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Conflict of Laws

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CHOICE OF LAW FOR TRUE CONFLICTS

**Bernhard v. Harrah’s Club.** This case represents the California Supreme Court’s first attempt to handle a dispute that it considered to be a “true conflict” since its adoption of the governmental interest approach to choice of law problems. The opinion is marked by the court’s explicit use of the technique of comparative impairment, first suggested by Professor Baxter, to resolve a true conflict. When read in conjunction with the recent case of *Hurtado v. Superior Court*, *Bernhard* also indicates that the court will continue to play a leading role in the development of choice of law.

In 1971 Philip and Fern Myers, residents of California, had numerous drinks at Harrah’s Club, a Nevada casino. While intoxicated, they drove back to California, where they negligently collided with a motorcycle driven by the plaintiff, Richard Bernhard, a California resident.

Under Nevada law a tavernkeeper is not liable for injuries to a third person inflicted by a patron who was served while intoxicated. In California, however, this liability has been imposed on taverns based upon a duty found in Business & Professions Code section 25602.

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2. California replaced the lex loci rule with governmental interest analysis in Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).
4. 16 Cal. 3d at 319-23, 546 P.2d at 723-25, 128 Cal. Rptr. at 219-21.
7. 16 Cal. 3d at 315-16, 546 P.2d at 720, 128 Cal. Rptr. at 216. For cases involving comparable fact situations, see Zucker v. Vogt, 200 F. Supp. 340, 341 (D. Conn. 1961), aff’d, 329 F.2d 42 (2nd Cir. 1964); Trapp v. 4-10 Investment Corp., 424 F.2d 1261, 1263-65 (8th Cir. 1970).
9. “Every person who sells, or furnishes ... any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.” CAL. BUS. & PROF. CODE § 25602 (West 1964). In Vesely v. Sager,
Thus choice of law was determinative of any duty owed by Harrah's to Bernhard.

Bernhard used California precedent as the basis for a suit alleging that Harrah's was negligent in continuing to serve alcohol to the Myers when they were unable to drive safely. In support of his choice of law, Bernhard alleged in his complaint that Harrah's, a Nevada corporation, sold intoxicating liquor to the public and that it solicited business in California knowing that California residents would use the public highways to drive to and from its Nevada establishment. Harrah's answered with a general demurrer, which contended that Nevada law must be applied since the alleged wrongful conduct was committed in Nevada. Alternatively, it argued that since liability derived from a duty imposed by section 25602, the duty should not apply to a Nevada tavern.

The case reached the supreme court after the demurrer was first sustained by the trial court but later reversed by the court of appeal. The court determined that there was an apparent true conflict because each state had an interest in applying its law to the case. It stated that when reexamination of the interests did not result in a more restrained interpretation that avoided the conflict, the comparative impairment approach should be used to apply the law of the state "whose interests would be the more impaired if its law were not applied." Concluding that California law should apply, the court reasoned that even a restrained interpretation of California's interest in protecting the general public from injury by intoxicated persons must reach an out-of-state defendant who regularly solicits business from California residents.

This Note will focus on two questions raised by the court's analysis of the choice of law problems in *Bernhard*: Was *Bernhard* really a true conflict? 

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5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971), the court considered this section and held that a tavern's sale of liquor to an intoxicated customer could be the proximate cause of the subsequent injury to a third party by the customer.

10. 16 Cal. 3d at 318, 323, 546 P.2d at 722, 726, 128 Cal. Rptr. at 218, 222. The contention was summarily rejected. *Id.* at 323 n.3, 546 P.2d at 726 n.3, 128 Cal. Rptr. at 221 n.3. See also Moore v. Greene, 431 F.2d 584, 590 (9th Cir. 1970).

11. 16 Cal. 3d at 316, 546 P.2d at 720, 128 Cal. Rptr. at 216.

12. Plaintiff's complaint was dismissed without leave to amend by the trial court. The court of appeal reversed, using interest analysis to decide that the case was a true conflict. *Bernhard v. Myers*, 117 Cal. Rptr. 351, 353-55 (3rd Dist. 1974) (opinion vacated). The court applied California law, not on the basis of comparative impairment, but because of the forum's interest in applying its law, the place of the injury, and Cavers' first preference principle. *Id.* at 355-56. See also D. Cavers, *The Choice of Law Process* 139-41 (1965).

