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AGAINST COMITY
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The misleading word 'comity' has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles.¹

If you are interested in the endlessly engrossing problem of choosing law, you may have noticed that yet another new/old idea has some currency right now: the idea of comity. Some courts² and commentators³

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1. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201-202 (N.Y. 1918) (Cardozo, J.).

2. See, e.g., *Wong v. Tenneco, Inc.*, 702 P.2d 570 (Cal. 1985); cf. Holly Sprague, *Comment, Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 CAL. L. REV. 1447 (1986).

3. See Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT'L L.J. 245 (1991); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 312-318 (1990); see also LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 145-90 (1991).

It should be noted that Professor Brilmayer apparently has abandoned the central thrust of her early attack on interest analysis. She now seems to recognize the usefulness of purposive reasoning for conflicts problems, and uses interest analysis to identify true conflicts. It is not clear whether she would agree with Professor Kramer that purposive reasoning is constrained by rationality. See Lea Brilmayer, *The Other State's Interests*, 24 CORNELL INT'L L.J. 233 (1991). In view of this change it is hard to agree with Professor Kramer that a "new generation of scholars rejects interest analysis entirely." Kramer, *Rethinking Choice of Law*, *supra*, at 278. Among his authorities for this

have recently reinvigorated the ancient argument⁴ in favor of comity in choice of law. These new comity theorists join unregenerate territorialists⁵ in believing that a happy world of mutual accommodation can be achieved through the use of neutral and independent tie-breaking rules. Such rules, in their view, will encourage states to defer to foreign law when to do so would maximize the states' mutual policies. The new comity theorists differ somewhat from their intellectual ancestors by stressing that the goal of maximized policy can be **(1991) 80 GEO. L.J. 54** achieved only if all, or many, states participate in the process. The model is one of "reciprocity."⁶

Taking on a misty glamour from chic references to game theory,⁷ the new reciprocity in choice of law arises from a speculative argument about comparative benefit. This begins with a question. How much better off would a state be if its courts systematically accommodated the policies of other states, abjuring enforcement of its own policies? Professor Larry B. Kramer is a strong proponent of comity and reciprocity. Interestingly, he concedes that the answer to that question is, "Not much." The benefits to the forum from unilateral accommodation of another's substantive policies, he acknowledges, generally would not outweigh the losses to vindication of substantive forum policy⁸ (Professor Kramer does not see

proposition only Brilmayer is currently active. Since this article was written, Professor Kramer has also distanced himself from some of the argumentation contained in *Rethinking Choice of Law*. See *infra* note 215.

4. See, e.g., JOSEPH BEALE, TREATISE ON THE CONFLICT OF LAWS (1935); RESTATEMENT OF CONFLICT OF LAWS (1934); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834). For the classic judicial exposition, see *Hilton v. Guyot*, 159 U.S. 113 (1895).

5. It is increasingly difficult to find clear examples, but for close approximations, see generally, John P. Kozyris, *Interest Analysis Facing Its Critics And, Incidentally, What Should Be Done About Choice of Law for Products Liability*, 46 OHIO ST. L.J. 569 (1985); Peter Hay, *Full Faith and Credit and Federalism in Choice of Law*, 34 MERCER L. REV. 709 (1983).

6. See, BRILMAYER, FOUNDATIONS AND FUTURE DIRECTIONS, *supra* note 3, at 162; Kramer, *Rethinking Choice of Law*, *supra* note 3, at 339.

7. Game theory was originally developed by John von Neumann and Oskar Morgenstern, who describe the theory in their THEORY OF GAMES AND ECONOMIC BEHAVIOR (1943).

8. Professor Kramer does not discuss other possible local losses. For discussion of these, see *infra* Part IV; see also Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595 (1984).

possible wider losses).⁹ That is so even if applying sister state law would advance the forum's procedural policies about the wise administration of law. Thus, the heart of the proposal is the suggestion that it is reciprocity that makes comity pay.¹⁰ The comity theorists argue that, if comity is reciprocal, both states are better off than they would have been if each simply applied its own law.

