April 1967

False Conflicts

Peter Kay Westen

Follow this and additional works at: https://scholarship.law.berkeley.edu/californialawreview

Recommended Citation
Peter Kay Westen, False Conflicts, 55 Calif. L. Rev. 74 (1967).

Link to publisher version (DOI)
https://doi.org/10.15779/Z38H47M

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
FALSE CONFLICTS

Rien ne semble vray, qui ne puisse sembler faux.†

On May 3, 1958, Harry Goldberger, a resident of New York, sold a 1950 Mercury registered in his name to Joseph Rivera, also a resident of New York. Although he endorsed the registration cards at the time of sale, Goldberger delivered the car to Rivera without removing the New York license plates registered in his name. Twenty-seven days later, on a rainy night in the District of Columbia, Rivera collided with a truck driven by an agent of Rawlings Truck Line, Inc. David Williams, a passenger in Rivera's car and a resident of New Jersey, filed suit for alleged injuries in the district court for the District of Columbia against Rawlings Truck Line, Inc. Unable to locate Rivera, Williams traced registration tags on the passenger car to Goldberger, whom he included in the suit as a proper party defendant.¹

The trial court directed the verdict in favor of Goldberger, by finding that he was not an “owner” within the meaning of the District of Columbia Financial Responsibility Law. On appeal, in Williams v. Rawlings Truck Line, Inc.,² the Circuit Court for the District of Columbia issued a per curiam decision reversing the verdict in favor of Goldberger by finding that he was an “owner” within the meaning of the New York Vehicle and Traffic Law. The case seemed to present a choice-of-law problem. For under District law, a registered owner is permitted to overcome the presumption of legal ownership by showing passage of equitable title, while under New York law he is estopped from denying ownership. The court resolved the problem by identifying the case as a “false conflict,”³ namely an instance where only one state—in this case New York—maintains an “interest”⁴ in having its law applied.

In sum, this case presents a classic “false conflicts” situation. Adoption of the New York doctrine of estoppel will further the interests of New York, but will not interfere with any of the articulated policies of the District of Columbia. On the other hand, application of the District’s rule allowing proof of sale would impinge upon New York’s interests, without furthering any of the recognizable policies of the District. As a false conflicts case, our decision becomes simple: we apply the estoppel rule of New York, the only jurisdiction with an interest

† 3 Montaigne, Les Essais ch. XII, at 179 (1739).
¹ For a detailed statement of the facts of the case, see Brief for Appellees, John Willis and Rawlings Truck Line, Inc., pp. 1-5, Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C. Cir. 1965).
² 357 F.2d 581 (D.C. Cir. 1965).
³ Id. at 586.
⁴ Ibid.
in having its law applied to the issue of defining ownership of the vehicle.\(^5\)

The court then remanded the case to the trial court for hearing on the second choice-of-law issue, namely whether New York or District law applied to the question of liability.

Two things should be noted at the outset. First, despite the language of the court in *Williams*, there is as yet no such thing as a "classic" false conflicts situation;\(^6\) and second, were such a situation before the court, its disposition would by no means be "simple."\(^7\)

The concept of "false conflicts" came into the choice-of-law world through a series of articles written by Professor Brainerd Currie between 1958 and 1965.\(^8\) Other commentators have since asserted that the idea of false conflicts is an old concept which Currie simply clothed in new terminology.\(^9\) Professor Cavers did, in fact, propose an approach to choice-of-law problems in 1933 which was very similar in principle and wording

\(^5\) Id. at 586. (Emphasis added.)


\(^7\) See analysis of the *Williams* case in text accompanying notes 124-43 infra.


to the one advanced by Currie.\textsuperscript{10} Currie, however, was the first to analyze systematically the disposition of what he called "false problems."\textsuperscript{11} The phrase "false conflicts" which Currie himself never used, has nonetheless been consistently attributed to him by others.\textsuperscript{12} While most commentators agree on the disposition of "false conflicts" cases,\textsuperscript{13} they have not yet agreed when such cases—not to mention "classic" false conflicts cases—may occur.\textsuperscript{14} Nor have they agreed on terminology. Hereinafter, the phrase "false conflicts" will be used to group together what have been variously called "false problems,"\textsuperscript{15} "spurious conflicts,"\textsuperscript{16} "illusory conflicts,"\textsuperscript{17} "apparent conflicts,"\textsuperscript{18} "avoidable conflicts,"\textsuperscript{19} "pseudo conflicts"\textsuperscript{20} and "superficial conflicts."\textsuperscript{21}

In his book, \textit{The Choice-of-Law Process}, Professor Cavers enumerates four kinds of "false conflicts":\textsuperscript{22}

1. Cases in which the laws of both states are the same.\textsuperscript{23}

---


\textsuperscript{14} Leflar, \textit{supra} note 6, at 260-70, 270 n.19.


\textsuperscript{17} Weintraub, \textit{A Method for Solving Conflict Problems}, 21 U. Pitt. L. Rev. 573, 574 (1960).


\textsuperscript{20} Ehrenzweig, \textit{Conflict of Laws} § 102, at 310 (1962).


\textsuperscript{22} Cavers, \textit{The Choice-of-Law Process} 63-64, 89-90 (1965).

\textsuperscript{23} Ehrenzweig limits the meaning of "false conflicts"—or "pseudo conflicts," as he calls them—to "cases where there [is] no difference, existing or alleged, between any of the potentially applicable laws . . . ." Ehrenzweig, \textit{Conflict of Laws} § 175, at 466 (1962).
2. Cases in which the laws of two states, though different, yield identical results with respect to the specific issue before the court.

3. Cases in which two states have different laws, but only one state has an interest in having its law applied. This is the case Currie referred to as a "false problem," and one which the court in Williams v. Rawlings Truck Line, Inc. identified as a "classic 'false conflicts' situation."24

4. Cases in which states with different laws both have an interest in applying their own law, but in which "the forum [is] prepared, when the circumstances warrant, to give a moderate and restrained interpretation to the policy or interest of one state or the other and thus avoid the conflict."25

Three more situations, not discussed by Cavers, have been referred to by other commentators as "false conflicts" and should be added to the list:

5. Cases in which the laws of two states are involved, but neither has an interest in having its law applied. Related to this is the case of a disinterested forum confronting a true conflict between two other states but having itself no rational preference for one rather than the other law.26

6. Cases in which foreign law (or forum law, as the case may be) is referred to not for the rule of decision, but as a datum for the state applying its law.27

"True conflicts [are such] in the sense that they require a choice between the law of the forum and one or more foreign different rules that purport to be applicable to the particular issue." Id. § 103, at 311. For comment on the value of such "pseudo conflicts" as choice-of-law precedent, see Ehrenzweig, The "Most Significant Relationship" in the Conflicts Law of Torts, 28 LAW & CONTEMP. PROB. 700, 701 (1963).

24 In the words of Professor Currie: "[E]ach is a case in which potentially (or conventionally) significant factors are associated with more than one state. They do not, however, present real problems, because they do not involve conflicting interests of the respective states. It is perfectly clear what the result should be in each. Either state, though approaching the case with no other purpose than to advance its own interests, would reach that result." Currie, Married Women's Contracts: A Study in Conflict-of-Laws Method, 25 U. CHI. L. REV. 227, 251-52 (1958). "When one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, there is no real problem; clearly the law of the interested state should be applied." Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. CHI. L. REV. 9, 10 (1958).


26 For the case where neither state has an "interest" in applying its law to the issue before the court, see Currie, Survival of Actions: Adjudication versus Automation in the Conflict of Laws, 10 STM. L. REV. 205, 229 (1958). For a discussion of the "disinterested forum," see Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROB. 754 (1963).

7. Cases in which the law of only one of several contact-states has been pleaded.28

Extensive discussion of Currie's "governmental-interest analysis"29 and of his approach to the disposition of "true conflicts"30 is beyond the scope of this Comment. That debate has been conducted elsewhere.31 Rather it is the purpose of this Comment to analyze the seven false conflicts situations described above, particularly with reference to the Williams case, by inquiring into what they have in common, and how they might best be resolved.

I

ABSENCE OF CONFLICTING INTERESTS

AND THE FINDING OF FALSE CONFLICTS

The concept of "false conflicts" enjoys protean facility for justifying everyman's choice-of-law theory.28 Members of the choice-of-law guild who discover a rational solution for a conflicts problem, tend to characterize the problem as a "false conflict." Although one member may criticize another for his finding of a false conflict, or for his approach to its solution, few have criticized the concept itself.33 Each seeks instead to incorporate it into his own method.

---


30 Currie was the first to divide the choice-of-law world into hemispheres of "false conflicts" and "true conflicts." Currie, Married Women's Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227, 251-63 (1958). To the extent that false conflicts and true conflicts together are all-inclusive and individually are mutually exclusive, the single problem in choice of law today is deciding where to draw the line between them.


32 For commentators using "false conflicts" or related terms, see notes 15-21 supra.

33 For extensive discussion of one particular substantive area, usury, in terms of false conflict analysis, see Comment, Usury and the Conflict of Laws: The Doctrine of the Lex Debtoris, 55 Calif. L. Rev. 123, 188-97 (1967).
Originally, the idea of false conflicts developed as part of Professor Currie's governmental-interest analysis. He claimed, in fact, that "the clearest contribution of governmental-interest analysis to conflict of laws method is that it establishes the existence of . . . false [conflicts] and provides a workable means of identifying them." The connection, however, between governmental-interest analysis and a finding of false conflicts is hardly fortuitous. The latter is rather a product of the former. To speak of governmental-interest analysis as a "workable means of identifying" false conflicts is to suggest that false conflicts "exist" somehow independently from the process which establishes them. To the extent that a finding of false conflicts is a product of governmental-interest analysis, it is both improper and misleading to divorce that finding from the process which creates it.

Professor Currie introduced his analysis by dividing the choice-of-law world at the outset into "true" and "false" conflicts. True conflicts were said to include those cases where the laws of "interested" states

---

34 Currie, The Disinterested Third State, 28 Law & Contemp. Prob. 754, 756 (1963). "Minimization of conflicts problems by weeding out 'false conflicts,' a technique not yet adequately developed, should be one of the most fruitful and expandable methods of simplifying choice of law." Leflar, supra note 31, at 289. "It should be apparent from the foregoing discussion that Professor Currie's analysis is particularly useful in eliminating false conflicts from cases where only one state's policy is relevant." M. Traynor, supra note 31, at 851. "One of the great virtues of Currie's thesis, it seems to me, is that it enables us to distinguish those cases and situations where there are real conflict problems, actual clashes of different states' policies . . . from [false] conflict cases . . . ." Kramer, supra note 31, at 531. Contra, Hill, supra note 31, at 495.


36 For inconsistencies that result when governmental-interest analysis is dissociated from the concept of false conflicts, see text accompanying notes 180-234 infra.

37 Currie himself used a slightly different terminology by speaking of "true conflicts" on the one hand and "false problems" on the other. Currie, Married Women's Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227, 254, 263 (1958). Currie later modified this rigid dichotomy by introducing a third class of cases: "In this paper I have mentioned three classes of cases: (1) Those in which analysis indicates that only one state has an interest in the application of its policy; (2) those in which it appears that each state would be constitutionally justified in asserting an interest, but on reflection conflict is avoided by a moderate definition of the policy or interest of one state or the other; (3) those in which a conflict of interests persists despite efforts to avoid it by moderate definition of policies and interests. In the past I have enjoyed saying that the problems of conflict of laws consist of (1) false problems and (2) problems that cannot be solved except by political action . . . . Rather plainly, however, it is not helpful to speak of the cases of the second class as 'false problem' cases." Currie, The Disinterested Third State, 28 Law & Contemp. Prob. 754, 763-64 (1963).
conflict. False conflicts, on the other hand, constituted those cases where the laws of interested states do not conflict, either because only one state is found to be interested, or because the laws of several interested states are found to be compatible.\textsuperscript{38} In applying Currie’s method, a court therefore makes a twofold finding: first, whether more than one state is “interested” in the outcome of the pending suit; and second, given several interested states, whether their laws in fact conflict.\textsuperscript{39}

Currie’s elusive concept of an “interested” state has not escaped criticism.\textsuperscript{40} To say that a state is “interested” in the disposition of a particular case is not to say that its citizens or public officials will in any way take notice of the litigation.\textsuperscript{41} Saying a state is “interested” in a particular suit is legal shorthand for saying that it is interested in having its law applied to the facts of that case. A state is interested in applying its law to a suit when policies underlying that law would thereby be furthered. Policies underlying a law, in turn, are furthered when that law is applied to factual contexts which it was intended to resolve. Differently phrased, a state is interested in applying its law to a particular case when it can be said that the law was designed to encompass the facts of just such a case. Laws of a state, in turn, are not designed to dispose of all conceivable cases,\textsuperscript{42} but only of those having factual contact with the state such that it may be affected by the outcome of the suit. A state is so affected when one of the persons it presumes to protect is a party to

\textsuperscript{38}I have suggested that, in the light of [governmental-interest analysis], some typical choice-of-law problems fall into two classes: (1) false problems and (2) problems which are insoluble by any conceivable conflict-of-laws method. When one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, there is no real problem; clearly the law of the interested state should be applied . . . . When each of two states related to a case has a legitimate interest in the application of its law and policy, a problem is presented which cannot be rationally solved by any method of conflict of laws . . . .” Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. CHI. L. REV. 9, 10 (1959).


