Id.* at 393, 155 Cal. Rptr. at 775.

ment with Currie's moderate and restrained reinterpretation.<sup>97</sup> Potter first examined California's interest in protecting persons injured by intoxicated drivers who were furnished with liquor outside California. Correctly inferring from its repeal of the policy promulgated in *Veseley* and expanded in *Bernhard* that the California Legislature had never shared the California Supreme Court's view that such protection should be provided "by regulating tavern keepers in Nevada,"<sup>98</sup> Potter concluded that the protective policy could be only as broad as it appeared in *Bernhard*.<sup>99</sup> He then decided that under *Bernhard* the policy applied "only to Nevada conduct causing injury in California."<sup>100</sup> Moreover, he observed, it was designed to apply only to Nevada taverns whose extensive advertising and other solicitation of business in California had induced Californians to come to Nevada to drink and gamble. Those factors were not present in *Cable*. Indeed, the only factor in the case supporting plaintiff's claim to the application of California law was her status as a California domiciliary who must be supported by the California taxpayers. That status alone, Justice Potter concluded, did not suffice to "control the allocation of Nevada's and California's 'respective spheres of law-making influence.'"<sup>101</sup>

At one point in his discussion, Justice Potter remarked that the application of the Nevada rule in this case "could not impair" the policy of California.<sup>102</sup> More consistent with his reasoning would have been the statement that California policy, as he had construed it, did not conflict with the policy of Nevada. I submit that the analysis performed in *Cable*, while cast in the language of comparative impairment, is an example of moderate and restrained reinterpretation of the forum's policy.<sup>103</sup>

As an additional justification for his decision, Justice Potter em-

---

97. *Id.* at 393-95, 155 Cal. Rptr. at 775-77.

98. *Id.* at 395, 155 Cal. Rptr. at 777.

The California Legislature expressly indicated its intent to abrogate the holdings in *Vesely*, *Bernhard*, and *Coulter*, and to reinstate "prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person," in 1978 Cal. Stats., ch. 929, § 1, 792-93.

99. 93 Cal. App. 3d at 395-96, 155 Cal. Rptr. at 777-78.

100. *Id.* at 396, 155 Cal. Rptr. at 778.

101. *Id.* at 397, 155 Cal. Rptr. at 778-79.

102. *Id.* at 396, 155 Cal. Rptr. at 778.

103. Toward the close of his opinion, Justice Potter, again following Justice Tobriner's example, bolstered his result by referring to Professor Cavers's notion that a plaintiff domiciled in a state having a higher standard of financial protection who is injured in a state with a lower standard must, in the absence of a special relationship between the parties, be deemed to have exposed himself or herself to the "risks of the territory." *Id.* at 398, 155 Cal. Rptr. at 779. See D. CAVERS, *supra* note 19, at 146-47. This gratuitous embrace of the admittedly "territorialist bias" inherent in Cavers's principles of preference, *id.* at 134, is inconsistent with both governmental interest analysis and the comparative impairment approach. One hopes that it may be disregarded as dicta unnecessary to the result.

ployed the "current vitality" test that Tobriner had created in *Offshore Rental*<sup>104</sup> for measuring the strength of state policy. Potter noted that the California legislature had repudiated the right of civil recovery against tavern keepers created by *Veseley v. Sager*<sup>105</sup> and extended to out-of-state defendants by *Bernhard*, and concluded that the impairment of that policy by application of Nevada law in *Cable* would have a "minimal effect" upon California's interests.<sup>106</sup> Apart from earlier criticisms of Tobriner's test,<sup>107</sup> its use in *Cable* demonstrates that several problems exist in determining the proper point at which the "vitality" of a particular policy is to be determined.

The first of these problems flows from the particular point Potter selected: the time of the appeal.<sup>108</sup> Because of the impossibility of predicting when a case will be decided on appeal, selection of that point can only add to the uncertainty already facing parties to choice of law cases.

Second, in *Cable*, that selection had the practical effect of giving the legislative repeal of *Bernhard* retroactive effect. Potter did concede that the repeal had not nullified plaintiff's cause of action.<sup>109</sup> But in striking the balance required by Tobriner's test, he decided that the underlying policy was no longer of great moment to California, thereby giving effect for all practical purposes to a legislative decision taken

104. See text accompanying notes 74-75 *supra*.

105. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

106. 93 Cal. App. 3d at 398, 155 Cal. Rptr. at 779.

107. See note 82 *supra*.

108. 93 Cal. App. 3d at 389, 395, 155 Cal. Rptr. at 773, 777.

109. *Id.* at 389, 155 Cal. Rptr. at 779.

Indeed, because the plaintiff in *Cable* was injured nearly seven months before *Bernhard* was decided, it could be argued that her cause of action was recognized retroactively. If one considers *Bernhard* the source of plaintiff's cause of action, and if one follows Currie in assessing the relevant state policies and interests at the time of the occurrence or event alleged to give rise to the legal consequences, B. Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89, 92-93, plaintiff would be unable to rely on *Bernhard*. One could, however, as the *Bernhard* court ultimately did, see text accompanying note 57 *supra*, view continuing to serve intoxicants to an already inebriated patron as conduct involving an unreasonably great risk of harm not justified by its social utility—*i.e.*, negligence. See W. PROSSER, LAW OF TORTS 145-49 (4th ed. 1971). Given the holding in *Veseley v. Sager* that the sale of alcoholic beverages can be the proximate cause of injury, 5 Cal. 3d at 166, 486 P.2d at 159, 95 Cal. Rptr. at 631, such a view of negligence cures any problem of retroactivity. Under such a rule, defendant should not be allowed to rely on its own defense under Nevada law when its conduct created an unreasonable risk of harm to persons from other states. This reasoning would support permitting the *Cable* plaintiff to sue, but it would not support extending *Bernhard* to cover her case when the defendant's conduct did not threaten the safety of any person outside of Nevada. See text accompanying notes 114-15 *infra*. Although development of tort law through the common law case method normally proceeds by attaching previously unrecognized legal consequences to the acts of the parties, in the interstate context, constitutional restraints are potentially applicable. See Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1598-99 (1978).

after the alleged wrong had occurred and been sued upon.<sup>110</sup>

Finally, the concepts underlying Tobriner's standard are not applicable to the situation in *Cable*. *Offshore Rental* involved a statute first enacted in 1872 and little noticed by courts or litigants since the 1930's. The contention that the statute's antiquity and neglect had reduced its policy to little relative importance is at least arguable. But *Cable* involved a cause of action judicially created in 1971 and legislatively terminated in 1978. Such a rapid change in the law is evidence of a disagreement over policy between two branches of government, not of the generally accepted slow withering away of a rule by desuetude. Although Tobriner could have reached the same judgment about the current vitality of the California statute during the course of litigation in *Offshore Rental* regardless of the point at which he made the assessment, Potter's judgment would have differed had he made his assessment as of the time of trial. It seems unfair to allow the rules to be changed this way in the middle of litigation.<sup>111</sup>

These problems would all have been avoided, of course, had Potter applied unembellished governmental interest analysis. To do so, he

---

110. Justice Potter is not, of course, the first jurist to allow a subsequent change in local policy to influence his thinking about its earlier force. Chief Justice Gray, writing for the Supreme Judicial Court of Massachusetts in the well-known case of *Milliken v. Pratt*, 125 Mass. 374 (1878), was plainly influenced by an expansion of the contractual capacities of Massachusetts married women that had occurred after the transaction in question and prior to the time of trial. B. CURRIE, *supra* note 2, at 80. Still, the fact that a thing is sometimes done does not justify its repetition if reason opposes the practice.

111. Others may not share my sense of fairness. See Trautman, *supra* note 30, at 129 (approving Chief Justice Gray's action in *Milliken v. Pratt*); Hancock, *Policy Controlled State Interest Analysis in Choice of Law, Measure of Damages, Torts Cases*, 26 INT'L & COMP. L.Q. 799, 802-03 (1977).