13. 16 Cal. 3d at 318-19, 546 P.2d at 722, 128 Cal. Rptr. at 218.

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

15. *Id.* at 322-23, 546 P.2d at 725, 128 Cal. Rptr. at 221.
conflict? If so, was the comparative impairment technique for resolving true conflicts used correctly?

I. Was Bernhard a True Conflict?

a. Apparent True Conflict

The greatest contribution of the governmental interest approach has been the identification of false conflicts\(^\text{16}\)—cases in which only one state has an actual interest in having its rule applied.\(^\text{17}\) If a false conflict exists, the forum court can apply the law of the interested state without subordinating the law or policy of any other state. When application of the law of each state involved in a case would advance the policies of that state, however, each state has a legitimate interest and an apparent true conflict exists.\(^\text{18}\)

In Bernhard the court first examined the policy behind Nevada's rejection of civil liability for tavern owners who serve intoxicated patrons.\(^\text{19}\) The Nevada Supreme Court has articulated the Nevada policy as based on a desire to protect Nevada bars from extensive liability.\(^\text{20}\) The California Supreme Court rightly concluded that Nevada has an interest in applying this defendant-oriented rule since Harrah's is a Nevada corporation and the tortious conduct occurred in Nevada.\(^\text{21}\)

California, on the other hand, imposes liability to implement a policy of protecting the public "from injuries to person and damage to prop-

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18. Currie, Notes on Methods, supra note 17, at 178-79. Professor Currie's final form of governmental interest analysis was a six-step process: (1) Forum law generally applies; (2) when foreign law is asserted, the forum state examines its policies and determines if the relation of the forum to the case is such that the state has an interest in applying its law to advance those policies; (3) the same analysis is performed for the foreign state; (4) if there is no forum interest but there is a foreign interest, the foreign rule applies; (5) where both the forum and the foreign states have interests, there is an apparent conflict, and the forum reexamines its interest to see if a more restrained interpretation of the state's interest in asserting its policy can avoid a conflict; and (6) in the case of an unavoidable true conflict the forum applies its own law. Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROB. 754, 757-58 (1963). See also B. Currie, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).
20. Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358, 359 (1969). The Nevada court also noted that the legislature had implicitly decided against civil liability, since a statute regulating service of liquor to minors imposed liability while the statute dealing with drunks or alcoholics did not. Id. at 101, 450 P.2d at 360.
21. 16 Cal. 3d at 316, 546 P.2d at 720, 128 Cal. Rptr. at 216.
The liability rule, promulgated in *Vesely v. Sager*, has two policies: (a) to increase highway safety and deter drunken driving by regulating the conduct of the supplier of the liquor; and (b) to increase the possibility of full compensation to injured California residents by adding the tavern as a codefendant. The court concluded that California has an interest in applying its rule when a California resident is injured by an intoxicated Californian on a California highway. *Bernhard* is thus an apparent true conflict, since both Nevada and California have interests in applying their respective rules. This conclusion, however, does not end the possibility that the conflict can be avoided.

b. Restrained Interpretation and False-False Conflicts

Even though an apparent true conflict exists, it may nevertheless be resolved by a more restrained interpretation of the forum state's interests. In effect, the court recognizes that a true conflict of state policies exists, but it adopts a narrow view of the forum state's interests. The case may then be readily resolved as a false conflict. The process has been described as the identification of a false-false conflict.

The court in *Bernhard* could have avoided a true conflict by a restrained interpretation of California's interest in applying the *Vesely* policy. That case could have been construed narrowly to apply only where a duty is imposed on taverns by section 25602 or by a Nevada statute with a similar express purpose of protecting the general public. This argument emphasizes the importance of the deterrence pol-

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23. *Id.*
24. *Id.* at 165-67, 486 P.2d at 159-60, 95 Cal. Rptr. at 631-32.
25. 16 Cal. 3d at 318, 546 P.2d at 722, 128 Cal. Rptr. at 219.
27. Horowitz, *supra* note 17, at 743-47; *Comments on Reich*, *supra* note 6, at 633-34. For the classic example of a false-false conflict, see *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).
29. See text accompanying notes 9, 22-24 supra.
icy at the expense of the compensation policy.\textsuperscript{32} Thus under this interpretation California would not have an interest in applying its deterrent and compensation policies unless tavern owners were subject to a statutory duty.