\textsuperscript{41} “The chief hazard, as I see it, may spring from the misleading air of substantiality that the term ‘interest’ exudes. It suggests that the state’s concern . . . is comparable to the state government’s interest in the achievement of public objectives it is actively pursuing or would vigorously defend.” CAVES, THE CHOICE-OF-LAW PROCESS 100 (1965).

FALSE CONFLICTS

the dispute,\(^{43}\) when misconduct it finds culpable transpired within the state,\(^{44}\) when its courts are invoked to resolve a dispute which it wishes to avoid,\(^{45}\) or when persons with a financial stake in the litigation are residents of the state.\(^{46}\)

The usefulness of Currie's method depends ultimately on its success in establishing meaningful criteria for identifying "governmental interests."\(^{47}\) In those rare cases where a state statute is accompanied by a statement of purpose outlining the extent to which it is to be applied to multi-state situations,\(^{48}\) the courts have some guidance in defining governmental interests. In most cases, however, where statutes are drafted in generalities,\(^{49}\) the courts—in deciding how such statutes apply to multi-state situations—must define their own criteria for determining governmental interest.\(^{50}\)

Because conflicts commentators themselves differ on what constitutes an interested state,\(^{51}\) it hardly seems surprising to find courts in disagree-

---

\(^{43}\) "Frequently it is clear that the purpose of a law is to protect . . . one of the parties to a transaction. It is equally clear that the benefit or protection is not intended for all men everywhere, but only for those who by virtue of their relationship to the state are within the legitimate scope of its governmental concern. If the policy of such laws is to be effectuated, they must be applied in such a way as to protect the intended beneficiaries." Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 *Yale L.J.* 1323, 1324 (1960). See Gore v. Northeast Airlines, Inc., 222 F. Supp. 50, 52-53 (S.D.N.Y. 1963); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 380-81, 82 N.W.2d 365, 368 (1957).


\(^{47}\) See Kramer, *supra* note 31, at 532.


\(^{49}\) "Lawgivers, legislative and judicial, are accustomed to speak in terms of unqualified generality. Apart from the imperatives, the words most inevitably found in rules of law are words like 'all,' 'every,' 'no,' 'any,' and 'whoever,'" Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. Chi. L. Rev. 227, 230 (1958).

\(^{50}\) "Even lawyer-drafted legislation usually fails to specify what factual connections with the forum call the statute into play. Indeed, only rarely is there clear indication of a policy which might be used as a premise to determine the statute's application to multi-state cases." Kelso, *supra* note 31, at 37.

ment on the same subject. Some courts define interests broadly to include almost every state which has factual contact with the case at hand; other courts construe such interests narrowly. Much discussion has already been devoted to the question whether courts are capable of, or constitutionally precluded from, "weighing" governmental interests. Whatever is meant by "weighing interests," it seems clear that normative judgments are implicit in the process of determining whether a foreign state has an interest in the disposition of a suit:

A court obviously must decide if the alleged policy of the state is in fact an existing one. The state must have an ascertainable policy, suitably expressed in its law. Next, in seeking out the reasons and governmental interests behind a state's policy, obviously a court must to a certain extent weigh and evaluate the innumerable reasons and interests which speculation and conjecture and imagination can conjure up to alert counsel and judges. Some will simply be dismissed as too fantastic, too improbable, in default of concrete evidence to the contrary. Others will be eliminated as highly unlikely. A court is bound to undertake some weighing, some valuation, some assessment of the rationality and legitimacy of the seemingly endless reasons and governmental interests which may possibly lie behind a state's policy, and to eliminate those that are too unlikely.


A Pennsylvania case\textsuperscript{57} illustrates the judicial process involved in identifying governmental interests. Plaintiffs, residents of Pennsylvania, were invited by defendant, also a resident of Pennsylvania, to fly from Pittsburgh to Miami in defendant's personally piloted plane to attend a football game. On the return trip, while flying over Georgia, the plane crashed killing all occupants. Suit was brought in Pennsylvania on behalf of the deceased passengers against the estate of the pilot. Under Pennsylvania law\textsuperscript{58} a guest may recover from his host on a showing of simple negligence. Under Georgia law\textsuperscript{59} a guest can only recover from his host on a showing of gross negligence. The trial court, assuming that Georgia law applied as the \textit{lex loci delicti}, returned a verdict in favor of the defendant. The Pennsylvania Supreme Court reversed by finding that Pennsylvania law governed the guest-host relationship.

The court specifically grounded its choice of law on "interest analysis,"\textsuperscript{60} and found that "under no stretch of the imagination can Georgia be viewed as a concerned jurisdiction... Georgia's only contact with the present case, as the situs of the accident, is wholly fortuitous..." In other words, the court determined that Georgia could have no conceivable interest in applying its guest statute to the facts at issue. The court based that determination on a finding that Georgia "in passing its statute... undoubtedly intended either to protect insurance companies from collusive suits or to prevent ungrateful guests from suing their hosts..."\textsuperscript{61} If the court correctly construed legislative intent, then no policy behind the Georgia guest statute would be served by precluding a Pennsylvania guest from suing a Pennsylvania host in Pennsylvania under a Pennsylvania insurance contract. However, it is possible that Georgia passed its statute to protect Georgia residents from rising insurance premiums, in which case it would be "interested" in preventing any recovery on an insurance contract which might affect those rates.\textsuperscript{62}

\textsuperscript{57} Kuchinic v. McCrory, 422 Pa. 620, 222 A.2d 897 (1966).
\textsuperscript{60} 422 Pa. at --, 222 A.2d at 899-900 (1966).
\textsuperscript{61} Ibid. (Emphasis added.)
\textsuperscript{62} It is assumed that Pennsylvania insurance companies will adjust their premiums to reflect the broader base of liability which this erosion of \textit{lex loci delicti} represents. Presumably, Georgia would have an "interest"—though an admittedly tenuous one—in protecting its residents contracting for insurance in Pennsylvania from those increased rates. For the suggestion that greater knowledge of insurance premium computation might transform a false conflict into a true conflict, see Currie, \textit{The Disinterested Third State}, \textit{28 Law & Contemp. Probs.} 754, 764 (1963). For discussion of the impact of insurance rates on choice of law, compare Morris, \textit{Enterprise Liability and the Actuarial Process—The Insignificance of Fore- sight}, \textit{70 Yale L.J.} 554 (1961), with Ehrenzweig, \textit{Conflict of Laws §§ 218-26 (1962).}
Whether or not the Pennsylvania court considered that possibility, it is hardly correct to say that Georgia "under no stretch of the imagination can... be viewed as a concerned jurisdiction." In making such a finding, the forum states a conclusion, not a premise. Although this is not improper, it should be recognized that the forum is ultimately compelled to define existing governmental interests in light of its own conflict-of-laws policy.

It has been recommended that the legislatures of each state specify policies underlying their existing law by outlining the extent to which those laws are to be applied to multi-state cases; the forum, accordingly, could avoid the problem of deciding whether a sister state were "interested" in a particular suit by referring directly to her declarations of interest. Unhappily, experience has shown that courts cannot responsibly avoid the task of settling conflicts cases by looking to another state's declared interests, for those declarations may seem irrational.

63 See note 35 supra. See also Von Mehren & Trautman, The Law of Multistate Problems 327-28 (1965).


66 "There is a contribution which legislatures can make to progress in this troubled field. They can cultivate the practice of adding to specific enactments a section specifying the extent to which the law is intended to apply to cases involving foreign factors... The value of such directions would be tremendous—provided, of course, that they were drafted with careful regard to the moderate and legitimate interests of the state, and not with an overweening desire to impose the doubtful wisdom of the enacting state upon the rest of the world... Their great value would lie in the fact that they would make explicit the policy expressed in the statute, and the mode of application which will promote that policy." Currie, Survival of Actions: Adjudication versus Automation in the Conflict of Laws, 10 Stan. L. Rev. 205, 247-48 (1958). Contra, Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U. L. Rev. 267, 278 (1966).

67 Gore v. Northeast Airlines, Inc., 222 F. Supp. 50 (S.D.N.Y. 1963), a diversity suit in a federal court for the Southern District of New York, was brought by survivors of a passenger. The latter had been a resident of New York, and had bought a ticket and boarded defendant's airplane in New York. He died when the plane crashed over Massachusetts. Three of the plaintiffs were domiciled in Maryland; defendant was a Massachusetts corporation. Although there is no limit in Maryland and New York upon damages recoverable for wrongful death, under the laws of Massachusetts such damages are limited to $15,000. Having assumed that Massachusetts had an interest in applying its law to limit the damages recoverable against a domestic corporation, the court found that New York did not have an interest.
FALSE CONFLICTS

in light of present knowledge. Moreover, if the forum decides that a foreign state is interested in a case by looking to that state's conflicts law, it subordinates its own choice of law to that of a foreign state, however archaic the latter may be. To do so frustrates the very goals of governmental-interest analysis. Instead, as Currie himself admitted, the forum should assume final responsibility for deciding whether another state is properly interested in the facts at issue. The forum ultimately makes such a finding not by asking whether the foreign state declares itself to be interested, but rather by asking whether—in light of forum policy—that declared interest seems reasonable. Ultimately, the forum imputes those policies to a foreign law which it could conceive a rational foreign court adopting, were that foreign court deciding the case at hand. To call such an evaluation "weighing" hardly advances conflict-of-laws analysis.

Having inquired into the policies underlying the laws of relevant contact states, the forum variously finds: (1) that only a single state is interested in applying its law to the facts at issue, (2) that several states in applying its law to a suit in which all parties were foreign residents. The court then decided that Maryland similarly had no interest in applying its wrongful death statute to a case involving domiciliaries of Maryland. However, the court did not consider the policies behind the Maryland wrongful death statute, but rather referred to a conflicts provision of the Maryland Code, Md. Ann. Code art. 67, § 2 (1957), which had been enacted years before Currie introduced his governmental-interest analysis to the choice-of-law world. For a similar conflicts provision, cf. N.C. Gen. Stat. § 58-28 (1950). The same difficulties in incorporating conflicts provisions in statutes occur on a federal level. For criticism of such provision in the Federal Tort Claims Act, 28 U.S.C. § 2671 (1964), see Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U.L. Rev. 267, 274 (1966). For more successful conflicts provisions, cf. Model Execution of Wills Act § 7; Uniform Stock Transfer Act § 22(1); Uniform Commercial Code § 1-105; Uniform Small Loan Law § 18 (Draft No. 6, 1936), reprinted in Hubacke, Annotations on Small Loan Laws 194, 202-03 (1938).

68 "The policy of [a state may be] based upon an old common-law rule, whose purpose is buried beyond hope of recall in antiquity. Indeed, it is very possible that the original purpose of the policy has long since ceased to be meaningful in modern civilization of twentieth-century America." Kramer, supra note 31, at 539; cf. Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U.L. Rev. 267, 278 (1966); R. Traynor, supra note 31, at 668, 673.

69 In Noe v. United States Fid. & Guar. Co., 406 S.W.2d 666 (Mo. 1966), a Missouri court applied a 1930 conflicts provision of the Louisiana Insurance Law, La. Rev. Stat. § 22-655 (1950), restricting the right of direct action to suits brought in Louisiana for accidents occurring there, to deny plaintiff a cause of action for an accident occurring in Louisiana. See also Kelso, supra note 31, at 60-61.

70 "This is not to say that the Court cannot inquire at all into the validity of the asserted interests. Certainly it can conclude that the asserted state policy has no demonstrable existence. Similarly, it can determine that the asserted basis for an interest in the application of a policy is too technical or attenuated to be of constitutional significance." Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. Chi. L. Rev. 9, 80-81 (1959). See also Currie, The Disinterested Third State, 28 Law & Contemp. Probs. 754, 784 (1963).
are so interested,\textsuperscript{71} or (3) that no contact state has an interest in the outcome of the suit.\textsuperscript{72}

\textbf{A. Case of a Single Interested State}

On an evening in June 1964, Lillian and Albert Clark drove from their home in Lancaster, New Hampshire, to Littleton, New Hampshire, on a short trip which took them briefly into Vermont. In Vermont, Albert’s alleged negligence caused an accident in which his wife Lillian was injured. On returning home, Lillian filed suit\textsuperscript{73} against her husband for damages due to negligence. Under New Hampshire law\textsuperscript{74} a host is responsible to guests for the exercise of ordinary care; under the laws of Vermont\textsuperscript{75} a host is liable to his guests only for “gross and wilful negligence.” The New Hampshire court allowed Lillian Clark to recover under forum law.