If the time of appeal is not the appropriate point at which to judge the vitality of state policy, what other point would be preferable? It seems reasonable to assume that the time for making this judgment—if it is to be made at all—should be the same as that established under interest analysis for the determination of the respective state policies and interests. In Currie's view, that point ordinarily occurs "at the time of the transaction or events on which the rights of the parties depend." B. Currie, *supra* note 109, at 92-93. *Accord*, Reich v. Purcell, 67 Cal. 2d 551, 555-56, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34 (1967) (opinion by Traynor, C.J.). But see Note, *Post Transaction or Occurrence Events in Conflict of Laws*, 69 COLUM. L. REV. 843 (1969) (criticizing Reich on this point). See also Sedler, *supra* note 1, at 236-42 (discussing posttransaction changes of residence). Taken literally, the consequences of that choice in *Cable* would have been to deny plaintiff the benefit of the policy subsequently declared in *Bernhard*. It can be argued that this is the proper result. If the defendant's acts at the time and place they occurred would not have given rise to civil liability either in California or Nevada, subsequent events should not normally be permitted to alter the consequences of those actions. Cf. Gibson v. Fullin, 172 Conn. 407, 374 A.2d 1061 (1977) (refusing to apply retroactively Florida's repeal of its guest statute in a suit by a Connecticut plaintiff against a Connecticut defendant to recover for injuries sustained in Florida at a time when the guest statute was in force). Although no objection apparently was raised to plaintiff's attempt to have *Bernhard* applied retroactively in *Cable*, selection of the time of the occurrence as the proper point for judging the "current vitality" of California policy would have shown its inapplicability to her case. See note 109 *supra*. See also McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CALIF. L. REV. 12 (1967).

should have proceeded in this fashion:<sup>112</sup> First, having been asked to apply the law of Nevada, he should have inquired into the policies expressed in that law as well as California's. This inquiry would have disclosed that Nevada's policy of prohibiting civil actions against tavern keepers was designed to avoid placing the risk of excessive liability on such businesses. California's law permitting such actions, on the other hand, was designed to implement two policies: one of deterrence, designed to regulate the conduct of bartenders in order to reduce drunk driving and thereby to promote increased highway safety; and one of compensation, designed to increase the opportunity afforded injured plaintiffs to recover full compensation by allowing suit against a presumably solvent codefendant.<sup>113</sup>

The court next should have inquired "into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies."<sup>114</sup> Nevada's interest in *Cable* was the same as in *Bernhard*: protecting its corporate defendant against liability for its acts in Nevada. Only one of California's policies, however, was implicated in *Cable*. California did have an interest in compensating plaintiff because she was a California resident the cost of whose care fell on California taxpayers. Its policy of deterrence, however, would not have been furthered by application of California law in *Cable*, because drunk driving by Nevada residents on Nevada highways normally does not imperil the safety of Californians in California. No interest in protecting the safety of Californians traveling on Nevada highways was asserted in *Bernhard*: the conduct of defendant Harrah's Club in attracting California patrons to its place of business through advertising, serving them excessive quantities of strong drink, and allowing them to return home as inebriated on the highways of California was what had placed defendant "at the heart of California's regulatory interest"<sup>115</sup> in that case. In *Cable*, the intoxicated driver was a Nevada resident whose conduct after departure from Sahara Tahoe did not breach the security of California.

The recognition of California's interest in compensating the plaintiff creates, at most, an apparent true conflict between the laws of California and Nevada. A court following governmental interest analysis would have sought to avoid a true conflict by employing a more moderate and restrained interpretation of the policy or interest of either state.

In performing this function, the forum would have found it easier

---

112. See R. CRAMTON, D. CURRIE & H. KAY, *supra* note 35, at 221-22.

113. See Note, *supra* note 56, at 292-93.

114. R. CRAMTON, D. CURRIE & H. KAY, *supra* note 35, at 222.

115. 16 Cal. 3d at 322, 546 P.2d at 725, 128 Cal. Rptr. at 221.

and more convenient to begin with its own law.<sup>116</sup> California's desire to compensate tort victims is limited by its recognition that liability should be imposed only upon those whom it regards as tortfeasors. To be sure, *Bernhard* establishes, as a matter of proximate cause, that tavern keepers who furnish alcoholic beverages to their customers must be regarded as tortfeasors when the customers injure third parties. But it is the very nub of the conflicts issue in *Cable* that Nevada has a different view of proximate cause.<sup>117</sup>

Whether California may impose its view of proximate cause on a nonresident defendant whose acts as well as plaintiff's injury occurred outside the state simply because the plaintiff is a California resident is not merely a question of choice of law. Serious constitutional problems are presented as well. No court has squarely held that the sole factor of plaintiff's domicile, without any other interstate overtones to the transaction, occurrence, or relationship, is enough to support application of forum law for the purpose of imposing liability upon a nonresident defendant not otherwise liable.<sup>118</sup> Indeed, the case most closely in point,

---

116. I do not share Professor Kanowitz's view that Currie, despite his express direction that the forum might seek to avoid an apparent true conflict by employing a "more moderate and restrained interpretation of the policy or interest of one state or the other," see B. Currie, *supra* note 11, actually intended only that the forum apply this technique to its own law. Kanowitz, *supra* note 8, at 268-71. For one thing, that reading of Currie would prohibit use of the technique by a disinterested forum dealing with an apparent true conflict between the laws of two interested states. But Currie himself suggested that it might be used in that situation to avoid a true conflict. B. Currie, *supra* note 11, at 768-72. Nor am I persuaded that the forum must refrain from using this technique to interpret the foreign law if the foreign state has rejected interest analysis in favor of a more traditional, jurisdiction-selecting rule. Kanowitz, *supra* note 8, at 271-72. Approaches based on an analysis of policy and interest are incompatible with territorial concepts and need not be limited by those concepts in working out their methodologies. I do agree, however, that if the foreign state has declared the scope of its own policy or interest, the forum should respect that declaration. *Id.* at 272-73. See text accompanying note 137 *infra*.

117. Professor Twerski might argue that California's tort policy is based on a moral judgment held without regard to state lines. See Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373, 384-85 (1971) (discussing false conflicts cases). In that sense, California may indeed "regard" Sahara Tahoe as a tortfeasor, but the question is the extent to which California may implement its view in the context of a federal system. It has been suggested that this sort of moral stance is "provincialism of the purest form." McLaughlin, *Territorial Due Process: Analysis of an Emergent Doctrine*, 81 W. VA. L. REV. 355, 381 (1979).

118. The best-known case most closely in point seems to be *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970) (Pennsylvania guest injured in Delaware by Delaware host; Delaware guest statute applied), where the constitutional issue is not discussed. *Accord*, *Byrn v. American Universal Ins. Co.*, 548 S.W.2d 186 (Mo. Ct. App. 1977) (applying Restatement Second; no discussion of constitutional issue). Professor Sedler, however, believes that application of Pennsylvania law in *Cipolla* would have been constitutional under an "existential-legal" view of the case as involving only one "functional socio-economic and . . . mobility area." Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394, 396-99 (1971). Be that as it may, *Cipolla* was not a case where the two states disagreed on whether the defendant owed a duty of care to the plaintiff. Had intentional or willful or wanton misconduct been shown, Delaware law would have imposed liability upon the defendant-host. In *Cable*, defendant tavern keeper owed no duty of care at all to plaintiff under the law of the place in which it acted. It seems

*Home Insurance Co. v. Dick*,<sup>119</sup> squarely holds to the contrary: plaintiff's domicile in the forum, unrelated to the cause of action, was not sufficient to permit imposition of liability under forum law. There are facts in the record in *Cable* that suggest that plaintiff's domicile in California may have been nearly as technical as that of the *Dick* plaintiff in Texas. She had ceased residing in South Lake Tahoe, California, nearly a month before the accident; she may have been living with Schaefer, the driver, in his mobile home in Nevada; and she had applied for and received a Nevada driver's license.<sup>120</sup> But since plaintiff "categorically denied any intent to abandon her status as a California domiciliary,"<sup>121</sup> the court treated her as a California citizen at the time of the accident.<sup>122</sup> Application of California law under these circumstances seems doubtful enough on constitutional grounds to encourage the court to take a moderate and restrained view of California's interest and to conclude that California law afforded no basis for plaintiff's recovery.<sup>123</sup> On this analysis, the court in *Cable* should have concluded

---

to me that a stronger constitutional case must be made for the imposition of liability as an initial matter than for the removal of a limitation on a liability that is recognized by both states. Cf. *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962) (constitutional to apply Massachusetts law to create cause of action for wrongful death and New York's policy of unlimited liability as measure of damages); *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (permissible to apply New York's policy of unlimited liability for wrongful death while applying Massachusetts Wrongful Death Act). This argument would justify on constitutional grounds the result in *Tjepkema v. Kenney*, 31 App. Div. 2d 908, 298 N.Y.S.2d 175 (1969) (New York's unlimited liability law, rather than Missouri's \$25,000 limitation on liability for wrongful death, applied by a New York court in an action by the estate of a deceased New Yorker killed in Missouri by a Missouri defendant), in which the only basis for the application of forum law was the plaintiff's residence and which Professor Rosenberg suggests is inconsistent with *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). See Rosenberg, *A Comment on Neumeier*, 31 S.C.L. REV. 443, 452-53 (1980).