The above approach was available to the court, which recognized that section 25602 could not be given extraterritorial effect because it is a criminal statute.\textsuperscript{33} Although Nevada's section 202.100, in effect at the time of the accident but subsequently repealed,\textsuperscript{34} was similar to section 25602, it was not based on similar policies. Its language and legislative history indicate that its primary purpose was to protect not the general public, but the immediate family of habitual drunkards by prohibiting bars from providing liquor to alcoholics after notification by the family or a peace officer.\textsuperscript{35} Since Nevada bars do not have a duty similar to that imposed by section 25602, California does not have an interest in applying its deterrence policy under the suggested restraint. Accordingly, Nevada law should apply. This option was rejected, however, by a finding that although \textit{Vesely} imposed liability based on section 25602, it also recognized a common law duty\textsuperscript{36} based on general principles of negligence and Civil Code section 1714.\textsuperscript{37} Thus the court was self-constrained to treat the dispute as a true conflict.\textsuperscript{38}

\section*{II. Was Comparative Impairment Used Correctly?}
\vspace{-0.5em}

\textbf{a. Application of Comparative Impairment in Bernhard}

The comparative impairment technique for resolving true conflicts seeks to accommodate conflicting state policies by allocating spheres of

\begin{itemize}
\item \textsuperscript{32} This emphasis is not unreasonable in light of \textit{Bernhard}'s focus on the deterrence policy. 16 Cal. 3d at 322-23, 546 P.2d at 724-25, 128 Cal. Rptr. at 220-21.
\item \textsuperscript{33} \textit{Id.} at 323-24, 546 P.2d at 726, 128 Cal. Rptr. at 222.
\item \textsuperscript{34} The statute made it a misdemeanor to sell "any intoxicating liquor to any person who is drunk or any person known . . . to be a habitual drunkard." Ch. 151, 1911 Nev. Stats. 313, \textit{as amended} (Nev. Rev. Stat. § 202.100 (1967)), \textit{repealed by} ch. 604, § 8, 1973 Nev. Stats. 1062.
\item \textsuperscript{35} Section 202.100 was originally enacted with the following purpose clause:
\begin{quote}
Giving Liquor to Habitual Drunkards
An Act to make criminal the selling . . . of . . . liquors to habitual or common drunkards or dipsomaniacs who are members of families and who are, when drunk, menaces to the life, health or peace of their families or who when lawfully bound to do so, fail to provide for their families the common necessities of life.
\end{quote}
\textit{Id.}
\item \textsuperscript{36} 16 Cal. 3d at 324-25, 546 P.2d at 726-27, 128 Cal. Rptr. at 222-23.
\item \textsuperscript{37} \textsc{Cal. Civ. Code} § 1714 (West 1973).
\item \textsuperscript{38} The court's reliance on Harrah's extensive activity in California suggests that even under the restrained interpretation suggested above, the case could be treated as a true conflict by considering Harrah's to be, in effect, a California tavern subject to section 25602. \textit{See} 16 Cal. 3d at 322, 546 P.2d at 725, 128 Cal. Rptr. at 221.
\end{itemize}
influence to the interested states in their regulation of conduct. It assumes that if the legislatures had actually negotiated the scope of their laws, they would have agreed to apply the law of the state whose interest would be more impaired if its law were not applied.

The court's conclusion that California's regulatory interest "would be very significantly impaired if its policy were not applied to defendant" deserves examination. It has already been pointed out that California's liability rule is based on policies of both deterrence and compensation.

The purpose of the deterrence policy is to prevent intoxicated driving, not to regulate taverns per se. Drunken driving, however, can also be deterred by intoxicated driving statutes and by the civil liability imposed upon the defendant driver. Both are available under Nevada law. Therefore, even though the method may not be as effective as dram shop liability, California's interest in the prevention of drunken driving is advanced under Nevada law.