Within months of the Clark accident, Laura and Neil Landers, residents of Connecticut, were driving near Lynchburg, Virginia, when Neil’s alleged gross negligence caused an accident in which his wife Laura was injured. On returning home, Laura filed suit\textsuperscript{76} against her husband for injuries sustained. Under Virginia law\textsuperscript{77} the common law disability of a wife to sue her husband persists; under Connecticut law\textsuperscript{78} that disability has been removed. The Connecticut court denied Laura Landers recovery by applying Virginia law.

The facts in \textit{Clark v. Clark}\textsuperscript{79} and \textit{Landers v. Landers}\textsuperscript{80} are identical for purposes of conflicts law. Each involved a suit between residents of the forum who, while driving cars registered and insured in the forum, became involved in out-of-state accidents. Plaintiff in each case, as wife and guest of defendant, would have recovered had the accident occurred in the forum. In one case, however, the court granted recovery under forum law by finding that the forum was the only state interested in the suit; in the other case, an “accident of geography”\textsuperscript{81} led the court to deny recovery by applying the law of a foreign state which had no interest at all in the suit.

\textsuperscript{71} See text accompanying notes 91-143 infra.
\textsuperscript{72} See text accompanying notes 144-79 infra.
\textsuperscript{73} Clark v. Clark, 222 A.2d 205 (N.H. 1966).
\textsuperscript{74} Millmore v. Milford Motor Co., 89 N.H. 272, 197 Atl. 330 (1938).
\textsuperscript{75} VT. STAT. ANN. tit. 23, § 1491 (1959).
\textsuperscript{76} Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966).
\textsuperscript{78} Ginsburg v. Ginsburg, 126 Conn. 146, 9 A.2d 812 (1939).
\textsuperscript{79} 222 A.2d 205 (N.H. 1966).
\textsuperscript{80} 153 Conn. 303, 216 A.2d 183 (1966).
The court in Clark approached the choice-of-law issue by asking whether more than one state was interested in the suit. New Hampshire, as domicile of both parties, would clearly seem interested in the disposition of a suit involving one of its injured residents. The parties had registered and insured their car under the laws of the forum and could be presumed to have reasonably expected recovery to be governed by its law. Furthermore, were the court to apply Vermont law, the burden of uncompensated injuries would fall on New Hampshire. Having determined that New Hampshire had an interest in applying its law to the Clark case, the court then analyzed Vermont's contact with the suit. The court assumed that Vermont, in enacting its guest statute, weighed the importance of compensating injured guests against the importance of protecting hosts from fraud and insurance companies from collusion. The court further assumed that Vermont tipped the legislative balance against guests to protect its own hosts and insurance companies, not to protect persons resident, and corporations domesticated, in foreign states. Therefore, since the court confronted a case involving neither a Vermont host nor a Vermont insurance company, it found that the Vermont guest statute was not intended to apply to the facts at issue—which is another way of saying that Vermont had not interest in applying its law to the case. In effect, the court faced a false conflict: Of two potentially applicable laws, only one purported to encompass the facts at issue.  

82 "The expectations of the present parties, if they had any, as to legal liabilities and insurance coverage for accidents, would be with reference to their own state, and they would think in terms of lawsuits brought in New Hampshire courts under New Hampshire law, if they thought about the matter at all." Clark v. Clark, 222 A.2d 205, 209 (N.H. 1966). See Ehrenzweig, Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws," 69 YALE L.J. 595, 603-04 (1960).  

83 Currie, Survival of Actions: Adjudication versus Automation in the Conflict of Laws, 10 STAN. L. REV. 205, 219 (1958): "Underlying our 'free enterprise' choice is the possibility that the state—the state concerned with the injured party—may have a residual responsibility: if the system of free enterprise does not provide compensation, the injured person may become a public charge." See also Currie, The Silver Oar and All That: A Study of the Romero Case, 27 U. CHI. L. REV. 1, 69 (1959); Comment, 54 CALIF. L. REV. 1301, 1323, 1327 (1966).  


85 It has been suggested that it would "constitute intermeddling so officious and unjustified as to amount to a denial of due process of law, or of full faith and credit to the laws of a sister state" for a state to extend the application of its own protective laws to persons "with whose welfare the state has no concern." Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, 69 YALE L.J. 1323, 1324 (1960).  

86 The case most often cited by Currie and others as illustrating the kind of false conflict which exists when only one of several contact states has an interest in applying its law to the facts at issue is Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws, 63 COLUM. L. REV. 1212 (Cavers at 1219, 1225, Currie at 1233, 1242) (1963). For other examples, see Lauritzen v. Larsen, 345 U.S. 571 (1953); Zogg v. Penn. Mut. Life Ins. Co., 276 F.2d 861
The disposition of the *Clark* case seems singularly reasonable, particularly when contrasted with the outcome in *Landers v. Landers*. In *Landers*, the Connecticut Supreme Court applied foreign law to deny compensation to a resident who would have recovered had the accident occurred within the forum. In doing so, it subverted the forum policy of allowing injured wives to sue their husbands, without advancing any particular policy of Virginia. Presumably, Virginia refuses to entertain suits between husband and wife for several reasons: first, to prevent marital harmony from being disrupted by litigious disputes; and second, to protect insurance carriers from collusive suits between husband and wife. Where, as in *Landers*, neither the family unit nor the insurance company is indigenous to Virginia, none of its policies can be served by applying its law. Since it was not argued that Virginia might be affected by the outcome of *Landers*, the choice-of-law problem before the court was not a problem at all. It was a false conflict because the law of only one state purported to apply.

---


---

When a court inquires into the policies underlying the laws of foreign states, it may find that those policies are either undeclared or anachronistic, in which case it is compelled to impute policies to that foreign state which seem reasonable in light of forum perspective.

See discussion in LaChance v. Service Trucking Co., 215 F. Supp. 162, 166 (D. Md. 1963) ("[T]he more realistic reason for refusing to permit tort actions by a wife against her husband [is] that they are likely to result in a collusive effort to mulct the husband's insurance carrier . . . "). See also Hancock, *The Rise and Fall of Buckeye v. Buckeye, 1931-59: Marital Immunity For Torts in Conflict of Laws*, 29 U. Cm. L. Rev. 237, 240 (1962).

*Landers v. Landers* was precisely the kind of case to which Currie was addressing himself when he spoke of "false problems" in the conflict of laws. "These are 'conflict-of-laws cases' according to a useful definition, which I have no disposition to disturb. That is, each is a case in which potentially (or conventionally) significant factors are associated with more than one state. They do not, however, present real problems, because they do not involve conflicting interests of the respective states. It is perfectly clear what the result should be in each. Either state, though approaching the case with no other purpose than to advance its own interests, would reach that result." Currie, *Married Women's Contracts: A Study in Con-

---


88 When a court inquires into the policies underlying the laws of foreign states, it may find that those policies are either undeclared or anachronistic, in which case it is compelled to impute policies to that foreign state which seem reasonable in light of forum perspective.

89 See discussion in LaChance v. Service Trucking Co., 215 F. Supp. 162, 166 (D. Md. 1963) ("[T]he more realistic reason for refusing to permit tort actions by a wife against her husband [is] that they are likely to result in a collusive effort to mulct the husband's insurance carrier . . . "). See also Hancock, *The Rise and Fall of Buckeye v. Buckeye, 1931-59: Marital Immunity For Torts in Conflict of Laws*, 29 U. Cm. L. Rev. 237, 240 (1962).

90 *Landers v. Landers* was precisely the kind of case to which Currie was addressing himself when he spoke of "false problems" in the conflict of laws. "These are 'conflict-of-laws cases' according to a useful definition, which I have no disposition to disturb. That is, each is a case in which potentially (or conventionally) significant factors are associated with more than one state. They do not, however, present real problems, because they do not involve conflicting interests of the respective states. It is perfectly clear what the result should be in each. Either state, though approaching the case with no other purpose than to advance its own interests, would reach that result." Currie, *Married Women's Contracts: A Study in Con-

---
FALSE CONFLICTS

B. Conflict Between Several Interested States
Avoided by Applying Laws of One

When the forum confronts a case having factual contact with more than one state, it makes a two-fold inquiry.\(^9\) First, it asks whether more than one state has an interest in applying its law to the facts at issue. If it finds that only one state has such an interest, it disposes of the choice-of-law issue by applying the law of that state. However, if the court should find that more than one state has an interest in applying its law, then it faces a second inquiry—namely, whether the laws of those interested states conflict when applied to the facts at issue.

The court may find that the laws of interested states do not conflict because they are the same, in which case choice of law becomes moot.\(^92\) Similarly, the court may find that the laws of both interested states, though different, produce the same result when applied to the facts at issue.\(^93\) It is only when the laws of several interested states are different and produce different results that the court faces the possibility of true conflict.\(^94\) Nonetheless, what appears to be a true conflict may be transformed into a false conflict in one of several ways: (1) By construing the laws of one interested state narrowly, the court may find that it in fact has no interest in applying its law to the multi-state case; (2) by analyzing the purposes underlying the laws of each interested state, the court may find that the application of one law would simultaneously fulfill the policies of both states; or (3) by “splitting”\(^95\) the facts of the case into independent issues, the court may find that each state has an interest in applying its law to different issues, thus avoiding the true conflict which would ensue if both laws purported to encompass the same issues.

\(\text{lict-of-Laws Method, 25 U. Chi. L. Rev. 227, 251-52 (1958). It should be noted that the Second Restatement of Conflicts would reach identical results in these “false conflict” cases. Instead, however, of saying that only one state had an interest in applying its law to the facts at issue, exponents of the Restatement would say that only one of the several contact states had significant relationship with the case. Restatement (Second), Conflict of Laws § 379 (Tent. Draft No. 8, 1963). Although Currie disagreed with the draftsmen of the Restatement in other areas, they would both analyze these false conflicts in the same way. See Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROB. 754, 757 (1963). Although it might been suggested that Virginia had an interest in the Landers litigation, see text accompanying notes 57-65 supra, that argument was not made. Absent such argument, the court faced a false conflict. See text accompanying notes 256-71 infra.}\)

\(^9\) See note 39 supra and accompanying text.

\(^92\) See text accompanying notes 180-204 infra.

\(^93\) See notes 205-34 infra and accompanying text.


\(^95\) See text accompanying notes 223-34 infra.
1. Finding False Conflicts Through Narrow Construction

In cases in which there is a conflict between the different laws of two interested states, the court can often "minimize" or "avoid" the conflict by narrowly construing one of the laws as inapplicable to the multi-state case before it. Some commentators treat this secondary process of "avoiding" conflicts as conceptually different from the preliminary process of identifying governmental interests. In contrast to "false conflicts," where only one state has an interest in the litigation, these "apparent" conflicts are said to be cases where each state appears to have an interest, until the court—through "reflection" and "painstaking analysis"—discovers that one of the laws does not apply to the multi-state case before it. In fact, however, "false" conflicts and "apparent" conflicts differ not so much in kind as in the stage at which the court determines that only one state has an interest in the multi-state case at hand.

A case often cited to illustrate this process of avoiding conflicts is Lauritzen v. Larsen. Plaintiff, a Danish seaman temporarily within the United States, contracted in New York to work for a ship of Danish

---


101 Ibid.

102 345 U.S. 571 (1953). For a recent case which further restricts the applicability of the Jones Act to avoid choice of law, see Tsakonites v. Transpacific Carriers Corp., 35 U.S. Weex 2312 (2d Cir. Nov. 16, 1966). The Lauritzen case presented no real choice-of-law controversy because narrow construction of the Jones Act left the Court without jurisdiction to make a further choice of Danish law. On the other hand, Justice Jackson explicitly construed the Jones Act in light of the fact that a cause of action was shown to exist under stipulated Danish law. Having construed the Jones Act narrowly, the Court found that Denmark was the only state with an interest in applying its law but at the same time denied itself jurisdiction to apply that law. 345 U.S. at 575.
FALSE CONFLICTS

origin and ownership. While sailing in Cuban waters, plaintiff was negligently injured during the course of his employment. On returning to the United States, he filed suit under the Jones Act which provided that "any seaman who shall suffer personal injury in the course of his employment . . . may . . . maintain . . . an action for damages . . . with the right of trial by jury . . . ." The statute, on its face, seemed to provide plaintiff with a cause of action. In effect, the laws of Denmark and the United States, which differed on the question of jury trial, both appeared to apply. The Court, however, speaking through Justice Jackson, found that it was not the intent of Congress to protect seamen whose contact with the United States was purely transitory. The Court avoided potential conflict between the apparently relevant laws of the United States and Denmark by finding the former inapplicable to the facts at issue.

The disposition of Lauritzen can be viewed in different ways. One could say that the Court made a preliminary determination that both Denmark and the United States were interested in the suit and then, subsequently, eliminated the latter interest by finding the Jones Act inapplicable. Or, one could simply say that the Court found Denmark to be the only state interested in applying its law to the case at hand. The difference between the two processes is one of degree only. Where it is clear that only one state has an interest in applying its law, a court can eliminate the other state from consideration. In more difficult cases, where several states seem to have prima facie interest, a court may expressly eliminate one of those potentially interested states by construing its policies as to the multi-state case narrowly. The difference, however, is not between false and avoidable conflicts, but rather between false conflicts which are easy and false conflicts which are difficult to resolve. In each case a court is deciding in light of forum policy that certain state contacts are to be given no choice-of-law significance.