In *Nevada v. Hall*, 440 U.S. 410 (1979), California was permitted to apply its own law imposing unlimited liability on Nevada even though Nevada had limited its own liability as sovereign in tort actions in its own courts to \$25,000. Nevada's employee had injured the California plaintiff in California while there on Nevada's business. Had Nevada not abolished its sovereign immunity to any extent and had plaintiff been injured in Nevada, I am doubtful that the California court, assuming it had jurisdiction, would have been able to avoid the command of the full faith and credit clause to apply Nevada law. While I admire Professor Sedler's courage in ridding himself of his last vestige of territorialism, Sedler, *supra* at 398, I am as yet unable to follow suit. I am somewhat comforted by the fact that *Cipolla* at least contained interstate overtones absent in my hypothetical variant of *Nevada v. Hall*. See Cavers, *Cipolla and Conflicts Justice*, 9 DUQ. L. REV. 360, 366-67 (1971).

119. 281 U.S. 397 (1930). See generally Reese, *supra* note 109.

120. 93 Cal. App. 3d at 386-87, 155 Cal. Rptr. at 772.

121. *Id.* at 386, 155 Cal. Rptr. at 772.

122. *Id.* at 386-87, 155 Cal. Rptr. at 772. At the time of the judgment, however, plaintiff had without question resumed her California residence. She was a patient at a California drug rehabilitation facility undergoing detoxification from a narcotics addiction that resulted from medication taken to relieve the pain caused by her injury. *Id.* at 387, 155 Cal. Rptr. at 772.

123. Whether there are any limits other than constitutional ones to the forum's initial assertion of an interest in the application of its policy under the Currie approach is a troubling matter

that the case presented an apparent conflict that could be shown through reinterpretation of the policy and interest of forum law, to be a false conflict.<sup>124</sup> Had Justice Potter followed this course, his resort to the use of comparative impairment would have been unnecessary.

## 2. Duarte v. McKenzie Construction Co.

Given its lack of precedential effect due to its nonpublication, only brief notice need be taken here of Justice Caldecott's opinion in *Duarte v. McKenzie Construction Co.*<sup>125</sup> The problem raised by the facts of the case, however, will detain us a bit longer.

*Duarte* involved a civil action for damages by a California plaintiff employed by a California subcontractor to work on a construction site in Nevada under the supervision of the defendant, a Nevada general contractor. Plaintiff was injured in Nevada in the course of his employment and had collected, pursuant to the California Worker's Compensation Act, worker's compensation for his injury.<sup>126</sup> As permitted by that Act, the plaintiff in *Duarte* asserted a third-party claim against the general contractor, a Nevada corporation that was not considered to be his "employer" under California law.<sup>127</sup> The Nevada Industrial Insurance Act, to the contrary, does treat subcontractors and their employees as employees of the principal contractor and, if applicable, would bar plaintiff's claim.<sup>128</sup>

Faithfully following the false path blazed in *Bernhard* and *Offshore Rental*, Justice Caldecott concluded that a true conflict was presented because "Nevada law precludes appellant's recovery and California law permits such recovery." Turning to comparative impairment analysis, Caldecott identified Nevada's policy as that of protecting the financial security of employers by restricting and making more predictable the cost of industrial accidents. He found California's

---

that I leave for another day. See generally Sedler, *supra* note 19, at 194-204. The analysis suggested in the text does not, however, apply to *Offshore Rental*. There, plaintiff's injury—the damage to its business caused by the loss of the services of a key employee—was suffered primarily at its corporate home in California and the entire transaction was replete with interstate overtones.

124. See Note, *supra* note 56, at 302 (discussing hypothetical case 28b).

125. 152 Cal. Rptr. 373 (1st Dist. 1979) (not officially reported).

126. CAL. LAB. CODE §§ 3201-6208 (West 1971 & Supp. 1979).

127. CAL. LAB. CODE § 3852 (West 1971). See generally Brooks, *Tort Liability of Owners and General Contractors For On-The-Job Injuries to Workmen*, 13 U.C.L.A. L. REV. 99 (1965).

128. NEV. REV. STAT. §§ 616.085, .370 (Leg. Counsel Bureau 1973). See *Stolte, Inc. v. District Court*, 89 Nev. 257, 510 P.2d 870 (1973). *Duarte* presents the converse of the situation in *Carroll v. Lanza*, 349 U.S. 804 (1955), where an injured worker was permitted to assert a third-party claim against a general contractor under the law of Arkansas, the place of injury, even though such a claim would not have been permitted under the worker's compensation law of Missouri, the place of his residence and employment by the subcontractor. The general contractor, *Lanza*, had his primary place of business in Louisiana. There is no indication in the opinion as to the content of Louisiana law on the question of third-party claims.

policy to be the protection of injured employees through the provision of two methods of recovery: (1) a worker's compensation award from the employer; and (2) a civil action against third-party tortfeasors. Although both methods are routinely available to an employee in California, Caldecott concluded nonetheless that "California's interest in providing full compensation to an injured employee relates only to the recovery of statutory benefits, not to the recovery of civil damages," and complained that, having already received the full statutory benefit, plaintiff "now wants additional compensation in the form of civil damages."<sup>129</sup>

Caldecott's conclusion here is plainly wrong. It ignores California's underlying tort policy, expressed in the context of industrial injuries in the form of the permissive third party claim, of allowing tort victims compensation for the full extent of their injuries.<sup>130</sup> The conflict of laws in *Duarte* between the exclusivity of Nevada's worker's compensation law and California's tort law was thus clearly presented. This conflict is not even addressed, let alone resolved, by Caldecott's observation that plaintiff's claims under the California Worker's Compensation Act had been honored.

Perhaps realizing that his opinion needed further support, Justice Caldecott relied on section 184 of *Restatement (Second) of Conflict of Laws*<sup>131</sup> for the proposition that it would be unfair to expect defendant, who was protected by the worker's compensation law in effect at the job site, to take account of the laws of the other forty-nine states from which its subcontractors might come.<sup>132</sup> This, too, was incorrect, for the Restatement, with its emphasis on "significant contacts" has been clearly rejected by the California Supreme Court as part of California's choice of law doctrine.<sup>133</sup>

129. 152 Cal. Rptr. at 378.

130. One of the chief reasons for the continued coexistence of worker's compensation and tort liability, especially where suits against third parties are concerned, is the greater benefit offered to the industrial victim through tort liability. See Fleming, *Tort Liability for Work Injury*, in 15 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW § 9-3 (O. Kahn-Freund ed. 1975).

131. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). Section 184 provides that Recovery for tort or wrongful death will not be permitted in any state if the defendant is declared immune from such liability by the workmen's compensation statute of a state under which the defendant is required to provide insurance against the particular risk and under which

(a) the plaintiff has obtained an award for the injury, or

(b) the plaintiff could obtain an award for the injury, if this is the state (1) where the injury occurred, or (2) where employment is principally located, or (3) where the employer supervised the employee's activities from a place of business in the state, or (4) whose local law governs the contract of employment under the rules of §§ 187-188 and 196.

132. 152 Cal. Rptr. at 379.

133. *Offshore Rental*, 22 Cal. 3d at 161, 148 Cal. Rptr. at 869, 583 P.2d at 723 ("Questions of choice of law are determined in California by the 'governmental interest analysis' rather than by

Turning from the analytic flaws in Caldecott's opinion, let us consider how the problem in *Duarte* should have been handled under governmental interest analysis.<sup>134</sup> First, an examination of the policies and

---

the trial court's 'most significant contacts theory.'"). Some courts have noted that the Restatement's "contacts" are not disregarded by the governmental interest approach and have taken into account in contracts cases the list of "relevant contacts" contained in § 188. *Robert McMullan & Son, Inc. v. United States Fid. & Guar. Co.*, 103 Cal. App. 3d 198, 204-05, 162 Cal. Rptr. 720, 723 (4th Dist. 1980), citing *Dixon Mobile Homes, Inc. v. Walters*, 48 Cal. App. 3d 964, 122 Cal. Rptr. 202 (3d Dist. 1975) (both involving recovery of attorney's fees). These courts misunderstand how facts are used in interest analysis: they give rise to interests only if they are made relevant to the case by the underlying policy of the laws in conflict. Lists of contacts divorced from policy have no place in the methodology of interest analysis.