This is an appealing proposal. I am interested in, and want to broach, the questions raised by it. I use the occasion to help lay the modern intellectual foundations for forum preference in choice of law. In Part I of this article I describe the game theoretic underpinnings of the comity theorists' argument. In Part II I consider the implications of reciprocal comity for substantive law. I do an interest analysis of the recent Supreme Court decision in *EEOC v. Arabian American Oil Co. (Aramco)*,¹¹ and comment speculatively on the case. In Part III I explore the failure of the Supreme Court as neutral arbiter, under the Commerce Clause, to create effective limits on the extraterritorial impacts of unilateral state law. I also examine specific "canons" of choice of law tentatively advanced by Professor Kramer. In Part IV I note dysfunction at the forum departing from its own law. Thus, I argue—unlike other modernists—that even when forum law favors the defendant the interested *55 forum should apply its own law. I conclude that reciprocal comity is not the appealing prescription that it sounds, but instead, in implementation, is discriminatory and substantively damaging to the rule of law.

I. GAME THEORY AND CHOICE OF LAW: GODZILLA MEETS THE SWAMP THING

To illustrate that choice of law is not a zero-sum game—one in which one player's loss is the other's gain—but rather a positive-sum game—one

9. For possible systemic losses on an interstate or international scale, *see infra* Part II.

10. The link between comity and reciprocity on which these writers insist is hardly new. *See Hilton v. Guyot*, 159 U.S. 113, 210-28 (1895) (holding unenforceable a French judgment for want of reciprocity, notwithstanding comity arguments). For more recent appreciation of the harmfulness of the linkage, *see infra* note 90.

11. 111 S.Ct. 1227 (1991) (holding that Title VII of the Civil Rights Act of 1964 does not extend to extraterritorial discrimination by an American employer against an American employee).

in which mutual benefits can outweigh individual losses—Professors Lea Brilmayer and Larry Kramer recall the classic instance of The Prisoners’ Dilemma.¹² A prosecutor in a totalitarian country has two suspects he believes have committed a political crime. He would like to have their confessions. The prosecutor, who always tells the truth, locks each suspect in a separate isolated dungeon. He makes the identical proposition to each of them, and tells each that he has made the other the identical proposition. If, after twenty-four hours, neither of them confesses, he will imprison each for six months. If one of them confesses, he will imprison that one for only three months, but the unconfessing suspect will get five years. If both confess, each will get two years.

Intuitively, one might suppose that each prisoner, in isolation from the other, would decide to play safe and not confess. By each seeking to protect herself, the pair could achieve the mutually advantageous disposition of six month terms. The trouble is that each prisoner knows the rules, and knows that the other knows. Each has a three-month incentive to betray the other by confessing, and each has the threat of the heavy five-year term if she refuses to confess and the other does. So theory predicts that with only one play of this game each prisoner will actually confess and serve a two-year term. The nice paradox is that although each acts rationally, the prisoners fail to achieve the most advantageous mutual position. Acting rationally but unilaterally and in ignorance, the prisoners cannot capture their collective advantage.

The difficulty for the prisoners is that they have only one play of the game. With additional plays of the game, they would gain information. More recent game theory predicts they would begin to perceive where their mutual **(1991) 80 GEO. L.J. 56** advantage lies.¹³ Professor Kramer

12. See MARTIN SHUBIK, *GAME THEORY IN THE SOCIAL SCIENCES* 254 (1982). Shubik attributes the game of The Prisoners’ Dilemma to A. W. Tucker, who circulated the game in mimeograph form at Stanford University in 1950. The statement of the game in the text is a paraphrase. For use of the game in conflicts analysis, see BRILMAYER, *FOUNDATIONS AND FUTURE DIRECTIONS*, *supra* note 3, at 156; John P. Kozyris, *Corporate Takeovers at the Jurisdictional Crossroads; Preserving State Authority Over Internal Affairs While Protecting the Transferability of Interstate Stock Through Federal Law*, 36 *UCLA L. REV.* 1109, 1115 & n.29 (1989); Kramer, *Rethinking Choice of Law*, *supra* note 3, at 341; see also Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 *HARV. L. REV.* 842, 844-47, 845 n.13 (1989).

13. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 92 (1984); Jack Hirshleifer, *Evolutionary Models in Economics and Law: Cooperation Versus Conflict*

argues that courts increasingly will practice comity, if they perceive that they are reinforcing shared policies.¹⁴ That is because, as modern game theory suggests, over time courts will become increasingly aware of comity's mutual benefits. There is more than one play of the game; the problem of choosing law goes on forever.

The analogy of The Prisoners' Dilemma is not as helpful to their model as the comity theorists would have us believe. I am only half joking in repeating that from The Prisoners' Dilemma one might draw the conclusion that if each prisoner acted in self-interest without worrying about what the other would do, each would intuitively and correctly refuse to confess. A more serious defect in the analogy, which I note preliminarily to my main points, is that the game is played quite differently in courts. Unlike the prisoners, who within the same play of the game must each make decisions affecting the other, a court faced with conflicting laws can take unilateral responsibility for choosing—for both concerned sovereigns—which of their respective laws to apply. The same question, or even a similar question, may never be presented to the other sovereign. To this the comity theorists would respond, along with other current proponents of a return to choice of law "rules,"¹⁵ that, a fortiori, courts with unilateral power of decision would benefit from neutral guidelines; that of course neutral guidelines occasionally will dictate departure from forum law; that such guidelines can be distilled from experiences accumulated through centuries of litigation; that there is real consensus about some of these neutral principles; and that courts are eager to seize the collective advantage promised by mutual adherence to the rules.

Strategies, 4 RES. L. & ECON. 1 (1982). The evolutionary model of game theory has been much discussed in legal literature on issues of cooperation and collective advantage. A Westlaw search of the literature produced 145 documents. A number of later works focusing on interstate tender offers incorporate evolutionary game theoretic arguments. For an example written from a conflicts perspective, see Kozyris, *supra* note 12, at 1115 & n.29. Both Kramer and Brilmayer base their comity argument on evolutionary game theoretic notions. BRILMAYER, FOUNDATIONS AND FUTURE DIRECTIONS, *supra* note 3, at 155; Kramer, *Rethinking Choice of Law*, *supra* note 3, at 340.

14. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 342.

15. See, e.g., FREDERICH JUENGER, GENERAL COURSE ON PRIVATE INTERNATIONAL LAW 288 (1983); ALI, COMPLEX LITIGATION PROJECT, Ch. 6, Choice of Law (Tent. Draft No. 3, 1990).

But—to turn The Prisoners’ Dilemma analogy back on itself—it was precisely through long experience with abstract, independent, neutral sounding rules that courts came to abandon choice of law rules and embrace modern interest analytic approaches instead. Innumerable plays of the game demonstrated the disappointing truth that under any set of well-intended, independent, abstract choice rules, in the substantial fraction of cases—those Brainerd Currie first called “false problems”¹⁶ and we call “false conflicts”—such (1991) 80 GEO. L.J. 57 rules will operate irrationally. False conflicts are those in which only one state has an interest in governing by its laws. The only rational solution to such a case is governance by the interested state.¹⁷ In another substantial fraction of cases—those Currie called “true conflicts” (in which either choice would be rational)—abstract rules will tie the interested forum’s hands. In turn, this will tend to lead to widespread evasion and manipulation of the abstract rules.¹⁸

16. Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 251-54 (1958). There is an obvious theoretical relationship between the state “interest” an analyst would require for governance, and the rational basis the Supreme Court requires for governance. *See generally* Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982). For a late false conflict case reaching forum law through constitutional rather than conflicts analysis, *see Gustafson v. International Progress Enter.*, 832 F.2d 637 (D.C. Cir. 1987).

17. *See Judge v. American Motors Corp.*, 908 F.2d 1565, 1575 (11th Cir. 1990); *see also* Currie, *Married Women’s Contracts*, *supra* note 16, at 240 (application of uninterested state’s law “incredibly perverse”).