---

105 Indeed, even Currie in describing his three categories of cases—false problems, conflicts to be avoided through restrained construction, and true conflicts—has said, "[T]he three classes of cases are a continuum with no clear internal boundaries." Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROB. 754, 764 (1963). See Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U.L. REV. 267, 289-90 (1966) ("[Minimization of conflicts problems] will not be useful in cases where one state's contacts with a set of facts are few and relatively insignificant as compared with those of another state whose law is different; in that situation a choice of law still has to be made even though the choice may be a comparatively quick one. That is an easy conflicts case, not a false one."); Leflar, Constitutional
2. Finding of False Conflicts by Applying Law of One Interested State to Serve Interests of Both

In cases in which several states with different laws are interested in the facts at issue, a court can often satisfy the policies underlying both laws by applying one of them.106 A Wisconsin case, Peterson v. Warren,107 is in point. John Hogenson, a resident of Minnesota, registered and insured trucks in that state for use in his construction business extending throughout Minnesota and Wisconsin. In July 1958, after he had accumulated a certain number of driving violations, his insurer, Home Insurance Company, filed proof of financial responsibility with the state as required by Minnesota law. In October of the same year, Harold Warren, one of Hogenson's employees and a resident of Wisconsin, was driving in Wisconsin with Hogenson's permission when his alleged negligence caused an accident injuring Vernon Peterson, a passenger in his truck and a resident of Wisconsin. In a Wisconsin suit by Peterson against Warren and Hogenson's insurance carrier, Home Insurance asserted the policy defense of having received no notice of the accident from Hogenson. Under Minnesota law,108 insurers waive all defenses for amounts up to 10,000 dollars on liability policies issued by them to persons for whom they have filed statements of financial responsibility. Under Wisconsin law, the insurer can always defeat liability by showing that notice provisions of the policy were violated by the insured. On the dubious ground that Minnesota was the place of contracting, the Wisconsin court granted a Wisconsin resident recovery for an accident occurring in Wisconsin by applying the Minnesota rule of strict liability.

The Peterson court found that both Minnesota and Wisconsin were interested in applying their laws to the facts at issue. Wisconsin clearly

---

107 143 N.W.2d 560 (Wis. 1966).
had a policy—reflected in its common law—of compensating its resident-victims\textsuperscript{109} for accidents occurring within the state. But Wisconsin apparently had a still stronger policy of protecting insurance companies from lack of notice by the insured. For in balancing the importance of protecting accident victims from financially irresponsible drivers against the importance of protecting insurance companies from contractual infractions, Wisconsin weighted the latter policy more heavily. Minnesota, on the other hand, was found to have a policy of protecting the public at large from the reckless driving of those operating cars registered in Minnesota, whether that driving occurred inside or outside the state.\textsuperscript{110} Minnesota apparently had a somewhat weaker policy of protecting insurance companies from contractual infractions by the insured. For in balancing the two policies, Minnesota allowed the policy of protecting accident victims from the financially irresponsible to prevail.\textsuperscript{111}

The Peterson court found that Minnesota rather than Wisconsin law governed rights under Hogenson’s insurance contract. Analytically, however, the court engaged in a two-step process: First, it construed the Minnesota policy favoring compensation to encompass the multi-state case at hand; second, it interpreted the Wisconsin policy of protecting insurance companies as one designed to benefit only \textit{domestic} companies. Since the insurance contract at issue had been issued by a Minnesota agent in Minnesota, Wisconsin’s protective policy was not applicable. Stated differently, Wisconsin was found to have no interest in extending

\textsuperscript{109} “It is the policy of our law to provide compensation to a person when he has been negligently injured.” Wilcox v. Wilcox, 26 Wis. 2d 617, 630, 133 N.W.2d 408, 415 (1965).

\textsuperscript{110} As Currie would have said, Minnesota had an “altruistic interest” in applying its law to an out-of-state event. Currie & Schreter, \textit{Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities}, 69 \textit{Yale L.J.} 1323, 1361 (1960): “It is not lightly to be assumed that the Constitution prohibits a state from adopting a humane and altruistic policy. Moreover, such a policy might well serve the selfish interests of the state if those interests are evaluated from a long-range point of view. In general, withholding the benefits of local laws from citizens of other states will invite retaliation, to the detriment of local citizens. . . . The proposition that a state violated the due-process clause when it applies its law in a situation in which it has no interest in doing so . . . must be qualified: an ‘altruistic interest’ in the application of the law may be an adequate defense against attack based on the due-process clause.” When Currie says a state has an “altruistic interest” in applying its law to a multi-state situation, he is really saying that the state is justified in applying its law even though it has no tangible governmental interest in the suit. To speak of “altruistic interests” in cases where a state has no real governmental interest is to admit that some cases cannot be consistently explained in terms of governmental-interest analysis. In reality, the language of “altruistic interests” is subterfuge for justifying the application of the “better law” to achieve a “just result,” when such application cannot be explained in terms of governmental interests. See Currie, \textit{Notes on Methods and Objectives in the Conflict of Laws}, 1959 \textit{Duke L.J.} 171, 180.

\textsuperscript{111} The Minnesota policy of compensating victims was allowed to prevail over its policy of protecting insurance companies only up to amounts of $10,000.
the "protective arm" of its legislation to Home Insurance Company. However, since Wisconsin still had a policy of compensating its resident-victims for accidents occurring within the state, the court simultaneously fulfilled the interests of both states in compensating Peterson by applying the Minnesota rule of strict liability. Although only Minnesota was interested in applying its law of insurance defenses, both states were interested in applying their own tort to the multi-state case. Through the "ordinary processes of construction and interpretation," the court eliminated Wisconsin as an interested state in the only relevant area in which the laws conflicted—the area of insurance defenses. That construction left both states with a common policy of compensation which could be fulfilled by applying the Minnesota rule of strict liability.

Unlike the narrow construction in Lauritzen which revealed the existence of only one interested state, narrow construction in Peterson revealed the existence of only one state with a policy concerning the multi-state issue of insurance defenses, but left both states with a residual and common policy of compensating plaintiffs. The Court in Lauritzen found that of two contact states with differing laws, only one was interested in having its law applied; the court in Peterson found that even though both contact states were interested in having their laws applied, their laws were the same with respect to the multi-state case before the court.

---

112 See note 267 infra.
113 The incidence of any state's law on a given factual situation may differ depending on whether those facts are wholly domestic to it or whether they contain foreign elements. Kramer, Interests and Policy Clashes in Conflict of Laws, 13 Rutgers L. Rev. 523, 532 (1959).
114 See note 109 supra.
116 See also Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C. Cir. 1965), in which the court held: "In sum, this case presents a classic 'false conflicts' situation. Adoption of the New York doctrine of estoppel will further the interests of New York, but will not interfere with any of the articulated policies of the District of Columbia." Id. at 586. The court commented in a footnote that "The District, moreover, may share New York's interest to the extent that maintaining the New York registration records with the maximum degree of accuracy would benefit the District by enabling its police and residents to identify owners of New York vehicles in use within the District." Id. at 586 n.11.
117 It has been suggested that there may be a constitutional distinction between cases like Lauritzen where only one state is interested in having its law applied, and cases like Peterson where each contact state is interested in having its law applied. See Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROB. 754, 764 (1963). Application of a "disinterested" state's law is said to be a denial of due process, Home Ins. Co. v. Dick, 281 U.S. 397 (1930), while application of each interested state's law is said to be constitutionally justified, even though the Court may choose to construe one of the laws as inapplicable. Currie, The Constitution and the Choice-of-Law: Governmental Interests and the Judicial Function, 26 U. Chi. L. Rev. 9, 16, 24 (1959). However, if the Lauritzen Court would have been constitutionally precluded from applying the Jones Act because the United States was
It should be noted, however, that governmental-interest analysis did not dictate the decision in *Peterson*. The court could instead have characterized the case as a "false conflict" by finding that Minnesota had no interest in having its liberal rule of recovery applied to an out-of-state accident involving foreign residents. In other words, in balancing the need to protect insurance companies from policy infractions against the need to protect accident victims from the financially irresponsible, Minnesota might have allowed the policy of compensation to prevail to protect its own residents for accidents occurring within the state. Since neither a Minnesota resident nor a Minnesota accident was involved in *Peterson*, the court might well have found that Minnesota law was not intended to encompass such an action. Stated differently, the court might have found that Minnesota had no interest in applying its law of strict liability to the multi-state case at hand. The argument that Minnesota had an "altruistic interest" in extending its standard of strict liability proves too much; for the court could just as rationally have found that Wisconsin had an "altruistic interest" in extending its rule on policy defenses to foreign insurance companies. Facing a variety of possible "false conflicts," the court ultimately characterized the case as it did to reach a "just result," one which generally conformed to the expectations of the parties.\(^{118}\) Governmental-interest analysis is a *method* for solving choice-of-law problems. It can indicate various paths which a court might

\(^{118}\) Since insurance premiums were rated to cover activities in both Wisconsin and Minnesota, Home Insurance was in no position to complain of "surprise." *Peterson v. Warren*, 143 N.W.2d 560, 562 (Wis. 1966). For a discussion of the doctrine of the "just result," see Leffler, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. Rev. 267, 295-96 (1966) ("[J]ustice in a particular case calls for individualization of decision, a choice of the better party in the litigation rather than the better law."); Lorenzen, *Territoriality, Public Policy, and the Conflict of Laws*, 33 Yale L.J. 736, 748 (1924) ("The general problem is, therefore, always the same: What are the demands of justice in the particular situation; what is the controlling policy?"); Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 206 (2d Cir. 1955) ("I grant that, in this context, I am stressing the need to do justice in particular instances. I do so unashamedly.") (Frank, J., dissenting). For a case in which the court specifically chose forum law as "better law" than foreign law, see Clark v. Clark, 222 A.2d 205, 210 (N.H. 1966).
follow in resolving conflicts problems, but it cannot tell the court which path to choose. That choice is one which the court must make in terms of criteria which governmental-interest analysis does not purport to supply.\footnote{For a discussion of normative criteria for solving choice-of-law problems see Cavens, \textit{The Choice-of-Law Process} 114-38 (1965) in which Professor Cavens proposes the adoption of what he calls “principles of preference.” See also Cheatham & Reese, \textit{Choice of the Applicable Law}, 52 \textit{Colum. L. Rev.} 959 (1952).}

3. \textit{Finding False Conflicts By “Splitting” Case Into Independent Issues}

In cases in which several states with different laws are interested in the facts at issue, a court can avoid true conflict by “splitting”\footnote{See note 225 \textit{infra}.} the facts of the case into independent issues and by selectively applying the laws of each interested state to different issues. Proponents of governmental-interest analysis find this process of “splitting” very much in order.\footnote{Cavens, \textit{The Choice-of-Law Process} 40-43 (1965); Cook, \textit{The Logical and Legal Bases of the Conflict of Laws} 431 (1942); Currie, Comments on Babcock v. Jackson, \textit{A Recent Development in Conflict of Laws}, 63 \textit{Colum. L. Rev.} 1212, 1234 (1963); Harper, \textit{Policy Bases in the Conflict of Laws: Some Reflections on the Rereading of Professor Lorenzen’s Essays}, 56 \textit{Yale L. J.} 1155, 1163 (1947); Leflar, \textit{Choice-Influencing Considerations in Conflicts Law}, 41 \textit{N.Y.U.L. Rev.} 267, 290 (1966): “Separability of issues is clearly desirable. The only purpose served by requiring every aspect of a tort to be solved by the laws of one jurisdiction is administrative simplicity. . . . But . . . the significant contact, the governmental interests, and the social policies that relate to one issue may be very different from those that relate to another. Separability of issues is essential if we are not to have automation in choice of law.” For a case discussing the splitting of issues, see Babcock v. Jackson, 12 \textit{N.Y.2d} 473, 484, 191 \textit{N.E.2d} 279, 285, 240 \textit{N.Y.S.2d} 743, 752 (1963), in which the court held that the guest-host relationship should be determined by the domicile of the parties and the standard of care by the place where the accident occurred.}

For if laws are applied to a multi-state case only when some purpose underlying them can thereby be served, it may well happen that the policies of one state require application of its law to only one issue in a case while the policies of another contact state can be fully sustained by applying its law to a different issue. It should be noted that the same process of splitting can occur under the rules of the \textit{Restatement}, either by applying the substantive law of a foreign state to one issue in a case and the procedural law of the forum to another issue of that same case,\footnote{Restatement, \textit{Conflict of Laws} §§ 584-85 (1934). Cf. Grant v. McAuliffe, 41 \textit{Cal. 2d} 859, 264 \textit{P.2d} 944 (1953). See Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 \textit{Yale L.J.} 333 (1933).} or by having the forum apply foreign law to one issue of a case and its own law to another issue of that case on the ground that the foreign law would offend its public policy.\footnote{Restatement, \textit{Conflict of Laws} § 612 (1934). Cf. Dalton v. McLean, 137 \textit{Me.} 4, 14 \textit{A.2d} 13 (1940). See generally, Paulsen & Sovern, “Public Policy” in the Conflict of Laws, 56 \textit{Colum. L. Rev.} 969 (1956).}
In Williams v. Rawlings Truck Line, Inc., the court avoided true conflict between the laws of New York and the District of Columbia by splitting the case into two issues and disposing of them separately under the laws of each state. As a threshold determination, the court found both New York and the District to be interested in applying their laws to the facts at issue. New York was interested in applying its law to allow recovery as a means of enforcing its registration laws. The District, on the other hand, had an interest in applying its law to a case involving an accident and uncompensated injuries within the District. The laws of each state were different, for District law would permit Goldberger to deny ownership, while New York law would estop him from doing so. The court nonetheless transformed what looked like a true conflict into a false conflict by splitting the case into two separate issues: the issue of ownership, and the issue of vicarious liability.