Professor Sedler has pointed out that most courts have taken the position that the tort liability of an employer to an employee covered by worker's compensation will be determined by the law of the state where the employer has taken out worker's compensation to cover the particular employee. Sedler, *supra* note 1, at 1039. However, the leading cases supporting this rule in the context of suits by an employee of a subcontractor against the general contractor were decided before the modern revolution in choice of law had begun. *E.g.*, *Jonathan Woodner Co. v. Mather*, 210 F.2d 868 (D.C. Cir. 1954) (applying Maryland law to deny tort recovery both because Maryland was the place of injury and because its worker's compensation recovery was exclusive); *Wilson v. Faull*, 27 N.J. 105, 141 A.2d 768 (1958) (relying on *Jonathan Woodner Co.* to deny tort recovery available under forum law in a case where the injured worker, the subcontractor, and the general contractor were all forum residents). Compare *Busby v. Perini Corp.*, 110 R.I. 49, 290 A.2d 210 (1972) (denying tort recovery available under forum law where the injured worker, the subcontractor, and the general contractor were all residents of Massachusetts where the worker's compensation remedy was exclusive) with *Wilson*. In contrast, see *Davis v. Morrison-Knudsen Co.*, 289 F. Supp. 835 (D. Ore. 1968) (applying Oregon law to permit an Oregon worker injured in Idaho to sue the employers in tort despite the exclusive provisions of the Idaho worker's compensation law. Plaintiff's job required him to drive a dump truck between Oregon and Idaho; the employers had elected to forego compensation coverage under Oregon law, but Idaho law required them to cover plaintiff and plaintiff had recovered under the Idaho statute. Defendants were Delaware and Massachusetts corporations doing business in Oregon and Idaho. The court expressly declined to follow *Jonathan Woodner Co.* and *Wilson* on the ground that to do so would conflict with Oregon's public policy.). And the single California case in point, *Howe v. Diversified Builders, Inc.*, 262 Cal. App. 3d 741, 69 Cal. Rptr. 56 (2d Dist. 1968), was on its facts an "unprovided-for" case in which a Nevada independent contractor asserted a third-party claim against a California general contractor who had hired plaintiff in Nevada for work on a job site located in that state. The court in *Howe* held that California had no interest in extending the policy of its tort law for the benefit of a Nevada plaintiff whose recovery was limited to worker's compensation under the law of his domicile, and carefully reserved decision in the case where plaintiff was a Californian. *Id.* at 745-47, 69 Cal. Rptr. at 59-60.

134. Professor Sedler would treat worker's compensation cases as a special class of conflicts cases. See Sedler, *supra* note 19, at 224-25 (discussing the worker's compensation cases as illustrative of the situation where the forum has uniformly refused to apply its own law allowing tort recovery if the employer has attempted to cover work-related injuries through compensation). Sedler suggests that the forum has no "real" interest in applying its law under these circumstances, and refers specifically to *Wilson v. Faull*, 27 N.J. 105, 141 A.2d 768 (1958). But if the worker's compensation context of *Wilson* is put aside, on its facts the case is one in which the parties were all residents of a recovery state (New Jersey) and the injury occurred in a nonrecovery state (Pennsylvania). In tort cases fitting that law-fact pattern, Sedler has elsewhere noted the universal practice of states that have abandoned the traditional approach to choice of law: recovery is permitted. Sedler, *supra* note 1, at 1033-34. Viewed as a torts case, *Wilson* presents a false conflict in which only the forum, New Jersey, has an interest in applying its law. It is not clear to me why *Wilson* becomes a case in which New Jersey has no "real" interest in applying its law merely because the

interests underlying California's tort law as well as Nevada's worker's compensation system would obviously have revealed an apparent true conflict.

The next step of the analysis would, of course, be to see if this conflict could be resolved by a more moderate and restrained interpretation of the policy or interests of either state. In performing this step, a California court would have been confronted with a Nevada decision indicating that Nevada would be unwilling to have the scope of its policy or interest narrowed. In *Tab Construction Co. v. District Court*,<sup>135</sup> the Nevada Supreme Court had applied Nevada law to protect a resident general contractor from the third-party claim of the employee of an Arizona subcontractor who had been injured in Nevada.<sup>136</sup> Despite the fact that the *Duarte* plaintiff had proceeded in California rather than Nevada, it seems clear that Nevada would be unwilling to have its policy construed by California so as to expose the Nevada defendant to civil liability. This clear statement by the Nevada court of its own policy and interest must be taken as authoritative in California.<sup>137</sup> Nevada's position therefore precludes a California court from limiting the

---

New Jersey general contractor was required to obtain worker's compensation coverage for the New Jersey employees of its New Jersey subcontractor in order to obtain a job in Pennsylvania. In an analogous case, Judge Friendly, in applying a policy-oriented approach to a conflict between the tort policies of the forum (New York) and the worker's compensation policies of the state where the job site was located and where the injury occurred (Virginia), concluded that New York would permit recovery for the New York plaintiff against defendants who were protected under the worker's compensation laws of Virginia. *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194, 202-06 (2d Cir.), cert. denied, 439 U.S. 1034 (1978). This result seems sensible to me. Professor Rosenberg's criticism of the outcome on constitutional grounds, see note 118 and accompanying text *supra*, does not seem persuasive because, unlike *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), the decedent's New York residence was not the forum's sole contact with the case. Instead, decedent's work for his New York employer required him to negotiate defendant Lee-Hy's contract with the Virginia partnership in charge of developing the shopping center, and he spent at least one day a week at the site supervising the construction, frequently visiting there three or four times a week. 579 F.2d at 196-97, 202-03. See Rosenberg, *supra* note 118, at 453-54.

135. 83 Nev. 364, 432 P.2d 90 (1967).

136. The plaintiff in *Tab* apparently had not applied for worker's compensation benefits under either Nevada or Arizona law; he simply alleged in Nevada that his third-party claim was permissible under Arizona law. Without examining Arizona's policy or interest, the Nevada court noted that it had a "legitimate constitutional interest," as the place where the work injury occurred, in applying its own law. Moreover, since Nevada was also the forum, the residence of the general contractor and the place where its business was localized, as well as the location of the site where the work was done, Nevada's policies relating to industrial injuries were "vitaly involved" and its interests should be given effect. *Id.* at 366, 432 P.2d at 91-92. The court cited *Pacific Ins. Co. v. Commission*, 306 U.S. 493 (1939), and *Carroll v. Lanza*, 349 U.S. 408 (1955). These cases, together with *Alaska Packers Ass'n v. IAC*, 294 U.S. 532 (1935), also support the existence of a "legitimate constitutional interest" in the state where the employee was hired to assert its own law. In *Duarte*, plaintiff was hired in California.

137. Professor Kanowitz has expressed this opinion elsewhere. Kanowitz, *supra* note 8, at 268-76.

scope of the Nevada policy through Currie's step of moderate and restrained interpretation.

California's conflicting policy and interest are not susceptible of being narrowed through moderate and restrained interpretation either. The nonexclusivity of worker's compensation recoveries under the circumstances here involved is explicitly stated in the California Labor Code.<sup>138</sup> Thus, unless a court is willing, as Justice Caldecott apparently was, to treat the California tort claim as a dead letter when asserted by California employees of a subcontractor that accepts employment in a state that immunizes the general contractor from tort liability,<sup>139</sup> a true conflict is unavoidable in *Duarte*. As already noted, in such a case, governmental interest analysis dictates the application of forum law.

So viewed, *Duarte* represents a missed opportunity for the California Supreme Court to reconsider its use of comparative impairment analysis in true conflicts cases. For if the court had followed the methodology set out in *Bernhard* and *Offshore Rental*, if it had given proper recognition to California's clearly expressed policy of providing injured industrial employees with full compensation for injuries caused by third party tortfeasors, and if it had accorded full respect to Nevada's conflicting policy expressed in *Tab Construction Co.*, it seems likely that the court would have reached an impasse. Each state's internal objectives would be completely frustrated by the subordination of its external objectives. *Duarte* shows that comparative impairment analysis is no more capable of resolving a true conflict than is governmental interest analysis. The court is thus left with the choice between a "give-it-up" forum preference rule such as Currie's,<sup>140</sup> or judgments about the relative values of the differing policies or the respective weight of the conflicting interests—judgments considered improper by both Currie and Baxter.<sup>141</sup>

---

138. See note 27 *supra*.

139. It may be suggested that the decision by plaintiff's California employer to bid as a subcontractor on defendant's Nevada project made Nevada law binding on its employees to the exclusion of California law. This argument, even if acceptable as a matter of contract law, would in effect amount to a waiver by the subcontractor of plaintiff's rights under California law. Such a result would seem directly contrary to California's interest in providing alternative modes of recovery for its injured workers in cases involving permissive third-party claims.