18. For recent examples of such evasion in the few courts still using the rule of *lex loci*, *see Owen v. Owen*, 444 N.W.2d 710, 711-12, 714-18 (S.D. 1989) (rejecting, as against public policy, rule of interspousal tort immunity under guest statute at place of injury, over concurrence urging abandonment of the rule of *lex loci*); *Vest v. St. Albans Psychiatric Hosp., Inc.*, 387 S.E.2d 282, 283, 286, 287-88 (W. Va. 1989) (holding, on ground of “comity”—over a vigorous dissent arguing that the court was abandoning the rule of *lex loci*—that the resident plaintiff need not comply with medical malpractice tort reform legislation of the state where the defendant was providing medical services, even assuming that was the place of the tort; distinguishing a hypothetical case in which the plaintiff also was not a resident). *See* Walter Wheeler Cook, *The Logical & Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 486-87 (1924) (judicial opinions, without purposive reasoning, will conceal Holmes’ “inarticulate major premise”; decisions are actually a function of policy).

These realist perceptions, reflected in decisions in New York¹⁹ and California,²⁰ and described by Brainerd Currie²¹ and Walter Wheeler Cook,²² are now shared by most courts in this country.²³ This is what toppled the traditional “rules” approach to the conflict of laws.²⁴ Decades of “plays of the (1991) 80 GEO. L.J. 58 game” had enabled courts to see the directions in which abstract rules were taking them: collective disadvantage and disarray. Courts began to consider whether collective advantage in conflicts cases might lie instead in mutual enforcement of local law.²⁵

19. See *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954); *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

20. See *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967).

21. See Currie, *supra* note 16.

22. See Cook, *supra* note 18.

23. For comprehensive case surveys, see John P. Kozyris & Symeon C. Symeonides, *Choice of Law in the American Courts in 1989: An Overview*, 38 AM. J. COMP. L. 601 (1990); Symeon C. Symeonides, *Choice of Law in the United States*, 37 AM. J. COMP. L. 457 (1989); Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041 (1987); Herma Hill Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983).

24. It is fair to say that most modernist approaches are at least in part interest analytic. Cf. ROBERT LEFLAR, *AMERICAN CONFLICTS LAW* 195 (3d ed. 1977) (“choice-influencing considerations [include] advancement of the forum’s governmental interests”); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b) (1971) (“factors relevant to the choice of the applicable rule of law include the relevant policies of the forum”). See generally Robert Lefflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10 (Spring 1977); Bruce Posnak, *Choice of Law: A Very Well Curried Lefflar Approach*, 34 MERCER L. REV. 731 (1983); William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash*, 34 MERCER L. REV. 645 (1983). For a recent example of a court ostensibly applying “the better law” approach, but in fact ably performing a governmental interest analysis, see *Judge v. American Motors Corp.*, 908 F.2d 1565 (11th Cir. 1990).

25. Courts articulating this insight often are adjudicating forum non conveniens or construing statutory or constitutional provisions that either seem to require, or at least do not in terms limit, access to courts. See, e.g., *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990) (upholding Texas legislature’s abolition of forum non conveniens for wrongful death and personal injury actions), cert. denied, 111 S.Ct. 671 (1991). A concurring judge noted: “Both as a matter of law and of public policy, the doctrine of forum non conveniens is without justification In fact, the doctrine is favored by multinational defendants because a forum non conveniens dismissal is often outcome-determinative, effectively defeating the claim” *Id.* at 682 (Doggett, J., concurring) (footnote omitted).

The problem is more complex than the new comity theorists imagine. Even if states choosing law were just like premodern sufferers in some philosopher's initial condition, even if all states knew that a set of shared policies was maximized because they were reliably and repetitively respected in other states, and even if all courts faithfully chose law according to such policies, we would still know little about the world their decisions would help to fashion. Generations of plays of the litigation game have led us to suspect that reciprocal comity in applying neutral choice rules may, in fact, present grave risks to the collective good.

II. RECIPROCAL COMITY AND THE RULE OF LAW

The comity theorists advance their proposals for "neutral" rules in the context of resolving so-called "true" conflicts.²⁶ A true conflict, of course, is a case in which either state's laws reasonably could be construed to govern on the particular facts. The state is thought to have a "legitimate governmental interest" when the reasons for its law would be served by applying it on the relevant issue.²⁷ Sensibly, the comity theorists limit to

26. The comity theorists now use interest analysis to identify true conflicts. In this sense they have joined the ranks of the modernists. Cf. Brilmayer, *The Other State's Interests*, *supra* note 3, at 242-43; Kramer, *Rethinking Choice of Law*, *supra* note 3, at 290-309.