The court applied New York law to the issue of ownership on two grounds. First, it found that the District had no interest in applying its rule allowing registered owners to prove passage of equitable title, because that rule was “designed to protect persons and property of District residents . . .” Since no party to the dispute was a resident of the District, “the District [was] not in position to assert an interest in the application of its law to [the] case; such an application would not further the policies underlying the District’s law.” Second, the court found that New York did have an interest in applying its rule of estoppel, because that rule was designed to compel compliance with New York registration laws. In the words of the court:

New York, on the other hand, has a substantial interest in the application of its rule of estoppel to this case. This New York doctrine is designed to enforce by its in terrorem effect the vehicle registration laws of the state, and thereby to maintain the integrity and accuracy of that state’s vehicle registration system. Fulfillment of this basic goal could require extra-territorial application of the estoppel doctrine. Otherwise New York residents would improperly transfer their cars any time the car was to be permanently, or even temporarily, removed from the state without fear of liability; ultimately, such a circumstance might lead to a significant impairment of New York’s record-keeping system.

Having decided that New York had an interest and that the District lacked an interest in applying its law to the issue of ownership, the court had no difficulty in choosing New York law.

---

124 357 F.2d 581 (D.C. Cir. 1965).
125 Id. at 586.
126 Id. at 585.
127 Ibid.
128 Id. at 585-86.
As part of an alternative ground for applying New York law to the issue of ownership, the court indicated that the District might have an interest in the issue of registration to the extent that proper registration would enable "its police and residents to identify owners of . . . vehicles in use within the District."\(^{129}\) However, the court also found that this interest in proper registration could be served by applying the strict New York rule of estoppel. Although the District finds it more important to allow its own registered owners to prove passage of equitable title than to enforce its registration laws, it might not hesitate estopping foreign registered owners from denying ownership if doing so would enforce proper registration of foreign vehicles operating within the District. Application of New York law would serve the purposes of New York and the District in enforcing proper registration without violating any District policy of protecting its registered owners.\(^{130}\)

The court in Williams explicitly applied New York law to the issue of ownership. By remanding the case for a new trial, the court was not called upon to decide the question of which law to apply to the issue of vicarious liability. However, in reversing the directed verdict in favor of Goldberger, the court formed standards to guide the lower court in resolving that choice-of-law problem. First, the court noted certain similarities between the New York and District owner-consent statutes and indicated that choice of law would become moot were those laws found to be the same.\(^{131}\) Assuming the laws to be different, however, the court recognized the possibility of true conflict between the laws of New York and the District. Without deciding that issue, the court suggested further that true conflict might be avoided if the New York vicarious liability statute were construed as having no extra-territorial effect.\(^{132}\) New York law would then be applied to the issue of ownership and District law applied to the issue of vicarious liability without the two laws coming into conflict.

Two points should be noted about the way the court in Williams regarded the choice-of-law issue concerning vicarious liability. For one thing, the court too hastily assumed that choice of law would become moot if the laws of New York and the District were found to be the same.\(^{133}\) For another thing, the court too hastily decided that the issue of vicarious liability could be resolved under a different law from the issue of ownership.

\(^{129}\) *Id.* at 586 n.11.
\(^{130}\) See text accompanying notes 106-19 *supra*.
\(^{131}\) 357 F.2d at 587.
\(^{132}\) *Id.* at 585.
\(^{133}\) See text accompanying notes 198-204 *infra*. 
It has been recognized by commentators \(^{134}\) and courts\(^{135}\) alike that "separate issues in the same case may call for the application of the laws of different states."\(^{136}\) In the now famous case of Babcock v. Jackson,\(^{137}\) the court avoided true conflict between the laws of Ontario and New York by isolating guest-host liability for treatment under New York law and standard-of-care for treatment under Ontario law. Nonetheless, the practice of severing issues for separate treatment under different laws produces grotesque results if exercised indiscriminately.\(^{138}\) Whether such splitting is appropriate depends on how closely the issues of a case are related.\(^{139}\) The court in Williams treated the issues of ownership and vicarious liability as if they were independent of one another. In fact, "ownership" is not an isolated concept under New York law, but rather one which has meaning only within the New York Traffic and Vehicle Law. The New York concept of ownership was framed by the courts of that state for the purpose of defining the New York standards of vicarious liability.\(^{140}\) The

\(^{134}\) See authorities cited in note 121 supra.


\(^{136}\)GOODRICH, CONFLICT OF LAWS § 95, at 176 (Scoles ed. 1964).


\(^{138}\) See note 227 infra.

\(^{139}\) Leflar, Constitutional Limits on Free Choice of Law, 28 LAW & CONTEMP. PROB. 706, 728 (1965).

\(^{140}\) The court in Williams cited three cases for the proposition that the New York rule estopping registered owners (as defined by N.Y. VEH. & TRAF. LAW § 420): from denying ownership was designed as a penal measure for enforcing proper vehicle registration, and not for the purpose of finding a "deep pocket" or solvent defendant for the injured plaintiff. Phoenix Ins. Co. v. Guthiel, 2 N.Y.2d 575, 141 N.E.2d 904, 161 N.Y.S.2d 867 (1957); Switzer v. Aldrich, 307 N.Y. 56, 120 N.E.2d 159 (1954); Shuba v. Greendoiner, 271 N.Y. 189, 2 N.E.2d 536 (1936). It is noteworthy that all three cases involved New York resident plaintiffs suing for injuries under the New York vicarious liability statute. In Shuba and Switzer, plaintiff was allowed to recover under the New York vicarious liability statute, N.Y. VEH. & TRAF. LAW § 388, formerly § 59, by invoking the estoppel rule. In Phoenix, a case whose value as precedent has since weakened, Musso v. American Lumbermen's Mut. Cas. Co., 14 Misc. 2d 450, 178 N.Y.S.2d 377 (Sup. Ct. 1958), an insurance company was sued on a policy in the name of the registered owner and was allowed to rebut the presumption of ownership to escape liability on the policy. However, there is nothing to indicate that the registered owner in Phoenix was financially incapable of paying for the New York plaintiff's injuries himself. Other New York cases show that the estoppel rule is selectively employed when it advances recovery under the vicarious liability statute (Morgan v. Termine, 2 Misc. 2d 109, 149 N.Y.S.2d 42 (Sup. Ct. 1956); Elfeld v. Burkhan Auto Renting Co., 299 N.Y. 336, 87 N.E.2d 285 (1949); Reese v. Reamore, 292 N.Y. 292, 55 N.E.2d 35 (1944)) and is disregarded when recovery can only be allowed by showing passage of equitable title (Schomer v. Andy LeGrew, Inc., 198 N.Y.S.2d 974 (Sup. Ct. 1960); Zeller v. Preferred Mut. Fire Inc. Co., 9 Misc. 2d 855, 168 N.Y.S.2d 260 (N.Y. Munic. Ct. 1957)). Most commentators admit that the efficacy of governmental-interest analysis depends on the ability of courts to identify and analyze policies underlying the laws of both the forum and foreign states. Kramer, supra note 113, at 532. It is therefore interesting to note the singular failure on the part of a learned court in Williams.
New York concept of ownership is as much a part of its standard of vicarious liability as the District standard of liability is to its treatment of ownership. To apply one is to apply the other.

If the court found that New York's vicarious liability law was not to be given extra-territorial effect, then it should not have given the New York concept of ownership extra-territorial effect. For, in applying the New York rule of ownership, the court effectively let the New York standard of liability in by the back door. To say that the Williams court should have applied either New York or District law as a whole to all the facts of the case is not to say that it faced a true conflict. If it found that New York law was not to be given extra-territorial effect, then it could have applied the law of the District as the single jurisdiction with an interest in the suit. If it found that New York law could be applied extra-territorially to a suit involving one of its residents, then it had two alternatives for avoiding true conflict. It could have found that the District had no interest in a suit involving none of its residents, in which case it would have applied the law of New York as the single interested state. Or, alternatively, if it found that the District was also interested in applying its law because the accident occurred within its jurisdiction, the court might have applied New York law as one which would simultaneously satisfy the policies underlying the laws of each state.

Prior to the Williams case, it had been repeatedly held that the New York owner-consent statute was not to be given extra-territorial effect. Cherwien v. Geiter, 272 N.Y. 163, 5 N.E.2d 185 (1936); Gavin v. Malherbe, 146 Misc. 51, 261 N.Y. Supp. 373 (Sup. Ct. 1932), aff'd, 240 App. Div. 779, 266 N.Y. Supp. 879 (1933), aff'd, 264 N.Y. 405, 191 N.E. 486 (1934). The owner-consent statute itself (N.Y. VEH. & TRAFF. LAW § 308, formerly § 59) was amended in 1958 to apply only to "vehicle[s] used or operated in this state." Nonetheless, the Williams court felt that the New York rule against giving the owner-consent statute extra-territorial effect might have changed since the decision in Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 279 (1963). However, in a post-Babcock case involving a New York owner giving a New York resident permission to drive his car, where the driver injured a New York resident-plaintiff while driving in New Jersey, a New York court applied New Jersey law to the question of vicarious liability by finding that the New York law had no extra-territorial effect. Fornaro v. Jill Bros., Inc., 22 App. Div. 2d 695, 253 N.Y.S.2d 771 (1964), aff'd, 15 N.Y.2d 819, 205 N.E.2d 862, 257 N.Y.S.2d 938 (1965).
Governmental-interest analysis is premised on the theory that only the laws of those states with an interest in an adjudication should be applied to the facts at issue. The adoption of that premise generates two closely related problems: first, the problem of choosing a law when the forum finds it has no interest in applying its own law; and second, the problem of choosing a law when the forum finds that no contact state has an interest in applying its law.

1. Disinterested Forum Facing True Conflict Between Other Interested States

The “minimum contacts” theory of jurisdiction precludes a court from hearing a case with which it has no significant relationship. Were that the exclusive theory on which a court could base its jurisdiction, no court would be competent to decide a case in which it was “disinterested.” For to say a court is disinterested in a case is to say that it has no contact which would justify its invoking forum law. Courts in the United States, however, are justified in taking in personam jurisdiction not only over those claims with which they have minimum contacts, but also over those actions in which interested parties are properly before the court. The “transient rule” of personal jurisdiction permits an action to be brought wherever the plaintiff can “catch” the defendant, with the result that the forum may be called upon to decide a case in which it has no interest.

Depending on how broadly the forum interprets domestic policies, it can always find some “interest” in the litigation, such as an interest in providing a judicial remedy for parties invoking its adjudicative machinery. However, it is one thing to say that the forum has an interest and the District have a common policy of compensation in such multi-state situations, New York as a way of buttressing its registration laws, and the District as a way of providing a fund to reimburse its residents for the cost of treating non-resident victims. Through the "ordinary processes of construction and interpretation," the court could eliminate the single area in which the laws of the two jurisdictions might conflict—the area of ownership by estoppel—by finding that the District has no interest in applying its lenient ownership doctrine to a non-resident with a car registered out-of-state.

147 Ehrenzweig, Conflict of Laws 103-07 (1962).
149 For a broad view of governmental interests, see Hill, supra note 140, at 490-92.
in entertaining a particular suit; it is another thing to say that it has an interest in applying its law to that suit. When the forum finds that none of the policies underlying its law would be served by applying that law to the facts at issue, it faces a choice-of-law problem.

The choice-of-law problem facing the forum may be a false one. If the disinterested forum finds that only one foreign state has an interest in applying its law to the instant suit, it should apply that law. If the forum finds that two or more foreign states have an interest in applying their law to the same suit, it has three alternatives: (1) Through "moderate and restrained interpretation," it may find that only one of the laws in fact applies; (2) it may find that by applying the law of one interested state it fulfills the policies underlying the laws of both; or (3) it may split the facts of the case into independent issues to be selectively resolved under the respective laws of each state.

In the Williams case, the court of appeals for the District of Columbia implied that it was a disinterested forum mediating a controversy between New York and New Jersey. Without subjecting New Jersey law to the same kind of policy analysis which it applied to District law, the court found that New Jersey had no interest in providing plaintiff with recovery. Since New York had such an interest and since New Jersey was found to have none, the court applied New York law. However, the court could also have found that the New Jersey rule of allowing registered owners to prove passage of equitable title was designed to protect New Jersey registered owners. In a case involving a New York registered owner and a New Jersey victim, New Jersey would arguably have a predominant interest in compensating the plaintiff. Furthermore, that interest could be validly served by applying New York law to the issues of ownership and vicarious liability. In each case, the court would avoid direct conflict by applying New York law.