140. B. CURRIE, *supra* note 2, at 121.

141. It is by no means clear which of these alternatives the California Supreme Court would choose if faced with such a case. I particularly hope, however, that if it chose the latter, it would not fall back on Tobriner's gratuitous reference in *Offshore Rental* to Professor Cavers's notions about persons assuming the risks of any territory they choose to enter. 22 Cal. 3d at 161, 148 Cal. Rptr. at 874, 583 P.2d at 728. Apart from dicta in *Offshore Rental* parroted in *Cable*, 93 Cal. App. 3d at 398, 155 Cal. Rptr. at 779, Cavers's "principles of preference," D. CAVERS, *supra* note 19, have not yet been adopted as part of California's conflicts law. Since the concededly "territorialist bias," *id.* at 134, underlying much of Cavers's thinking is, at the very least, out of harmony with

## III

AN EVALUATION OF THE USE OF COMPARATIVE  
IMPAIRMENT IN CALIFORNIA

The four cases discussed in this paper share a law-fact pattern familiar to students of the conflict of laws. All are cases in which a plaintiff from a "recovery" state<sup>142</sup> is injured by a defendant from a "nonrecovery" state whose conduct occurred in that state.<sup>143</sup> In all the cases except *Bernhard*, the plaintiff had gone into the defendant's state and was injured there.<sup>144</sup> Cases presenting this law-fact pattern pose apparent true conflicts of laws. Rather than considering whether a more moderate and restrained interpretation of the policy or interest of one state or the other might avoid the conflict as interest analysis teaches,<sup>145</sup> in each of these cases the court treated the apparent true conflict as if it were a true conflict and proceeded to attempt a resolution of that conflict through what it took to be Baxter's comparative impairment approach.

The use of this approach in the three cases following *Bernhard* has had several unfortunate effects. First, it has made the courts overly hasty to identify true conflicts. Governmental interest analysis was introduced into California law as early as 1961, with Traynor's opinion in *Bernkrant v. Fowler*,<sup>146</sup> but its use had uncovered no true conflicts cases until 1976, the date of Sullivan's adoption of the comparative impairment approach in *Bernhard*. Thereafter, within the space of three years, three other cases had been identified as true conflicts by the California courts. But these cases were not structurally different from *Bernkrant*; it too, was a case in which liability would not have been imposed on the defendant under the law of his home state, but would have been under the law of plaintiff's state.<sup>147</sup> Had the courts in the later cases

---

both Currie's governmental interest analysis and Baxter's comparative impairment formula, its use in California will not help to alleviate the existing confusion.

142. This fact was assumed for purposes of decision in *Offshore Rental*. See text accompanying note 64 *supra*.

143. See, e.g., Sedler, *supra* note 1, at 1036-38.

144. I do not believe the place of injury was controlling in *Bernhard*. In my view, the result would not have changed if plaintiff had been parking his motorcycle in the Nevada side of the parking lot at Harrah's Club in Stateline when he was struck by Fern Myers.

145. Professor Sedler has suggested that, although Currie's original formulation, which distinguishes between false conflicts, apparent conflicts, and true conflicts, remains valuable for teaching purposes, it can be disregarded by courts when deciding cases. Sedler, *supra* note 19, at 221-22. For reasons I will detail shortly, I do not share this view. See text accompanying notes 186-89 *infra*.

146. 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

147. Unlike the four cases discussed here, *Bernkrant* involved a planned transaction: the refinancing of a sale of land in Nevada that allegedly involved an oral promise to forgive the indebtedness of the vendees in the will of the vendor. The oral promise violated the California Statute of Frauds, but would have been valid in Nevada.

followed Traynor's reasoning in *Bernkrant*, they might have avoided reaching the true conflict stage through the use of a more moderate and restrained interpretation in some of the cases. But instead, the present California judges seem to find the comparative impairment approach so satisfactory that they are willing to invent excuses for its use. Currie's warning that "[t]o assert a conflict between the interests of the forum and a foreign state is a serious matter,"<sup>148</sup> although dutifully quoted in both *Bernhard*<sup>149</sup> and *Cable*,<sup>150</sup> has essentially been disregarded.

This rush to identify true conflicts has produced at least two regrettable consequences. First, in deciding choice of law cases, some California courts have failed to examine with care and precision the content of local policy. Thus, in *Offshore Rental*, the supreme court simply assumed that section 49 of the Civil Code granted employers a cause of action for losses resulting in injuries to key employees, only to conclude, by the use of an unprecedented procedure, that the cause of action was "archaic."<sup>151</sup>

This practice will make California's choice of law decisions less intelligible both to future California courts and to courts of other states seeking to learn the scope of California policy. In modern conflicts law, courts may consult choice of law decisions in states following a functional or interest analysis in order to determine whether those states would choose to assert their policy or interest in a given situation.<sup>152</sup> Although a California judge following that practice in *Duarte* might have been disappointed to learn from *Tab Construction Co.* what Nevada saw as the scope of its policy,<sup>153</sup> he or she would have had no doubt that the information sought had been accurately provided. What will a judge from a sister state looking at the opinion in *Offshore Rental* learn about the scope of California policy? Although it has been labeled "archaic" by the California Supreme Court, section 49 of the Civil Code remains on the statute books. However, neither that court nor any other in California has assessed its modern content. Under those circumstances, the inquiring judge might be tempted to conclude that section 49 can safely be disregarded in a conflicts case. Such a conclusion would be unfortunate if it carried the implication that Cali-

---

148. B. Currie, *supra* note 11, at 757.

149. 16 Cal. 3d at 320, 546 P.2d at 723, 128 Cal. Rptr. at 219.

150. 93 Cal. App. 3d at 394, 155 Cal. Rptr. at 776.

151. As we have seen, in *Duarte* the court of appeals simply treated as a dead letter California's policy of allowing injured employees to assert tort claims against third parties. 152 Cal. Rptr. 373.

152. See R. CRAMTON, D. CURRIE & H. KAY, *supra* note 35, at 398-402.

153. See text accompanying notes 135-36 *supra*.

fornia judges do not object to the subordination of legislative policies with which they disagree.

Second, by hastily assuming that a true conflict exists whenever each state has a legitimate interest in applying its own law, the courts have placed an unnecessary strain on interstate harmony. This eagerness to find true conflicts is subject to the same criticisms that were levelled against Currie's original approach: it is parochial in its tendency to cause the assertion of the broadest possible application of forum law.<sup>154</sup> Currie himself recognized this problem and introduced the step of moderate and restrained interpretation to solve it. The use of that step permits the forum to assure other states and nonforum litigants that it respects and takes seriously the conflict of values inherent in the federal system, and that it will employ good will in the hope of avoiding conflict.

But if, despite all of the forum's best efforts, a true conflict must be confronted, Currie's approach requires that the interests of the forum must prevail, thus defeating the competing interests of the other state. Comparative impairment, too, assumes that the external objectives of one state must ultimately yield, but Baxter implicitly rejects the position that the state whose interests are preferred must always be the forum. Instead, the presumed major justification for comparative impairment analysis is that it will produce uniformity of outcome regardless of where the suit is brought. Such uniformity is one of the traditional goals of conflicts theory. As we have seen, however, Baxter did not anticipate that this goal could be attained as a matter of state law. He warned that state courts, as "active participants in the formulation and implementation of local policies"<sup>155</sup> should not be given responsibility for "deciding when those policies will yield to and when they will prevail over the competing policies of sister states."<sup>156</sup> The result in *Bernhard* amply vindicates Baxter's warning. I agree with the conclusion drawn in a thoughtful student note that courts of different interested states would arrive at different judgments about the relative degree of impairment to their external objectives in close cases.<sup>157</sup> Had *Bernhard* brought suit in Nevada, and had the Nevada courts applied comparative impairment, it seems safe to conclude that the Nevada

---

154. Von Mehren, Book Review, 17 J. LEGAL EDUC. 91, 94-95 (1964).

155. Baxter, *supra* note 4, at 23.

156. *Id.* Professor Trautman disagrees. In his view, a state court judge "exercising national authority" would not only be free to weigh the relative strength of the concerns of his own state and those of the conflicting state, "but indeed is under a duty to do so and to reach a solution which accommodates those concerns with the needs of the multistate order." Trautman, *supra* note 30, at 115. To place such a duty upon state court judges is not, of course, to insure that the obligation will be impartially discharged.

157. Note, *supra* note 56, at 303.

policy would have been found to have suffered the greater impairment if California law were applied.<sup>158</sup> As Professor Kanowitz has noted,<sup>159</sup> the use of Baxter's principle by the California Supreme Court in *Bernhard* resulted in Currie's outcome: application of forum law. One may confidently predict that a Nevada forum would also have found the principle consistent with application of its own law.