27. This was Brainerd Currie's analysis. Currie, *Married Women's Contracts*, *supra* note 16, at 252. The reader will recognize here the standard model of legal analysis, "purposive reasoning," described in 2 HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1413-17 (tent. ed. 1958) (unpublished manuscript on file at The Georgetown Law Journal). Cf. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 59-62, *passim* (1765-69). Though under heavy attack from the public choice theorists and others, purposive reasoning remains the standard model. In conflicts analysis as elsewhere, it is a constructive, objective, teleological inquiry, worlds away from a search for some supposed actual intention. See WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 42-46 (1942); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 183-184 (1963); Ernest Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 *YALE L.J.* 736, 743-51 (1924).

Nothing in the public choice theorists' ongoing critique of "actual legislative intention" as a guide to statutory meaning (see generally *Symposium on the Theory of Public Choice*, 74 *VA. L. REV.* 167 (1988)), touches the continuing usefulness of purposive reasoning. Professor Kramer recognizes this. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 300 n.65. Legislation indeed may be—as public choice theory tells

true conflict cases their proposal for neutral, reciprocal, policy-maximizing rules. True (1991) 80 GEO. L.J. 59 conflicts obviously are the cases that could use tie-breaking rules. Tie-breakers would be pointless for false conflicts, because cases in which there is only one interested state solve themselves.

Baldly put, then, comity theorists urge courts in a defined set of cases not to apply otherwise applicable local law. I beg no questions here; I say “applicable” because their model is intended precisely for cases in which, *ex hypothesi*, local law applies. In a true conflict each state’s law “applies.”

Mindful of the reality that judges are sworn to enforce applicable local law, and that judges are criticized when they take it upon themselves to construe away otherwise applicable law, let us rescue the comity theorists from themselves and assume that each state’s legislature authorizes comity. Each legislature, hopeful of reaping mutual benefits, authorizes judicial retreat from local policy in cases of true conflict where a codified set of given neutral rules requires that result. The question then becomes whether, even with such authorization, the possible costs of such a program might outweigh the conceivable benefits.

Words like comity, reciprocity, and mutuality, have a deceptively right ring, like good breeding and sweet disposition. The alternative is the much less friendly principle that the interested forum should apply its own law. That may help to explain why American courts today, in true conflict cases, are again beginning to depart from their own law.²⁸ The pied piper

us—the awful product of interest group politics and logrolling. A majority may well find it mathematically impossible to achieve its preferences among multiple ranked choices. But that makes it all the more useful for courts to perform their characteristic function of reading law purposively, to discern what plausible public policy is, and to rationalize its implementation. Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 846 (1989).

28. Well-known true conflict cases in which nonforum law was chosen—to my thinking wrongly—include *Edwardsville Nat’l Bank and Trust Co. v. Marion Lab., Inc.*, 808 F.2d 648 (7th Cir. 1987) (federal transferee court sitting in Indiana applies Indiana law remitting Illinois plaintiff in malpractice suit to cumbersome agency created by Indiana tort reform legislation although plaintiff had access to a tort suit in home state and filed the action there; Indiana was residence of the defendant physician); *Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482 (9th Cir. 1987) (forum, residence of the plaintiff, applies longer statute of limitations of the place of injury); *Offshore Rental Co., Inc. v. Continental Oil Co.*, 583 P.2d 721 (Cal. 1978) (forum applies foreign law as better