Similarly, California's policy of compensation might also have been fulfilled had the defendant driver carried enough insurance to compensate the plaintiff fully. The court did not discuss the driver's capability for compensation, since she was not a party to the appeal. Therefore, the actual degree of impairment of California's compensation interest under Nevada law is unknown. California's interests do not appear to be as seriously impaired under Nevada law as the court believed.

The impairment of Nevada's interests under California law should now be considered. Those interests appear much stronger than Bernhard indicates. Both the Nevada Supreme Court and Legislature have declined to impose liability on dram shops.

39. Id. at 320-21, 546 P.2d at 723-24, 128 Cal. Rptr. at 219-20; Baxter, supra note 3, at 12; Horowitz, supra note 17, at 751-53.
40. Baxter, supra note 3, at 12-18.
41. 16 Cal. 3d at 323, 546 P.2d at 725, 128 Cal. Rptr. at 221 (emphasis added).
42. See text accompanying notes 22-25 supra.
45. For a comparison between drunk driving statutes and dram shop acts, see Comment, Driving Under the Influence of Alcohol: A Wisconsin Study, 1970 Wis. L. REV. 495. The actual effectiveness of dram shop liability laws is unknown. Id. at 510-12; U.S. DEP'T OF TRANSPORTATION, ALCOHOL & HIGHWAY SAFETY, A REPORT TO THE CONGRESS FROM THE SECRETARY OF TRANSPORTATION 75 (1968).
46. Although California's compensation policy would always conflict with Nevada's rule, the relative impairment of California's interest must depend upon the actual facts of the case. See Baxter, supra note 3, at 9-13.
has approached the problems of drunken driving and alcoholism by dealing directly with the intoxicated person.\textsuperscript{48} If Nevada protects its taverns from liability to its own residents, it has an even greater interest in preventing their liability to out-of-state residents.\textsuperscript{49} Moreover, \textit{Bernhard}'s reference to the duty found in section 202.100 is incorrect since it was aimed at the local alcoholic and never intended to be applied to strangers.\textsuperscript{50} In addition, the statute had been repealed in 1973, after the accident but well before \textit{Bernhard} was decided; the repealing act removed all criminal sanctions for alcoholic abuse and established medical treatment instead.\textsuperscript{51} \textit{Bernhard}'s application of California law, therefore, appears seriously to impair Nevada's expressly articulated policy.

The foregoing analysis raises doubts about the correctness of the court's use of comparative impairment to resolve the conflicting state policies. The application of California law seriously impairs Nevada policy, even where the Nevada tavern actively solicits California business.\textsuperscript{52} In contrast, California's policies of deterring intoxicated driving and compensating injured residents can still be advanced under Nevada law. In sum, it appears that the court's case for applying California law to the dispute is overstated at best.\textsuperscript{53}

\textsuperscript{48} See Little, \textit{supra} note 43, at 191-92.

\textsuperscript{49} It is possible that Nevada's policy was adopted primarily to protect the large clubs in Reno, Las Vegas, and Tahoe, which attract out-of-state residents and provide much of the state's revenue.

\textsuperscript{50} There is only one mention of the words “any person who is drunk” as opposed to six references to “habitual drunkards or dipsomaniacs” and five references to “husband and father.” Ch. 151, 1911 Nev. Stats. 313, \textit{as amended} (\textit{NEv. REV. STAT.} \textsection 202.100 (1967)), \textit{repealed} by ch. 604, \textsection 8, 1973 Nev. Stats. 1062.


\textsuperscript{53} An analogy may be drawn to People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480 (1957). The case involved a car bought in Texas and then used to transport marijuana in California without the knowledge of the Texas mortgagee. California law required the forfeiture of any security interest unless the mortgagee had investigated the purchaser's character and other relevant factors. The mortgagee did not have reason to investigate the purchaser's character or to expect that California law would apply. The court applied Texas law, because Texas' interest in upholding sales transactions would be seriously impaired if its residents had to investigate the laws of every other state. California's policy excused innocent mortgagees and was not impaired since the interest of the wrongdoer was still forfeited. The use of cars for criminal purposes could still be deterred through regulation of California mortgagees. \textit{Id.} at 598-99, 311 P.2d at 481.