---


151 See text accompanying notes 96-105 supra.


153 See text accompanying notes 120-43 supra.

154 357 F.2d 581, 586 n.13 (D.C. Cir. 1965).

155 The court decided that New Jersey had no interest in fixing liability on defendant Goldberger by looking to a New Jersey case, Burke v. Auto Mart, Inc., 37 N.J. Super. 451, 117 A.2d 624 (App. Div. 1955), involving a New Jersey registered owner, a New Jersey plaintiff and an accident in New Jersey. The court made no inquiry into the policies underlying the New Jersey rule to determine how that rule might apply to a multi-state situation such as Williams.

156 For statement of the New Jersey rule allowing passage of equitable title, see Burke v. Auto Mart, Inc., supra note 155.
If the disinterested forum finds a true conflict between the laws of two foreign states, it has various choices. The court may succeed in avoiding that choice by dismissing suit under the doctrine of forum non conveniens. However, when dismissal is not a proper alternative, the court must make a choice of law. In making such a choice, the forum is admittedly no longer dealing with a false conflict. Nonetheless, it is interesting that none of the choices open to the court can be easily justified in terms of Currie's analysis. To apply forum law to a suit in which the forum has no interest is to ravage the very premise of governmental-interest analysis. To apply the "better" of two foreign laws is to engage in "weighing," which Currie finds improper. To choose that foreign law which is most similar to forum law is an excuse for allowing the forum to apply either the "better" law or its own law. To follow Currie's suggestion of flipping a coin or of applying the law of the state which comes first in the alphabet is to equate choice-of-law theory with "sorcery." Currie's dilemma adheres in his reluctance to have courts engage in a "weighing" of interests. However, to the extent that courts make normative evaluations in resolving even false conflicts, there is nothing inconsistent in similarly allowing the disinterested forum to choose whichever foreign law produces a "just" result.

2. Disinterested Forum Facing Case In Which No State is Interested

The disinterested state may also find that no state has an interest in applying its law to the facts at issue. Currie constructed such a case

\[\text{References}\]

161 For the suggestion that the forum may apply that foreign law which is most similar to forum law, see Comment, 54 Calif. L. Rev. 1301, 1329 (1966). See also Von Mehren & Trautman, The Law of Multistate Problems 407-08 (1965); Currie, The Disinterested Third State, 28 Law & Contemp. Prob. 754, 779 (1963).
162 "One is almost tempted to suggest that it would be better to flip a coin..." Currie, Married Women's Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227, 252 (1958).
163 "In all solemnity, I suggest that a nearly ideal choice-of-law rule for such cases would be that the governing law shall be that of the state first in alphabetical order." Currie, The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws, 28 U. Chi. L. Rev. 258, 279 (1961).
165 See note 65 supra.
by varying the facts of *Grant v. McAuliffe*,\(^ {167}\) in which California applied its survival of actions statute to allow a California plaintiff to recover against the estate of a California resident for an accident occurring in Arizona. The policy underlying the Arizona law of allowing such actions to abate was presumably designed to protect Arizona beneficiaries and estates probated in Arizona.\(^ {168}\) Since *Grant v. McAuliffe* involved a California estate being probated in California, Arizona admittedly had no interest in applying its law to defeat recovery. California, on the other hand, by allowing recovery apparently considered it more important to compensate California plaintiffs than to protect California estates from being depleted by suits against deceased residents.\(^ {169}\)

In Currie's hypothetical case, an Arizona plaintiff was injured in Arizona by a California resident who died before action was brought in California.\(^ {170}\) Currie described this "unprovided case" as a "kind of lacuna" in which "neither state cares what happens."\(^ {171}\) Arizona would have no interest in applying its statute of abatement to a case involving a California estate with California beneficiaries. California, on the other hand, would have no interest in having such action survive against a local estate to compensate a foreign resident for an out-of-state accident. The policies under neither law would be served by applying it to the facts at issue.

To say that no state has an interest in applying its statutes to a particular case is not to say that no state has an interest in providing judicial remedy for the parties. If the statutes of neither state apply, the court may, for example, seek a remedy at common law.\(^ {172}\) However, it may well be that neither the common nor statutory laws of either contact state applies. Currie has suggested that in such cases the forum should invariably apply its own law.\(^ {173}\) Others have suggested that the forum apply any law but its own.\(^ {174}\) Whatever commentators may say, it seems likely that judges in such context will choose the "better" law to produce what they consider a "just result."\(^ {175}\)

\(^{167}\) 41 Cal. 2d 859, 264 P.2d 944 (1953).
\(^{170}\) Id. at 229-32, 244.
\(^{171}\) Id. at 229.
\(^{172}\) Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959).
\(^{173}\) "If I were a judge I think I should prefer application of the law of the forum . . . . But then, I am a pretty old-fashioned fellow." Currie, *The Disinterested Third State*, 28 *Law & Contemp. Prov.* 754, 780 (1963).
\(^{175}\) "When a court finds itself faced with a choice between such anachronistic laws still
The problem of the disinterested forum is rare, and may become increasingly rarer as theories of judicial competence work to restrict the ‘transient rule’ of jurisdiction. However, the concept of the disinterested forum remains useful to test the finding of a false conflict. Since the disposition of a false conflict is theoretically one which each contact state would independently reach by looking to its own interests, it is also one which a disinterested third state would have to reach. In resolving a false conflict, a court should therefore ask whether a disinterested third state with the same case before it could be reasonably expected to reach the same result for the same reasons. If so, then the choice-of-law problem is truly a false one.

II

ABSENCE OF DIFFERING LAWS

A. Case of Identical Laws

In cases having contacts with more than one state, it often happens that the laws of each contact state are the same. According to tradi-

176 In the visible experience of modern American law teachers its occurrence is extremely rare. Our casebook cases, and the current cases about which we write in the law reviews, almost invariably involve a conflict, or apparent conflict, between the forum and another state. It is extremely difficult to find actual cases for the purposes of a discussion [of the disinterested forum] . . . For that reason I have tended to regard the problem as relatively unimportant, though intellectually troublesome . . . ” Currie, The disinterested Third State, 28 LAW & CONTEMP. PROB. 754, 765 (1963). For possible cases of a disinterested forum, see LaChance v. Service Trucking Co., 215 F. Supp. 162 (D. Md. 1963); Dimon v. Dimon, 40 Cal. 2d 516, 254 P.2d 528 (1953); Youssoupoﬀ v. Widener, 246 N.Y. 174, 158 N.E. 64 (1927).


tional conflict-of-laws doctrine, inquiry is made into proper choice of law even though there may be no difference between the laws of the various contact states. More recently, however, commentators have urged that such cases be treated separately from other conflict-of-law cases on the ground that they present no real choice of law. "[I]f the laws of both states, relevant to the set of facts, are the same... then there is no real conflict-of-laws at all..." Choice of law seems irrelevant in a situation where all choices are the same. In such a situation, disposition of the case is not meaningfully affected by choice-of-law considerations. To choose any particular law is to beg the question by assuming that choice of law has a material bearing on the outcome of the case. To the extent that designation of a particular law is necessary for pleading or other purposes, the court should probably prescribe forum law. However, once the court has established that the relevant laws of each contact state are identical, it should refuse to entertain all choice-of-law arguments.

In discussing the absurdities involved in seeking rules for choosing between identical laws, commentators are irresistibly drawn to Marie v. Garrison. However, since that "undeservedly famous case" actually involved two differing laws which happened to produce identical results,


186 See Ehrenzweig, Conflict of Laws § 102, at 310 (1962).


it will be discussed later. More relevant to the present discussion of identical laws is the case of *Dalton v. McLean.*

Arnold McLean, a resident of Maine driving in New Brunswick, had an accident in which he was killed and several residents of New Brunswick injured. Plaintiffs brought suit in Maine against McLean's estate, alleging negligence. At the date of the accident, Maine had a survival of actions statute while New Brunswick did not. Before suit was brought, however, New Brunswick enacted a survival of actions statute similar to Maine's with retroactive provisions covering the date of accident. The laws of each state, if applied, would have upheld the cause of action against McLean's estate. Finding itself unable to apply either statute, however, the court eventually denied suit altogether as non-actionable at common law. In sum, the court dismissed a suit which could have been sustained under statutes in each contact state, because its conflicts doctrine rendered each statute unacceptable.

It seems clear that the suit in *Dalton* should have been sustained if proper under the laws of both Maine and New Brunswick. Such a result could be reached by applying either the *lex loci delicti* or the *lex fori.* Doing so, however, is itself a concession to choice of law where no such choice exists. Instead, having determined that the laws of all contact states are identical, the court should dismiss the conflicts issue as immaterial. In *Williams v. Rawlings Truck Line, Inc.,* the court decided that the issue of ownership should be governed by New York law. As for the question of the defendant-owner's vicarious liability, the court noted that if New York law were similar in wording and purpose to District law, "the problem of selecting the applicable statute [would] become moot." In discussing false conflicts involving identical laws, commentators have often failed to state what they mean by the statement that "the laws of [all] states relevant to the set of facts are the same." To say that the laws of two contact states are "the same" might mean that each state

---

189 See note 219 infra and accompanying text.
190 137 Me. 4, 14 A.2d 13 (1940). The McLean court made a preliminary finding that New Brunswick law applied as the *lex loci delicti.* On closer analysis, however, the court concluded that the retroactive provisions of that jurisdiction's survival of actions statute conflicted with the public policy of Maine. The court consequently denied a cause of action under New Brunswick law by finding the retroactive provisions of its statute inapplicable to a case involving Maine resident-defendants. If the case had been wholly domestic to Maine, the statute of Maine would have applied. Had the case been wholly domestic to New Brunswick, the statute of New Brunswick would have applied. Ultimately, however, the multistate character itself of the case caused the court to reject the statutes of both jurisdictions.
191 357 F.2d 581 (D.C. Cir. 1965).
192 Id. at 587.
would reach an identical result if all facts in the case were domestic. On the other hand, it might mean that each state would reach an identical result if faced with the same multi-contact case. The difference is crucial. Assume that state $X$ has a Dram Shop Act making liquor dealers vicariously liable for the torts of intoxicated persons to whom they sell alcohol. State $Y$ has a similar law, having modeled its statute after that of state $X$. A, resident in state $X$, sells liquor to an intoxicated person, $B$, who enters state $Y$ and injures plaintiff $C$, a resident of that state. $C$ brings suit in state $X$ against $A$. If all facts were domestic to state $X$—that is, if $A$, $B$, and $C$ were all residents of state $X$, with the sale of liquor and the following accident both occurring in state $X$—then the courts of that state would grant $C$ recovery. If suit were brought in state $Y$ and all facts were domestic, $C$ would also recover. In that sense, the laws of both states are the same. Accordingly, one could argue that since the laws are identical, and since each state would grant recovery if all facts were domestic, the forum should not deny recovery simply because the sale of liquor occurred in one state and the injury in the other. In other words, having determined that the laws of each state are parallel, the court might grant recovery by dismissing the choice-of-law issue as moot.

To dismiss the choice-of-law issue, however, is to assume that the case before the court is wholly intrastate in character and ignore its multi-state contacts. To do so might well produce an improper result. For it is possible that each state, in reviewing the purposes and policies of its Dram Shop Act in light of the multi-state case before the court, would decide that no recovery should be allowed under its law. State $X$ might find that its law was designed to protect people in that state from being injured by intoxicated individuals. State $Y$, on the other hand, might find that its law was penal in design, intended to punish liquor dealers in the state for selling alcohol to inebriated persons. The policies of neither state $X$ nor state $Y$ would be served in such a case by holding $A$ liable.