It must be acknowledged, however, that in the other three cases discussed above, the California courts applied foreign law—results in which we may assume the other forum would concur. Thus, agreement on outcome would have been achieved in three out of the four cases. Not a bad scorecard, one might think. But if these cases had been decided under an accurate use of governmental interest analysis, the tally would not have been very different. As I have tried to suggest, only two of these cases, *Bernhard* and *Duarte*, actually posed true conflicts requiring, in Currie's view, that each forum apply its own law. In *Cable*, had the omitted step of reinterpretation been used, the apparent true conflict could without question have been resolved in such a way that Nevada law could have been applied by either state without reaching the true conflict stage. And the outcome in *Offshore Rental* should have turned on what the court determined to be the modern content of section 49 of the Civil Code. Depending on the results of the torts analysis, the conflict could have either been resolved as nonexistent, with both states denying recovery, or it might have escalated into a true conflict if California was found to be a real, rather than hypothetical, recovery state and if the reinterpretation step did not yield a solution. The score is then two and two, with the application of forum law expected in *Bernhard* and *Duarte*, and that of the foreign state clear in *Cable* and probable in *Offshore Rental*. The agreement is reduced from three cases to two, hardly an overwhelming demonstration of the greater capacity of comparative impairment analysis to produce uniformity.

A second major drawback of the formal adoption of comparative impairment analysis in California, independent of its tendency to foster hasty and often erroneous identification of true conflicts, is the damage its use has done to the internal consistency of California conflicts law. In *Cable*, Justice Potter's analysis more closely resembled Currie's moderate and restrained interpretation than the comparative impairment approach. Currie expected the forum at the reinterpretation stage to see whether it might be possible to narrow the statement of policy or

---

158. *Id.* at 294-96. Others agree. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 L. & CONTEMP. PROB. 10, 21-22 (1977); Note, *After Hurtado and Bernhard: Interest Analysis and the Search for a Consistent Theory for Choice-of-Law Cases*, 29 STAN. L. REV. 127, 146 (1976).

159. Kanowitz, *supra* note 8, at 260.

interest it had itself formulated earlier with reference to its own law or that of the foreign state, as appeared appropriate to avoid a true conflict.<sup>160</sup> But that reinterpretation was to be performed purely as a local court would interpret its own local policy and interest; as Professor von Mehren observed in criticism of Currie's approach, his focus was primarily on domestic policy to the exclusion of multistate policies that exist only in conflicts cases.<sup>161</sup> Baxter's emphasis, on the other hand, was frankly placed on a comparison of the potential damage done to the state policies and interests at issue in the specific multistate setting. That is why he wanted the standard of comparison to be formulated and applied as an initial matter by impartial federal judges acting under federal law. In *Cable*, Justice Potter did not focus on multistate issues by comparing the relative degree of impairment of California and Nevada policy. Instead he probed the reach of California policy and concluded that it was not applicable to the plaintiff's injury under the circumstances of the case—that is, he narrowed his initial statement of California's policy.<sup>162</sup> Thus, although his conclusion, true to the precedents he was bound to follow, was phrased in terms of comparative impairment, that analysis was superfluous to the result in *Cable*. Yet the necessity to use it caused Justice Potter to engage in one kind of analysis under the guise of another, thus impeding the orderly development of the law.

*Cable* at least came to the right result for the right reason, even if forced to proceed under false labels. The result in *Bernhard* was right for the wrong reason; and that in *Duarte* was simply wrong. *Offshore Rental* came to a questionable result using reasoning not countenanced either by Currie or Baxter. If dissatisfaction with Currie's temporary "give-it-up" forum preference solution to true conflicts cases stimulated Sullivan's adoption of comparative impairment, California has paid a high price for his restiveness. In addition to the unfortunate consequences of that choice noted above, Tobriner's expansion of the Baxter-Horowitz approach to include bits and pieces of functional analysis and other theories has been like opening Pandora's box. He has set loose various techniques, such as the determination of the strength with

---

160. I do not agree with Professor Kanowitz that the difference between moderate and restrained reinterpretation and comparative impairment is that Currie, correctly read, wanted the forum to reexamine only its own law at the reinterpretation stage, while Baxter would require each state, as forum, to attempt to limit the interests of both. *Id.* at 266-73. But I do agree with him that the forum must accept, for the purposes of performing the reinterpretation of foreign law, a prior statement of the foreign court or legislature regarding the scope of its policy and interests in the multistate setting. *Id.*

161. Von Mehren, Book Review, *supra* note 154, at 94-95. Responding to similar criticisms, Currie pleaded the "felt necessity to emphasize the obstacles that the present system interposes to any intelligent approach to the problem." B. CURRIE, *supra* note 2, at 187.

162. 93 Cal. App. 3d at 390, 155 Cal. Rptr. at 774.

which local policy is held and the comparison of that policy with the laws of other states to see whether it is "archaic or outmoded," that are inconsistent with the patient analysis of the content of local law.<sup>163</sup> Few state court judges, invited to compare their own law with that of other jurisdictions, will limit themselves to an examination of the proper scope of their own law or even to an analysis of the degree of detriment it can safely be expected to bear. Currie, a conservative when it came to judicial activism, sought to restrain the urge to create systems for resolving true conflicts with the temporary device of his forum preference rule. It is ironic indeed that California, whose judges had adhered most closely to Currie's teachings, should have succumbed to the temptation to make just the sort of normative judgments about the relative "values" of competing state policies and interests that he and Baxter both deplored.

Others have called for abandonment of the comparative impairment technique.<sup>164</sup> To their plea I now add my voice. Baxter's proposal might have been workable had it been effectuated as he had envisioned through the overruling of *Klaxon* and the stabilizing medium of federal law.<sup>165</sup> Standing alone as a state conflicts rule, the technique has not been a valuable addition to California law.

If the California Supreme Court is persuaded by this reasoning, it will be left with the question of how it should decide cases that do present true conflicts. In order to suggest an answer to that question, it may be helpful to take brief note of some changes in thinking about

---

163. See text accompanying notes 72-76 *supra*.

164. Kanowitz, *supra* note 8; Note, *supra* note 158, at 127.

165. Professor Donald Trautman has recently suggested that the creation of a federal common law of choice of law need not await the overruling of *Klaxon*. Trautman, *supra* note 30, at 111-16. Some may think that this intriguing notion might provide a new foundation for Baxter's comparative impairment technique. Trautman's proposal appears to be that state and federal court judges should treat choice of law cases as cases "arising under" the Constitution or laws of the United States, *id.* at 127, and as appropriately requiring federal solutions. *Id.* at 117-19. This invocation of federal authority would permit judges to set limits imposed by federal common law, not merely by federal constitutional law, on the reach of state policy and would, in turn, justify the application in a conflicts case of a "normal" rule followed by most states, even though it may not be the rule in force as a matter of domestic law in any of the concerned states. *Id.* at 115. As Trautman puts it, the "chief consequence" of such a conception of federal common law "would be to free state judges from local rules that capriciously interfere with multistate transactions and to provide state and federal judges alike with an intellectually congenial way of approaching multi-state problems." *Id.* at 127. Appealing though it may be, Trautman's proposal is fundamentally at odds with Currie's governmental interest analysis, for it implicitly rejects the proposition that conflicts law is state law as well as the view that the state court judge is and ought to be an instrument of state policy. See B. Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960). To rely upon this conception to justify the continued use of comparative impairment in California would necessitate creating an internally inconsistent system. That would not be helpful.

choice of law since Currie first announced his governmental interest analysis in 1958.

#### IV

#### A RECONSIDERATION OF THE USE OF FORUM LAW TO RESOLVE TRUE CONFLICTS

As we have seen, the achievement of uniformity and predictability has long been a traditional goal of conflicts scholars.<sup>166</sup> Given the condition of the field at the time he wrote, however, Currie gave higher priority to other goals. More pressing to him was the need to "clear away the apparatus that creates false problems and obscures the nature of the real ones."<sup>167</sup> At the time, most of Currie's colleagues seemed willing to tolerate the initial ambiguity and unpredictability that accompanied interest analysis as well as other modern, policy-oriented approaches. But with the publication of Restatement Second in 1971 under the leadership of its Reporter, Professor Reese,<sup>168</sup> has come an increasing emphasis on uniformity and predictability through the creation of rules. And in response, those scholars, such as Professor Sedler, who have consistently worked within the framework of interest analysis, have felt compelled to demonstrate that predictability can also be achieved through use of the case method in choice of law.<sup>169</sup> Courts have responded by adopting methods of resolving conflicts cases that seem to promise a higher degree of certainty than the ad hoc decision—among them Judge Fuld's rules for guest statute cases adopted by the New York Court of Appeals.<sup>170</sup>

Viewed in this light, the California Supreme Court's aimexation of comparative impairment to interest analysis is consistent with what appears to be a prevailing desire to achieve uniformity. As others have noted,<sup>171</sup> Currie's approach does not lack predictability. States with potentially conflicting interests are easily identified, and when a true conflict arises, the forum state will always apply its own law. But it undeniably lacks uniformity. By insisting that the forum's judges, when faced with a true conflict, must advance the forum's policies, Currie's version of interest analysis remains the only major theoretical

---

166. *E.g.*, Shapira, "Grasp All, Lose All": On Restraint and Moderation in the Reformulation of Choice of Law Policy, 77 COLUM. L. REV. 248, 250-51 (1977).