California may also achieve its purpose in \textit{Bernhard} through alternate means unless the defendant driver is uninsured or unable to compensate fully the plaintiff. Although
b. Usefulness of Comparative Impairment in Resolving True Conflicts

There has been extensive debate among conflicts scholars on the proper use of governmental interest analysis to resolve true conflicts. Since the California Supreme Court has adopted comparative impairment as the means of resolving true conflicts, an examination of its utility is appropriate.

To illustrate the method's approach to difficult problems and to examine its effectiveness, comparative impairment will be applied to hypothetical situations based on the Bernhard facts. The results will be compared with Professor Currie's rule that a forum should apply its own law if a true conflict cannot be avoided by a restrained interpretation of the forum's interest. It has been suggested that comparative impairment avoids forum shopping and improves primary predictability (legal outcome known at the time of the conduct). If the method is difficult to apply where the interests are closely balanced, however, the case might lose not only primary but also secondary predictability (legal outcome in the particular forum known since the lawsuit was begun). In contrast, Currie's forum-preference rule guarantees secondary predictability. Moreover, if a forum's bias for its own policies influences choice of law under comparative impairment, forum shopping may still occur. The marginal increase in fairness under comparative impairment thus may not be worth the price of increased complexity and loss of predictability that may result from an abandonment of a forum-preference rule for true conflicts.

The following analysis will use the court's reasoning in Bernhard rather than that suggested above in sections I and II of this Note. The hypothetical cases vary the following factors: (a) residence of the plaintiff; (b) residence of the intoxicated driver; (c) location of the defendant tavern; (d) location of the accident; and (e) forum state. Harrah's has greater contact with California than does the mortgagee, it also expects Nevada law to apply to its conduct in Nevada.


56. See note 18 supra.

57. Baxter, supra note 3, at 3-22.

58. Symposium, Round Table, supra note 26, at 224-25.

59. These are typically used to analyze conflicts problems. See, e.g., Baxter, supra note 3, at 9-16; Currie, Contracts, supra note 55, at 231; Symposium, Round Table, supra note 26, at 215-20.

60. This last factor will test Baxter's argument that the comparative impairment technique is independent of choice of forum. Baxter, supra note 3, at 9.
The factors can be either domestic (D) or foreign (F); in the *Bernhard* case California is taken as the domestic state.

Variation of these 5 factors\(^6\) creates 32 possible hypothetical cases, presented in Table 1 with *Bernhard* as hypothetical 25. Not all of the hypotheticals are true conflicts, however; therefore, they are arranged in sets that can be resolved by similar reasoning. Table 1 also indicates the law that should be applied to the false conflicts.

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61. Currie generated the hypothetical cases from an all-domestic case by varying only one factor at a time, then two, and then progressively varying additional factors. *Currie, Contracts, supra* note 55, at 233. Table 1 rearranges them as Currie did in his later tables.
Set A removes the hypothetical cases where the plaintiff, intoxicated driver, and tavern all reside in the same state. Governmental interest analysis dictates that the law of that state should apply to these false conflicts.\(^6\)

In Set B both the plaintiff and the tavern are in the same state; the law of that state ought therefore to apply.\(^6\) One could argue that California's deterrence policy gives it an interest in cases 11 and 15, since the accident occurred in California with an intoxicated California driver.\(^6\) California, however, has other means of preventing intoxicated driving;\(^6\) its ability to regulate California taverns will not be diminished if liability is not imposed here.\(^6\) California has no interest in compensating a Nevada plaintiff in disregard of Nevada's policy to protect its taverns.\(^6\)

The hypothetical cases in Set C are apparent true conflicts since they involve a foreign plaintiff and a domestic tavern. They can be resolved, however, as false conflicts since application of California law will not impair Nevada's interests.\(^6\) The California tavern ought not object to being held to the higher duty imposed by its own state, even

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65. See notes 43-45 supra and accompanying text. One alternative is to apply Nevada law to the tavern while using California law between the other parties. See Brinkley & West, Inc. v. Foremost Ins. Co., 499 F.2d 928, 934-35 (5th Cir. 1974); Note, Heads: Lex Locii Delicti; Tails: Lex Locii Domicile, 51 Den. L.J. 567, 579 (1974).