It would be paradoxical for either state to allow recovery, for the laws of

---

195 See Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir. 1959); Eldridge v. Don Beachcomber, Inc., 342 Ill. App. 151, 95 N.E.2d 512 (1950); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957).
197 State $Y$ may have an interest in seeing that its resident, $C$, is compensated. If so, that policy of compensation would be reflected in its general tort law, under which $C$ might be able to sue $B$, the tortfeasor. For the purposes, of illustration, however, it is assumed that state $Y$ has not incorporated a secondary policy of compensating the victims of inebriated persons into the provisions of its Dram Shop Act. For the constitutional implications of limiting the protection of state $X$'s law to residents of that state, see Currie, Selected Essays on the Conflict of Laws 475-90 (1963).
both as to the multi-state case are the same, namely that no recovery be allowed. In the absence of an applicable statute, the forum would dismiss the suit, unless it could be shown that a cause of action existed at common law.\textsuperscript{188}

In the \textit{Williams} case, the court assumed that choice of law as to owner’s vicarious liability would become moot if the laws of New York and the District of Columbia were found to be the same. It is possible, however, that New York would find its law inapplicable to a suit by a resident of another state concerning an accident which occurred outside New York. In weighing the importance of providing accident victims with solvent defendants against the importance of holding registered vehicle owners harmless from driving over which they have no control, New York may have allowed the policy of compensating plaintiffs to prevail \textit{in order to} protect New York resident-plaintiffs. Since \textit{Williams} concerned an out-of-state accident involving a non-resident plaintiff, a New York court might well find its doctrine of ownership by estoppel inapplicable. Stated differently, a New York court might well find that New York had no interest in applying its law of vicarious liability to such a case. Similarly, it is possible that the District of Columbia would find its law designed to protect residents.\textsuperscript{199} Although it is more likely that the District recognizes a policy of providing compensation for those injured within its jurisdiction so that a fund be available to reimburse District residents offering aid to the victim,\textsuperscript{200} the court did not discuss any such policy for invoking a governing law. Instead the court assumed that the law of some contact state applied. Were those laws found to be identical, it thought the choice-of-law issue should be dismissed as immaterial.\textsuperscript{201}

The court in \textit{Williams} expressly decided to confront choice of law by employing “interest analysis,”\textsuperscript{202} but in considering the identical laws of two contact states, it assumed that one of them had to govern, \textit{without} inquiring whether either state had an “interest” in the litigation. This inconsistency in method has been fostered by those advocates of “governmental-interest analysis” who cheerfully probe respective state policies

\textsuperscript{188} Waynick v. Chicago’s Last Dep’t Store, 269 F.2d 322, 324 (7th Cir. 1959).

\textsuperscript{199} The statement by the courts of a state that its owner-consent statute is not to be given extra-territorial effect can be interpreted to mean that the legislature only intended to protect its own residents. \textit{Cf.} Williams v. Rawlings Truck Line, Inc., 357 F.2d 581, 587 (D.C. Cir. 1965).


\textsuperscript{201} Williams v. Rawlings Truck Line, Inc., 357 F.2d 581, 586-87 (D.C. Cir. 1965). The court seemed to be operating on the assumption that one of two “jurisdiction-selecting rules” applied, either the law of the defendant’s domicile or the \textit{lex loci delicti}. \textit{Cf.} Cavers, \textit{A Critique of the Choice-of-Law Problem}, 47 \textit{HARV. L. REV.} 173, 191-92 (1933).

\textsuperscript{202} 357 F.2d at 586.
when the laws of contact states differ, but ignore the question when they are the same. In a case in which the laws of contact states are the same, there are three possibilities. Each state may have policies which call for application of its law; one state may have such a policy; or neither state may have a policy which would justify invoking its law. In the first case, where both states have policies to be served by applying their laws, “there is no real conflict of laws at all.” The law common to both states should be applied because choice of law is a moot issue. In the second case, where one state has a policy which would be advanced by applying its law to the issue before the court, that law should be applied. What is relevant is not that the other state has an identical law, but that the other state has no interest in applying its law. In the third case, where neither state has a policy which would be fulfilled by invoking its law, the court should dismiss the case for failure to state a cause of action under either law.

B. Case of Identical Results

Frank and Helen Jacek, residents of New Jersey, were traveling in New York when the car Frank was driving became involved in an accident in which his wife Helen was injured. At the time of the accident, Frank was insured under a liability policy issued in New Jersey by the Maryland Casualty Company, providing that the insurer would satisfy any claim which Frank might “become legally obligated to pay” for damages arising from an automobile accident. Wives in New York are permitted to sue their husbands for negligence but are not permitted to recover on their husbands’ insurance policies “unless express provision relating specifically thereto is included in the policy.” New Jersey, on the other hand, would construe Frank’s insurance policy to cover Helen’s injuries, but would not permit wives to sue their husbands for negligence. If the facts were wholly domestic to either New York or New Jersey, the result under the laws of each would be the same. New York would deny Helen recovery on the ground that Frank’s policy does not cover her injuries; New Jersey would deny her recovery on the ground that suits in tort between husband and wife are not entertained in that state.

See authorities cited in note 182 supra.

Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U.L. Rev. 267, 290 (1966). Choice of law is a moot issue only if the laws of both contact states are the same as applied to the multistate case.


Id. at 44.

N.Y. GEN. OBLIGATIONS LAW § 3-313, formerly N.Y. DOM. REL. LAW § 57.

N.Y. INS. LAW § 167(3).

When a court confronts a case having factual contact with more than one state and discovers that each state would reach the same result if faced with a wholly domestic case of the same type, it has three alternatives: (1) It may invoke choice-of-law reasoning to select a particular governing law, even though the result would be the same under any other applicable law;\(^ {210} \) (2) it may decide that choice of law is moot in a multi-state case where the result would be the same under the laws of each contact state;\(^ {211} \) or (3) it may reach a result contrary to the one which would prevail in the domestic situation under the laws of each contact state, either by finding that the laws of no contact state apply\(^ {212} \) or by

---

\(^ {210} \) Hamilton v. Glassell, 57 F.2d 1032 (5th Cir. 1932).

\(^ {211} \) It is helpful in discussing false conflicts to specify what is meant by saying that the laws of each contact state "would yield the same result." Cavers, The Choice-of-Law Process 89 (1965). It is one thing to say that each law as applied to an intrastate case of the same type produce an identical result. It is another thing to say that each state would reach an identical result in resolving the multi-state case before the court. Cf. Harper, Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays, 56 Yale L.J. 1115, 1163-65 (1947). Conceding that each state would reach an identical result if confronted with the multi-state case, one should distinguish between the case where the forum determines that a foreign state would reach the same result by looking to the foreign state's domestic law (Internatio-Rotterdam, Inc. v. River Brand Rice Mills, Inc., 259 F.2d 137 (2d Cir. 1958), cert. denied, 358 U.S. 946 (1959)) and the case where it determines that a foreign state would reach the same result by looking to that state's conflicts law. Gessler v. Gessler, 273 F.2d 302 (5th Cir. 1959); Autographic Register Co. v. Phillip Hano Co., 198 F.2d 208 (1st Cir. 1952); Larx Co. v. Nicol, 28 N.W.2d 705, 224 Minn. 1 (1947). For example, it is one thing for a New Jersey court to decide that Helen Jacek would also be denied recovery in New York by finding that New York would construe the provisions of the insurance policy to deny her recovery; it is another thing for the court to decide that she would be denied recovery by finding that New York defers questions of intra-family immunity to the law of the parties' domicile. The doctrine of renvoi, by which the forum defers not only to the foreign state's domestic law but also to its conflicts law, has been said to have little place in governmental-interest analysis. Currie, The Disinterested Third State, 28 Law & Contemp. Probs. 754, 782 (1963). If a court chooses to resolve conflicts problems by applying governmental-interest analysis, it does so by looking to the policies underlying the laws of contact states, not by looking to "jurisdiction-selecting rules" which those states may have erected. The doctrine of renvoi assumes that the forum has decided to defer to the law of another jurisdiction, the only question being whether the "law" of that jurisdiction includes its conflicts law. But a court which practices governmental-interest analysis only defers to the laws of another jurisdiction when it finds that doing so fulfills policies underlying those laws. That the foreign jurisdiction might itself follow other choice-of-law rules does not mean that the forum should abandon governmental-interest analysis. If all states adopted governmental-interest analysis to resolve their choice-of-law problems, then it would be possible for a disinterested forum to defer to law of a foreign jurisdiction including its conflicts law. However, if that were the case, the "conflicts" law of the foreign jurisdiction would consist of the same process of governmental-interest analysis which the forum would apply to the case at issue. In that context the doctrine of renvoi loses its meaning. But see Von Mehren & Trautman, The Law of Multistate Problems 549-52 (1965). See also De Nova, Conflict of Laws and Functionally Restricted Substantive Rules, 54 Calif. L. Rev. 1569 (1966).

\(^ {212} \) Scheer v. Rockne Motors, Corp., 68 F.2d 942 (2d Cir. 1934); Nelson v. Eckert, 231
finding that the laws of several contact states combine to resolve separate issues of the case, producing a result which neither would reach independently.\textsuperscript{213}

The court in \textit{Maryland Cas. Co. v. Jacek}, having determined that the results under both New York and New Jersey law would be the same, might nonetheless have tortuously probed choice-of-law rules to decide which law to apply. Viewing the suit as one sounding in tort, the court might have decided that New York law should apply as the place where the accident occurred.\textsuperscript{214} On the other hand, viewing the suit as one for recovery on a contract, the court might have found that New Jersey law applied as the place where the contract was made.\textsuperscript{215} Either line of reasoning produces the same result—Helen is denied recovery on the insurance policy.

On the other hand, since the outcome of the case would be unaffected by any choice of law, the court might instead have dismissed that issue as moot. It has been suggested that in cases in which the same result prevails regardless of the law applied, there is no real conflict of laws at all.\textsuperscript{216} Allowing the court to indulge in gratuitous reasoning, besides wasting judicial effort, produces a body of misleading dicta parading as valid choice-of-law precedent.\textsuperscript{217} More serious, however, such convoluted reasoning\textsuperscript{218} increases the likelihood that the court will find neither law applicable and reach a result contrary to the policies prevailing in each contact state.\textsuperscript{219}


\textsuperscript{216} \textit{CAVERS, THE CHOICE-OF-LAW PROCESS} 89-90 (1965). \textit{Hancock, supra} note 182, at 134; \textit{Lefler, Choice-Influencing Considerations in Conflicts Law}, 41 N.Y.U.L. Rev. 267, 290 (1966); \textit{Morris, supra} note 182, at 891; \textit{Weintraub, A Method for Solving Conflict Problems—Torts}, 48 CORNELL L.Q. 215, 235 (1963). It should be noted that choice of law is a moot issue only if the laws of each state produce the same result as applied to the multi-state case before the court. See note 211 \textit{supra}.

\textsuperscript{217} \textit{EHRENZWEIG, CONFLICT OF LAWS} § 175, at 465-66 (1962).

\textsuperscript{218} "[I]f the laws of both states, relevant to the set of facts . . . would produce the same decision in the lawsuit, then there is no real conflict of laws at all . . . . Some of the strangest decisions with some of the lengthiest and most convoluted opinions in the books could have been handled simply and easily if the false conflict analysis had been understood and accepted." \textit{Lefler, Choice-Influencing Considerations in Conflicts Law}, 41 N.Y.U.L. Rev. 267, 290 (1966).

\textsuperscript{219} In \textit{Scheer v. Rockne Motors, Corp.}, 68 F.2d 942 (2d Cir. 1934), a New York automobile owner provided use of his car to an employee who in the course of his employment drove into Ontario and had an accident injuring his New York passenger. The court held that New York standards of vicarious liability—making an owner liable for the acts of
The argument that choice of law should be dismissed as moot in a case where different laws of several contact states produce the same result is persuasive only if one assumes that one of the several laws must be applied and that together they cannot be legitimately combined to produce a result contrary to the one which would obtain in a wholly domestic case. The Restatement has operated on the first assumption, namely that the law of at least one contact state has to apply.\textsuperscript{220} On that

---

assumption, it of course makes no difference which law is applied. Critics of the Restatement, however, have suggested that laws of contact states be invoked only when some purpose underlying them would thereby be served. On that assumption, it is entirely possible that no policies of any contact state would be advanced by applying its law to a multi-state situation. The fact that the laws of each contact state if applied would produce the same result does not mean any such law should be applied.

It rarely happens that no contact state's policies would be served by applying its law to a multi-state situation. More common is the situation where the law of one contact state is invoked to resolve one issue in a case and the law of another state is applied to a different issue, so that combined they produce a result contrary to the common one which would obtain if the entire law of only one state were applied. Such hybrids can only occur if the court "splits" the case into separate issues and decides to resolve some issues under the laws of one contact state and other issues under the laws of another state.

In Maryland Cas. Co. v. Jacek the court adopted this third alternative by splitting the case into two issues: the issue of immunity between husband and wife, and the issue of insurance coverage. The court then combined the New York law of allowing suit between spouses with the New Jersey standard for construing insurance coverage to reach a result which neither New York nor New Jersey alone would have provided. Both contact states would have denied Helen Jacek recovery; together their laws were combined to provide her with a cause of action.

The result in Jacek is grotesque. But it is grotesque not because the court reached an outcome different from any which New York or New Jersey alone would have provided, but rather because it split and combined issues improperly. The court failed to realize that the New York

---

222 See text accompanying notes 167-79 supra.
224 Goodrich, Conflict of Laws § 95, at 176 (Scoles ed. 1964).
225 No authoritative terminology has yet been established for describing this process of splitting. Leflar refers to the process as "severance." Leflar, Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws, 63 COLUM. L. REV. 1212, 1249 (1963). For various synonyms, see NIEDERER, EINFUHRUNG IN DIE ALLGEMEINEN LEREN DES INTERNATIONALEN PRIVATRECHTS 207-08 (1934). See also text accompanying notes 120-43 supra.
227 "True it is that choice of law must proceed on an issue-by-issue basis; but modern conflict-of-laws analysis can make no more serious mistake than to indulge in an unprincipled eclecticism, picking and choosing from among the available laws in order to reach a result that cannot be squared with the interests of any of the related states. Issue-by-issue analysis should not result in the cumulation of negative policies to produce a result not contemplated by the law of either state," Cavers describing Professor Currie's position, Cavers, Choice-
rule for allowing suit between husband and wife is as closely linked to its narrow construction of insurance policies as the New Jersey rule disallowing such suits is with its broad interpretation of insurance coverage. Both New Jersey and New York are concerned about the danger of collusion which exists when spouses are allowed to sue each other. New Jersey has avoided that danger by proscribing such suits altogether. New York, on the other hand, permits suit but minimizes the danger of collusion by interpreting insurance policies strictly. The Jacek court ignored the protective measures of each state by treating the immunity issue separately from the insurance issue. In doing so, it subverted New Jersey policy of preventing collusion against insurance companies without serving any New York policy of providing compensation for injured spouses.