167. B. CURRIE, *supra* note 2, at 187.

168. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972). *See also* Edwards, *Choice of Law in Delict: Rules or Approach* (pt. 1) 96 S. AFR. L.J. 48 (1979).

169. Sedler, *supra* note 1.

170. *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). *See* Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548 (1971).

171. *E.g.*, Sedler, *supra* note 19, at 201-04; Twerski, *Neumeier v. Kuehner: Where Are The Emperor's Clothes?*, 1 HOFSTRA L.J. 104, 121 (1973).

model that does not purport to offer a solution that could be attained regardless of the place where suit is brought. Indeed, it ensures that true conflicts will be decided differently in each legitimately interested state.

As I have suggested, the use of comparative impairment does not produce significantly greater uniformity than does the accurate use of interest analysis. In my opinion, the somewhat greater disuniformity produced by the use of forum law in true conflicts cases is preferable to the undesirable consequences of using more complex analyses. Unexpected support for this view recently came from one of the creators of functional analysis: Professor Arthur von Mehren.<sup>172</sup>

Deploring the "pervasive malaise" engendered by dissatisfaction with the results in many multistate cases, von Mehren has proposed that the forum should resolve true conflicts cases by determining how it would, in a domestic case, resolve a similar internal clash of values or policies.<sup>173</sup> This approach is different from Currie's forum preference rule, von Mehren contends, because it goes beyond having the forum apply its own law to advance its policy or interest, essentially ignoring in the process the conflicting views held by the other interested state. Instead, the forum should view its own law as a source of rules designed to achieve justice between the parties in domestic cases and should use those rules as a model for solving conflicts cases.<sup>174</sup>

As an illustration of his new approach von Mehren offers *Neumeier v. Kuehner*,<sup>175</sup> a case in which the New York Court of Appeals applied Ontario's guest statute to preclude recovery for wrongful death against a New York host whose negligence had caused the death of his Ontario passenger in Ontario. In von Mehren's view, a better result would have been attained had the New York court given effect to its domestic policy of subordinating the interests of host-drivers and their insurers to those of the victim's representatives.<sup>176</sup>

Von Mehren's otherwise valuable suggestion is flawed by the case used to illustrate it. *Neumeier* is an example, not of a true conflict case, but of an "unprovided-for" case, in which neither New York nor Ontario had an interest in applying its policy to the particular facts at issue.<sup>177</sup> New York's policy was to compensate all resident tort victims, including guests: since plaintiff was not a New Yorker, that policy was not directly implicated. Ontario's policy was to protect its hosts and

---

172. Von Mehren, *Choice of Law and the Problem of Conflicts Justice*, 41 L. & CONTEMP. PROB. 27 (1977).

173. *Id.* at 34.

174. *Id.* See also Note, *supra* note 158, at 150-52.

175. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

176. Von Mehren, *supra* note 172, at 34-36.

177. See R. CRAMTON, D. CURRIE & H. KAY, *supra* note 35, at 281-83.

their insurers from ungrateful guests and their excessive or perhaps collusive claims: since defendant and his insurer were not residents of Ontario, that policy was not directly implicated either. Von Mehren implies that New York's application of Ontario law advanced a relevant forum policy because it maximized the interests of New York's own residents.<sup>178</sup> This, however, is inaccurate for New York has no policy of protecting hosts and their insurers against the claims of guests. Interest analysis does not propose that the forum's residents should be benefited by the importation from other states of policies it has discarded.<sup>179</sup> In discussing the unprovided-for case, Currie expressly rejected, on constitutional grounds, the notion that the forum should selfishly protect the local party against the claims of the outsider.<sup>180</sup> What Currie originally proposed as the preferred solution is similar to the one now suggested by von Mehren: the forum should apply its own law simply because there is no reason to displace that law with any other.<sup>181</sup> The New York defendant should have been held liable in *Neumeier* because no interested state, including his own, had any basis for freeing him from culpability.<sup>182</sup>

Moreover, Currie expressly advocated use of the forum's own law as the standard of justice between the parties in another context where the forum's policies and interests were not affected: the case of a true conflict tried in a disinterested forum.<sup>183</sup> That case was as insoluble for Currie as an ordinary true conflict now appears to be for von Mehren. When neither scholar was able to propose any other solution he found entirely satisfactory, both resorted to the forum's use of its own law as the measure of justice.

It is not as evident to me as it seems to be to von Mehren that Currie's use of forum law in true conflicts cases somehow yields a lower quality of conflicts justice.<sup>184</sup> It is precisely because Currie saw the forum's courts as the judicial arm of state government, empowered to effectuate in private litigation the community values and state policies set out in earlier cases or established by the executive or legislator, that he directed those courts in conflicts cases to advance their own state

---

178. Von Mehren, *supra* note 172, at 35.

179. A similar proposal advanced by Professor Ratner to justify application of a Mexican law limiting damages for wrongful death in a case where a Mexican plaintiff sued a California defendant in California to recover for a death caused in California was implicitly rejected by the California Supreme Court in *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974). See Ratner, *Choice of Law: Interest Analysis and Cost-Contribution*, 47 So. CAL. L. REV. 817, 835-36 (1974).

180. B. CURRIE, *supra* note 2, at 154-55.

181. *Id.* at 156.

182. See Sedler, *supra* note 19, at 235-36; Note, *supra* note 158, at 152-53.

183. B. Currie, *supra* note 11, at 779-80.

184. Von Mehren, *supra* note 172, at 34.

policies and interests when their achievement was threatened by the asserted conflicting claims of another state. Why is this not just what von Mehren advocates, that is, the use of the forum's law to achieve justice, according to the forum's own conception, between the parties?

Von Mehren's objection appears to be that the nonforum parties are less likely to accept as providing them equal treatment a solution designed to advance the forum's own purposes.<sup>185</sup> Yet, as we have seen, Currie's analysis does not ignore the content of the conflicting laws of other states. The forum must patiently identify the conflicting policies of both states and, in a spirit of good will, try to avoid the conflict through accommodation. But, in the end, if no such resolution is possible, the forum's law must supply the rule of decision because the forum's judges are not authorized to look elsewhere for the just result. The knowledge that another interested state has a different conception of what constitutes justice between the parties which that state's courts would have implemented given the opportunity, seems disquieting to von Mehren. But his formulation, that the forum should apply its own law in a true conflicts case as the measure of a just solution rather than to advance its own policy and interest, seems merely to conceal the underlying clash of values, not to make it less troublesome.

Nonetheless, although he remains critical of Currie's approach, von Mehren's present position is not far from a proper reading of interest analysis. In my view, his misgivings merely point up the need for courts following interest analysis to make explicit use of moderate and restrained interpretation when an apparent true conflict has been identified so that others may see the effort at compromise contained within that approach.

Professor Sedler, an adherent of interest analysis, takes a position almost diametrically opposed to that suggested here. In his extremely valuable reformulation of Currie's teaching, Sedler suggests that courts following interest analysis need not concern themselves with false conflicts, apparent true conflicts, and true conflicts, but should instead limit their focus to whether the forum has a "real" interest in applying its own law.<sup>186</sup> Indeed, he comes close to advising the forum to apply its own law unless to do so would be unconstitutional.<sup>187</sup> Regrettably, I cannot agree. I am not persuaded that application of forum law under

---

185. *Id.* at 32.

186. Sedler, *supra* note 19, at 220-22. Sedler apparently would have the forum subsume the step of moderate and restrained interpretation in the process of determining whether the forum has a "real" interest. But, apart from a fear that courts will be confused by the separation, I do not see what is to be gained by combining these steps in the analysis. The open consideration of the other state's policy and interest is an effective way of allowing others to see that justice is being done.

187. *Id.* at 222.

this rationale is the "most effective and rational way to accommodate conflicting state interests."<sup>188</sup> As I have noted earlier, I believe that the considerations appropriate to the stage of moderate and restrained interpretation are required to give other states and nonforum litigants the assurance that the forum respects and takes seriously the conflict of values inherent in the federal system.<sup>189</sup>

Thus, if the California Supreme Court chooses to continue to decide choice of law cases with the aid of Currie's version of governmental interest analysis, it should return to the use of forum law to decide true conflicts cases. That solution is still the one most compatible with the goals underlying 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.