68. Nevada's policy is not to deny compensation to injured plaintiffs, but to protect Nevada taverns. It has no interest in extending this protection to California taverns. See Hurtado v. Superior Court, 11 Cal. 3d 574, 585-86, 522 P.2d 666, 673, 114 Cal. Rptr. 106, 113; Note, Measure of Damages, supra note 17, at 76-79.
in case 24. The tavern might argue in cases 17-20 that California does not have an interest in benefiting a foreign plaintiff at the expense of a California resident, especially when the accident occurred outside California (19 and 20). A refusal to apply California law based solely on the residence of the plaintiff (see cases 1, 2, 9, and 10), however, might be a denial of equal protection.  

Set D presents the remaining eight hypothetical cases, which involve a domestic plaintiff and a foreign tavern. These are the only true conflicts. In using comparative impairment and Currie's forum-preference rule to analyze these cases, it will be useful to consider the bar's activity in advertising in California and soliciting California customers. A factor will be added to represent either a bar engaging in a large amount of California solicitation (L) or a bar with a small amount of California activity (S). This factor splits Set D into 16 cases, as shown in Table 2. Hypotheticals with the same facts but different forms will be analyzed together by comparative impairment.  

Case 25a is Bernhard, and California law applies. A Nevada court should reach the same result in 29a. Cases 25b and 29b change the extent of the bar's California activity and consequently weaken

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<th>Law Applied</th>
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* Factor Key:  
P—plaintiff's residence  
D—intoxicated driver's residence  
B—location of the bar  
A—location of the accident  
F—forum  
S—scope of the bar's California activity

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70. Currie & Schreter (now Kay), Unconstitutional Discrimination in the Conflict of Laws: Equal Protection, 28 U. Chi. L. Rev. 1, 11-13, 41-42 (1960); Sedler, Sym-
California's deterrence interest. A California court might emphasize the similarities to *Bernhard* and apply California law in 25b since the hypothetical is well within the broadest limits of California's policy.\(^1\)

A Nevada court would focus on the tavern, which has not sought California business, and conclude that its policy of limited liability would be seriously impaired unless Nevada law were applied in 29b.\(^2\)

The conflicting equities make comparative impairment difficult to apply here, and it is unlikely that both forums would reach the same result.

California retains both compensation and deterrence interests in hypotheticals 26 and 30. Its interest in protecting its residents from drivers who become intoxicated in Nevada should be independent of the driver's residence. If the tavern solicits extensive California patronage, it can anticipate potential liability and get insurance; thus California law should apply in case 26a. A Nevada bar, however, which does not have a Nevada duty to refuse to serve intoxicated Nevada patrons, does not expect them to go to California and injure California residents.\(^3\)

Because the drunken driver's residence is irrelevant, to apply the above argument would mean that the bar becomes liable for any intoxicated patron who happens to drive to California, despite Nevada law that denies both civil liability and any duty whatsoever. Since California can enforce its deterrence policy by other means,\(^4\) it seems unlikely that a Nevada court would apply California law in case 30a unless the plaintiff could not recover from the intoxicated driver. The serious impairment of the foreign policy leads easily to the conclusion that courts in either forum would apply foreign law in cases 26b and 30b, where the bar's California activity is decreased.

Hypothetical cases 27 and 31 change the location of the accident to the foreign state. A dictum in *Bernhard* implies that California's deterrence policy might not reach a Nevada accident,\(^5\) but that California retains a compensation interest.\(^6\)

Furthermore, *Bernhard* has imposed a duty, at least for the large bar (27a and 31a), to refrain from serving intoxicated California residents because they are likely to drive into California while still intoxicated.\(^7\)

Nevada has a strong in-
interest in applying its pro-defendant rule to a Nevada defendant when both the wrongful conduct and the accident are foreign factors. Although it is a closely balanced case, a California court might follow Bernhard's reliance on the bar's extensive California activity to minimize the impairment of Nevada policy and accordingly apply California law in case 27a. Case 31a suggests that a Nevada court would reach the opposite result by recognizing the use of territorialism to decide cases with closely balanced interests. In cases 27b and 31b the small bar is unlikely to have a serious impact on the number of intoxicated drivers in California; Nevada law should therefore apply.