By varying the facts in Jacek, it is possible to construct a situation in which the laws of two states would deny recovery in a domestic case but properly combine in a multi-state case to provide a cause of action. State X does not allow suit between spouses but does consider it negligent per se to exceed its highway speed limits. State Y allows suit between spouses but does not consider it negligent per se to exceed its speed limits. Franque and Ellen Jacek, residents of state Y, were traveling in state X at excessive speed when Franque collided with another car,
injuring both the driver of that car and his own wife, Ellen. Franque had no reason to know that, at the time of the accident, his speedometer was defective and that his speed exceeded legal limits. On returning to state Y, Ellen filed suit against her husband for damages due to negligence. Under the laws of state Y, Ellen would be denied recovery, for her husband could show that he was not negligent according to the laws of that state. Similarly, under the laws of state X, she would be denied recovery, for that state does not entertain suits between husband and wife. However, even though neither state X nor state Y alone would grant Ellen recovery, it would be quite proper to provide her with a cause of action by applying the law of state Y to the issue of inter-spousal immunity and the law of state X to the issue of negligence. By having the law of the parties' domicile govern capacity to sue and by having the law of the place of accident govern the standard of care, the court fulfills the policies underlying the law of each state.

III

ABSENCE OF CONFLICTING INTERESTS: A THRESHOLD INQUIRY

A. Case of Foreign Law as Datum

Early in 1959, one year after his seminal essay on “Married Women's Contracts,” Currie wrote a short article explaining the general scope and purpose of his proposed method. In that article he divided all conflicts cases into two categories: “(1) those in which the purpose of the

232 “[W]e should think it natural enough that a two-state case involving two distinct policy problems should not always have the same result as a one-state case involving the same problems.” Cavars, THE CHOICE-OF-LAW PROCESS 40 (1965). “Although the result might appear anomalous on first thought, there should be nothing surprising in the suggestion that the combination of the relevant policies of two states might bring about a legal result which would not be obtained under the policy of either one of them alone.” Harper, supra note 211, at 1163.


234 “[T]here is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction. Where the issue involves standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling but the disposition of other issues must turn . . . on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented.” Babcock v. Jackson, 12 N.Y.2d 473, 484, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 752 (1963).


236 Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 DUKE L.J. 171.
reference to foreign law is to find the rule of decision, and (2) those in which the reference has some other purpose." Currie then, as later, addressed himself to choice-of-law problems arising in the first category and expressly refrained from discussing those of the second category. The distinction that he had drawn, however, between "rules of decision" on the one hand and "datum" on the other has persisted.

When a court looks to foreign law for a rule of decision, it determines rights and defenses not by its own, but by another law. In cases where the forum has no interest and a sister state has some interest in applying its law to the facts at issue, the forum finds a rule of decision in that foreign law. In other cases, however, where the forum has an interest in applying its law and chooses to do so, it may look to foreign law as "datum" to be considered with other relevant facts under forum law. If a domiciliary of state X, for example, dies leaving property in state Y, the courts of state Y may decide that the validity of the will is to be determined by the laws of state X. In such a case, the forum is making a conflicts-of-law decision that the rights of the parties be determined by looking to foreign law. On the other hand, the forum may also look to foreign law not for a rule of decision, but rather as a "datum" in applying its own law. A domiciliary of state X dies leaving property in the state to B, an alien and a resident of state Y. State X has a reciprocal inheritance statute allowing non-resident aliens to take property by succession if...
the alien's homeland provides American citizens with similar rights. In deciding whether B should succeed to the property in question, the courts of state X must look to the laws of state Y to determine whether that state grants similar rights to Americans. But in looking to the laws of state Y, the forum is not looking for a rule of decision. On the contrary, it finds the rule of decision in its own law, namely that B is allowed to take by succession upon the showing of certain facts. In this case, one of those relevant facts also happens to be the laws of a foreign state. But that does not mean the forum is making a choice of law. For in cases where the forum looks to a foreign law as datum in applying its own law, no conflict of laws exists. Since the forum looks to foreign law only after it has already decided to apply its own law, there is no place for even potential conflict of laws.

The fact that choice of law seems irrelevant in datum cases has led some commentators to speak of such cases as false conflicts. To a certain extent it is true that datum cases present no conflicts problems. But it is true only because the forum has already made a threshold choice-of-law decision. Having made that threshold decision, the forum looks to foreign law as datum without reference to choice of law. The "false conflict" label should not, however, preclude inquiry into the wisdom of that initial choice-of-law decision itself.

Commentators often cite as datum cases those which involve questions of personal status. Banco de Sonora v. Bankers' Mut. Cas. Co. is such a case. An American insurance carrier issued to a Mexican bank a casualty policy which provided in part that "packing and sealing of the package containing the property insured hereunder shall be witnessed by two adults." In an Iowa suit for loss under the policy, the bank alleged that sealing of the lost package had been witnessed by a seventeen-year-old boy. The court in Banco de Sonora looked to its own law for rules governing construction of the policy. However, according to forum rules of decision, whether the seventeen-year-old boy was an adult was a question of personal status to be determined by the law of his domicile. The court did not look to Mexican law for the rule of decision, for it had al-

---

247 Kay, supra note 240, at 62.
250 124 Iowa 576, 100 N.W. 532 (1903).
251 Id. at 578, 100 N.W. at 533.
ready decided that recovery under the policy was to be governed by forum law. Under forum law, however, recovery was conditioned upon proof of a fact, namely whether the seventeen-year-old boy was an adult in his own country. To determine that fact, the court looked to Mexican law as datum.

Reference to foreign law as datum may be dictated by statute or by contract as well as by judicial decision. Once that decision has been made, choice of law is a foregone conclusion; and any purported conflict of laws concerning the relevance of foreign law is a false conflict. Having decided that the casualty policy in Banco de Sonora was to be construed by forum law, with reference to Mexican law for a preliminary determination of status, the court faced no conflict at all between the laws of the forum and Mexico. But the decision to construe the insurance policy under forum law and the decision to determine “adulthood” under the lex domicilii involved choice-of-law considerations which deserve critical appraisal. The fact that datum cases are false conflicts for some purposes does not insulate them from governmental-interest analysis altogether. The fundamental choice-of-law assumptions on which they rest are always open to question.

B. Case of Unpleaded Foreign Law

The court in Williams v. Rawlings Truck Line, Inc., found New York to be the only state with an interest in applying its law to the issue of vehicle registration. What appeared to be a choice-of-law problem presented in fact no real conflict at all, for the law of only one state purported to govern that particular issue. The court accordingly disposed of the case as a “false conflict.” However, in resolving Williams by construing only the laws of New York and the District, the court of appeals trans-
formed still another potential choice-of-law problem into a "false conflict." For it avoided altogether the relevance of the law of New Jersey, domicile of the plaintiff and a state with an immediate interest in the issue of his recovery. The court succeeded in ignoring New Jersey law because it had not been properly pleaded and proved. Counsel for appellant "characterized" the issue of vehicle registration as one in contract and urged application of New York law as *lex loci contractus*. Counsel for appellee, on the other hand, characterized the action as one tort and urged application of District law as *lex loci delicti*. Neither party raised the issue of New Jersey's interest in the litigation. By refusing to take judicial notice of an unpleaded law, the court resolved the case without inquiring whether the laws of New Jersey, as an interested state, conflicted with those of New York.

If the court finds in a multi-state case that counsel have failed to plead the law of any state having a real interest in the suit, it may either dismiss on *forum non conveniens* grounds or take judicial notice of an applicable law. If the court finds that counsel have failed to plead the law of

---

257 See Currie, *On the Displacement of the Law of the Forum*, 58 Colum. L. Rev. 964, 965 (1958). To say that the case of unpleaded foreign law presents a "false conflict" is not to deny that a true conflict would ensue if such law were pleaded. Although a true conflict might confront the court if all applicable laws were before it, failure to plead such laws precludes the court from facing that issue.

258 For the problems of pleading and proving foreign law, see CHEATHAM, GOODRICH, GRISWOLD, & REES, *Conflict of Laws* 351-417 (4th ed. 1957); Ehrenzweig, *Conflict of Laws* §§ 121-23, 126-29 (1962); 2 Wigmore, *Evidence* § 566 (3d ed. 1940); 3 id. § 690; 4 id. § 1271; 5 id. §§ 1633, 1674; 7 id. § 1953; 9 id. §§ 2436, 2558, 2573; Nussbaum, *The Problem of Proving Foreign Law*, 50 Yale L.J. 1018, 1044 (1941).


262 It is interesting in view of the District's dissatisfaction with the *Restatement, Conflict of Laws*, that counsel for both parties in Williams based their conflicts arguments on the *Restatement, Cf.*. Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense, 350 F.2d 468, 471 (D.C. Cir. 1965), *cert. denied*, Tramontana v. Varig Airlines, 383 U.S. 943 (1966) ("The Supreme Court in its decisions . . . has recognized the inadequacies of the theoretical underpinnings of Slater and its progeny. The latter cases have a highly attenuated precedential weight, both in authority and reason. Thus we are free to explore the question presented by this appeal in the light of the newer concepts of conflict of laws.").

263 See Currie, *On the Displacement of the Law of the Forum*, 58 Colum. L. Rev. 964, 965 (1958). In an action by a New Jersey plaintiff against a New Jersey registered owner, it has been held that the registered owner may show passage of equitable title. Smith v. Kirby, 113 N.J. 1, 172 Atl. 41 (1934).


265 To date 28 jurisdictions have adopted the Uniform Judicial Notice of Foreign Law Act, 9A U.L.A. §50 (1965) and several states have enacted other similar statutes. See, *e.g.*, Cal. Evid. §§ 311, 450-55, 459, 1452-53; N.Y. Civ. Prac. Law & Rules, Rule 4511.
an interested state, it may take notice of, and apply that law. However, to say that the court must seek still other applicable laws when one has been properly raised or judicially noticed is to misconstrue the judicial function in governmental-interest analysis. It is not for the court to generate true conflicts by taking judicial notice of potentially applicable laws when counsel have agreed to resolve their dispute under laws properly before the court.266

The language of governmental-interest analysis is misleading to the extent that it implies that "interested" states claim to dictate governing law.267 To say that a state is interested in a particular suit is to say that one of the parties to that suit stands in a relationship with that state such as to justify his claiming the protection of its laws. If that party feels he would be better protected under the laws of another interested state, the first state cannot be said to have suffered any real injury. The interest of a state consists in extending the protective arm268 of its legislation, not in insisting on its application.269 The decision to seek that protection lies with the litigant.

Standards of due process are met by the application of the law of at least one interested state.270 That the laws of other interested states have not been pleaded and will not be raised has no constitutional significance. Having met minimum requirements of due process, the court should leave the raising of potentially applicable laws, the analysis of policy underlying them, and the presentation of governmental interests to the realm of trial


An exception to this rule might be made in a case where the unpleaded law of an interested state is forum law. Even though the law of an interested state is before the court, judicial notice might be taken independently of unpleaded forum law if that law reveals strong forum policy against disposition of the case under pleaded law. For the "public policy" exception generally in conflict of laws, see Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956).

267 EHRENZWEIG, CONFLICT OF LAWS § 122, at 349 (1962).


269 Clark v. Clark, 222 A.2d 205, 208-09 (1966) ("In most private litigation the only real governmental interest that the forum has is in the fair and efficient administration of justice . . . . ").

strategy. The court has no duty to generate true conflicts where none have been raised by the parties.

CONCLUSION

The concept of false conflicts has wide appeal and diverse meaning. In some cases, it is used to describe situations in which choice of law is moot. In other cases, it is used to describe the choice-of-law process itself. And in still other cases, it is used to describe situations in which choice of law has already been made. In each case, however, by characterizing a choice-of-law problem as a false conflict, the courts are asserting that only one law can be rationally applied to the facts at issue. The concept of false conflicts has value for courts which are sufficiently sophisticated to engage in the kind of reasoning it presupposes. The concept is also useful in eliminating as forceful precedent those choice-of-law cases which are found to have involved no real conflict. But it is no shibboleth for solving the problems of private international law. Rather it is a challenge to counsel and courts alike to abandon the talismans of the past by confronting the task of accommodating legitimate state interests.

Peter Kay Westen