### CONCLUSION

This Article has examined four cases in which California courts have attempted to superimpose Baxter's comparative impairment approach upon Currie's governmental interest analysis. The described results include: (1) a distortion of the methodology of governmental interest analysis; (2) a tendency on the part of California judges to depart from the patient interpretation of local law in favor of the hypothetical creation of true conflicts that may be resolved quickly by the use of comparative impairment; and (3) an importation into the structure of governmental interest analysis of value-laden factors inconsistent with its basic approach. Further, this Article has found that these drawbacks are not counterbalanced by any substantial improvement in uniformity of result or by a marked decrease in parochial attitudes. Accordingly, it has been suggested that the use of comparative impairment be abandoned and that courts using interest analysis continue to resolve true conflicts by the application of forum law as the measure of a just result.

In order to underscore the need for future investigation of solutions to choice of law problems, a postscript seems appropriate. All four of the cases discussed in this Article were decided by unanimous courts. In view of the criticisms expressed here and elsewhere,<sup>190</sup> it seems surprising that none of the judges who participated in these cases felt moved to offer a concurring, or even a dissenting, opinion.<sup>191</sup> I do not read this unanimity as proof of a total agreement with both result

---

188. *Id.* at 231-32.

189. *See* text following note 154 *supra*.

190. *E.g.*, Kanowitz, *supra* note 8; Note, *supra* note 56; Note, *supra* note 158.

191. That the California Supreme Court ordered the opinion in *Duarte* not to be published does, of course, indicate disagreement with the reasoning. *See* note 7 *supra*.

and reasoning. Rather, I fear it indicates an unwillingness to devote scarce resources of judicial time and energy to the development of a field already oversupplied with "compass[es] which everyone but [their] maker[s] [say are] defective."<sup>192</sup> This exemplifies on the judicial level the malaise that Professor von Mehren senses is inhibiting further efforts to move choice of law off the "well-watered plateau" that Professor Leflar claims it presently inhabits, at least in torts cases.<sup>193</sup> Professor Shapira, an acute observer of the American legal scene, has also called attention to the discontent that affects the work of scholars and judges engaged in spelling out the "new orthodoxy."<sup>194</sup> His solution—to "think small" in choice of law—leads, like von Mehren's quest for justice, back to forum law.<sup>195</sup>

In my view, the discontent is not attributable only to the tension caused by conflicting values, as von Mehren suggests, or to the impossibly high goals set by modern scholars, as Shapira claims. In large measure, the malaise that affects current choice of law thinking stems from the profound disagreement among scholars concerning the proper methodology for handling the cases. The tidal wave of creative effort that followed the collapse of the First Restatement has receded, leaving isolated, stagnant pools of doctrine, each jealously guarded by its adherents. Professor Sedler's demonstration that many of the cases fall into coherent patterns if one looks at the results while ignoring the theoretical labels<sup>196</sup> is an encouraging tribute to the coping capacity of judges,<sup>197</sup> but it does not purport to resolve the underlying conceptual differences.

I think the time may be propitious for a return to basic principles, so that we may consolidate some of the competing approaches. The unifying element should be a preference for local law.<sup>198</sup> In my view,

---

192. *Erwin v. Thomas*, 264 Or. 454, 458, 506 P.2d 494, 496 (1973) (Holman, J.).

193. Leflar, *supra* note 158. Professor Ehrenzweig insisted that the malaise was the result of dissatisfaction with tort law, not with conflicts law. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 378 (1966).

194. Shapira, *supra* note 166, at 248.

195. *Id.* at 255-59.

196. Sedler, *supra* note 1, at 1032-41.

197. Professor Leflar has warned his colleagues that busy judges cannot be expected to take the time to keep up with or to keep separated in their opinions the variegated choice of law approaches now being spun out by the scholars. Leflar, *supra* note 158, at 11-12.

198. By the use of this terminology, I do not mean to suggest a spurious distinction between "local law" and "forum law," nor do I wish to renew older discussions about how ideas found in foreign legal systems are to be translated into concepts familiar to the forum. See Cavers, *Comment: The Two "Local Law" Theories*, 63 HARV. L. REV. 822 (1950). Still, the term "forum law" has been rather closely associated in recent years with the work of Albert Ehrenzweig and Brainerd Currie, while the term "local law" may now have lost some of its prior association with the theories of Walter Wheeler Cook and Judge Learned Hand. The concept of "local law" may therefore provide a more neutral foundation upon which to build. I think, too, that use of the term "local law" may serve as a helpful reminder that the court that decides a conflicts case should

the purpose of modern choice of law theories is to identify situations in which departures from the application of local law can be justified.<sup>199</sup>

Governmental interest analysis fits this model easily; Currie expressly accorded primacy to forum law, displacing it only in cases where the policy and interest of another state could be accommodated without frustrating the competing legitimate interests of the forum. Under his approach, departures from the application of local law are justified in false conflicts cases where the forum is the disinterested state and in apparent true conflict cases where reexamination of the policies or interests involved reveals that, again, the forum is actually disinterested. Such departures are not appropriate in the "unprovided-for" case since the policy of no other state would be furthered by its application in that situation.<sup>200</sup> Professor Cavers's "principles of preference," conceived as they originally were for use in deciding true conflicts cases, can also be viewed as descriptive of situations in which he believes that departures from local law are justified.<sup>201</sup> The concept of party autonomy as expressed in section 187 of the Restatement Second<sup>202</sup> fits this model as well when the law chosen is different from local law.

Other justifications for departing from local law have been proposed. But I am unwilling to follow those suggestions that do not stem from the interpretation of local law. Thus, in my view, departures from the application of local law are not justified solely on the ground that some other law is "better,"<sup>203</sup> that it represents the "emerging" view,<sup>204</sup> that it is the "normal" rule,<sup>205</sup> that it is a "true rule,"<sup>206</sup> or even that it is

---

not automatically consider itself free to look beyond its own law merely because the case presents nonlocal circumstances.

199. Indeed, even the traditional approach can be seen as saying that departure from local law is justified when the plaintiff's right had vested under the substantive law of a foreign territory and its recognition would not violate local public policy.

200. Professor Sedler's "common policy" solution for the "unprovided for" case is not inconsistent with this view. A policy held in common by both states will be reflected in the local law of each. Thus, the "common policy" solution would permit both New York and Ontario to allow recovery in *Neumeier*. See text accompanying notes 177-82 *supra*.

201. D. CAVERS, *supra* note 19.

202. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

203. *E.g.*, *Leflar I*, *supra* note 82, at 294-304. For perceptive criticism of Leflar's approach, see Hogue, *Arkansas' New Choice of Law Rule for Interstate Torts: A Critique of Wallis, Williams, and the "Better Rule of Law,"* 1978 WASH. U.L.Q. 713.

204. *E.g.*, A. VON MEHREN & D. TRAUTMAN, *supra* note 19, at 377.

205. *E.g.*, Trautman, *supra* note 30, at 115.

206. A. EHRENZWEIG, *supra* note 19, at 352-54. Nevertheless, Ehrenzweig's work is consistent with the model suggested here, since he viewed the *lex fori* as the basic rule for choice of law. And his concept of the application of the "law of a proper forum" captures current notions of a possible merger between the standards for judicial jurisdiction and legislative jurisdiction. See Hay, *The Interrelation of Jurisdiction and Choice-of-Law in United States Conflicts Law*, 28 INT'L & COMP. L.Q. 161 (1979).

the law of the place having "the most significant relationship" to the transaction and the parties.<sup>207</sup> Nor, to return to the specific focus of this Article, do I think a departure from local law is justified when the policy of some other state will be relatively more impaired by not being applied.<sup>208</sup>

The question we are trying to answer in choice of law cases is not "whose law is to be applied?," even when that inquiry is limited to a choice between specific conflicting laws, rather than a choice between legal systems. Instead, our question could better be phrased as "under what circumstances is a departure from local law justified?" The illustrations of the basic consistency of this perspective with modern conflicts theories offered above are by no means exhaustive. But they may be representative enough to suggest a return to a more basic view of the matter. Those who are attracted by the hope of a less restrictive solution through the medium of federal law<sup>209</sup> may not be sympathetic to this view. Those who would like to achieve uniformity through the creation of narrow rules,<sup>210</sup> as well as those who frankly favor judicial choices based on value judgments,<sup>211</sup> have a different vision. Still, there may be value in the effort to reduce the scope of disagreement among us.

---

207. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 188, 145 (1971).

208. Baxter, *supra* note 4, at 18.

209. *E.g.*, Trautman, *supra* note 30.

210. *E.g.*, Reese, *supra* note 168.

211. *E.g.*, Leflar, *supra* note 82.