California's interest in full compensation for the California plaintiff might be sufficient to justify application of California law in case 28a. Nevertheless, its deterrence interest would not be seriously impaired under foreign law. Nevada's interest is considerably stronger in this hypothetical case than in Bernhard since all other factors are foreign. Comparative impairment indicates that foreign law should apply in hypothetical cases 28a, 28b, 32a, and 32b.

A court using pure interest analysis as formulated by Professor Currie to resolve these true conflicts would first reexamine the forum's interest to see if a more restrained interpretation avoids the conflict. If not, it would then apply the forum's law. Therefore, a domestic forum would apply its law to cases 25a-28b unless this result is considered unfair to small bars. California's interest in applying its liability rule to foreign taverns could be restrained to those cases involving an accident in California or a tavern with extensive California activity. Given Nevada's policy of protecting its bars, the court would avoid the conflict and apply foreign law in 28b and perhaps in 27b. A foreign forum would be unlikely to restrain its interest except perhaps for case 29a. It could adopt an interpretation that Nevada had no interest in limiting the liability of a bar with extensive California activity that serves an


79. See Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 721-22, 733, 101 Cal. Rptr. 314, 320-21, 329 (2d Dist. 1972), involving similar factors except that Remington, and not the Mexican subsidiary that committed the tort, was the named defendant. The case may be regarded as a true conflict in which the court implicitly ruled that comparative impairment of Mexico's policy would be slight. See Horowitz, supra note 17, at 751-52.


81. See Couch, supra note 78, at 9.

82. Currie, Notes on Methods, supra note 17, at 179.
intoxicated California patron. The repeal of section 202.100 and the explicit policy statement of Hamm v. Carson City Nugget, Inc. make this conclusion doubtful. Therefore, foreign law should apply in hypotheticals 29a through 32b.

This analysis suggests the unlikelihood of California's rule of dram shop liability being applied to Nevada taverns that do not solicit California business. Indeed, the case may never arise since a California court may not have jurisdiction over a Nevada tavern that lacks California contacts. On the other hand, Nevada clubs with extensive California activity like Harrah's must expect liability for any injury to a California resident in California regardless of the residency of the intoxicated driver. Similarly, California law would probably not apply to a Nevada accident that does not involve two California drivers.

Turning finally to an assessment of the utility of comparative impairment, one notes, initially, the difficulty of determining the relative impairment of policies in closely balanced cases. It is quite doubtful that courts of different interested states would arrive at the same judgment, even though the method is supposed to be forum-independent. The promise of neutrality, although attractive, is deceptively simple; the comparative impairment technique conceals value judgments made by the forum in determining the degree of impairment and relative importance of the conflicting policies. It thus appears doubtful that the technique provides greater secondary predictability for choice of law than a forum-preference rule. Besides being difficult to predict, comparative impairment cases will require detailed and careful reasoning by the trial judge. The difficulty of the reasoning process is illustrated by the suggestion in section IIa of this Note that the application of comparative impairment in Bernhard itself is incorrect, even though the court's ultimate result is easily justified under Currie's approach. Appeals will be encouraged since, as the analysis of the hypothetical cases indicates, it is easy to change the relative impairment by placing a different emphasis on the interests involved. Thus the method's high degree of sensitivity to competing policies will create reasonable and fair results only to the extent that attorneys effectively present the governmental interests involved in a case. In the final analysis, since unreasonable

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84. Professor Currie argued that courts should not choose between true competing states' interests because they do not have the resources to develop the necessary facts and because this choice is a political function. Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. Chi. L. Rev. 9, 9-12 (1958); Currie, Third State, supra note 18, at 759-64. But see Baxter, supra note 3, at 18-19; Traynor, Conflict of Laws, 49 Calif. L. Rev. 845, 852-55 (1961).
86. See Note, After Hurtado and Bernhard, supra note 52, at 145-54.
87. Note, Lex Loci Delicti, supra note 69, at 584.