seems once again to be leading a dance, and comity theory has its modern judicial converts. Albert A. Ehrenzweig once famously declared that, over the general (1991) 80 GEO. L.J. 60 run of cases, courts do tend to apply their own law. He identified this as the residual “true rule” of decision—true in an empirical sense.²⁹ This may be the true rule elsewhere in the world and may once have been the true rule in this country. But as the comity theorists acknowledge, the tendency today is in the direction of comity, and away from forum law.³⁰ American courts try hard to do the reciprocal, unselfish thing.³¹ There is already so much unthinking but fresh consensus behind comity that American courts are shifting toward a position perilously close to that once labeled “absurd” by Chief Justice Stone; they suppose that in true conflict cases they must always apply foreign law instead of their own.³² I use “always” here because the new idea is one of reciprocated comity. Because reciprocated comity suggests an ideal of universal adherence, the special risks the model presents would be systemic and broad in scale. They would lie beyond the undescribed “sacrifice” by the forum mentioned by Kramer³³ (presumably this is the impairment to forum policy that attends a refusal to enforce forum law). The risks, if any, of reciprocated comity would also lie beyond the problems created for the decision of other local cases when an interested forum departs from its own law. I have noted such dysfunction in an earlier work and I will revisit the problem in a later part of this paper.³⁴ Here I mean to push on beyond merely local dysfunction and explore two other related and perhaps even more important issues.

law, although forum could have construed local law to reach same result, and did so in a later case, *cf. Weinrot & Son, Inc. v. Jackson*, 708 P.2d 682 (Cal. 1985)); *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679 (N.Y. 1985) (forum, the place of injury, applies nonforum law of joint domicile of parties to grant defendant charitable immunity in personal injuries case).

29. Albert A. Ehrenzweig, *A Proper Law in a Proper Forum: A “Restatement” of the Lex Fori Approach*, 18 OKLA. L. REV. 340 (1965).

30. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 344.

31. *Cf. Symeonides*, *supra* note 23, at 459.

32. *Alaska Packers Ass’n v. Industrial Accident Comm’n*, 294 U.S. 532, 547 (1935).

33. *See Kramer, Rethinking Choice of Law*, *supra* note 3, at 340.

34. *See infra* Part IV. *See also* Weinberg, *On Departing From Forum Law*, *supra* note 8, at 34.

The first of these is the question whether, if the forum refuses to take unilateral responsibility for law enforcement, there is a finite risk of system-wide failure to govern injurious behavior. The second is the corollary question, whether the mutual well-being of all states is advanced when the interested forum applies its own law; indeed, whether states can achieve their collective advantage only through reliable enforcement of forum law.

A. COMITY AND THE ILLUSION OF EQUIVALENT CHOICE

1. Is Forum Law Different From Foreign Law?

Professor Kramer does not deny that comity imports departures from forum law. But he argues that there is no structural difference between forum law and foreign law.³⁵ He argues that to withhold forum law does not mean that no law is enforced. Rather, a choice of nonforum law simply means that **(1991) 80 GEO. L.J. 61** another law is applied. Some reasonably parallel law, he seems to imagine, springs into place. This is a happily symmetrical view of the consequences of a choice. But it does seem somewhat at odds with Kramer's own perception that the choice of law question typically arises on demurrer to a complaint, or by way of defense.³⁶ Defendants, after all, do not expensively argue foreign law if they would be almost equally badly off under it.

The reality seems quite different. True conflicts occur along a spectrum of possibilities. (Here I confine discussion, realistically, to the true conflict at the forum chosen for its law by the plaintiff.) There is a large group of cases in which local law would let the plaintiff seek damages, and foreign law confine the plaintiff to a restrictive remedy elsewhere, like workers' compensation.³⁷ There are numerous cases in which a foreign remedy looks reasonably parallel to the remedy at the forum, but in which the plaintiff cannot carry the burden of proof under the foreign cause of action: strict products liability at the forum, for

35. Larry Kramer, *Return of the Renvoi*, 67 N.Y.U. L. Rev. (forthcoming 1991).

36. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 339.

37. *E.g.*, *Lauritzen v. Larsen*, 345 U.S. 571, 575-76 (1953); *O'Connor v. Lehigh Paving Corp.*, 579 F.2d 194, 203 (2d Cir.), cert. denied, 439 U.S. 1034 (1978).

example, in conflict with negligence at the sister state.³⁸ There are also cases in which foreign law would reduce only the quantum of damages: the forum's full damages for the loss of life of a breadwinner, for example, as against a "capped" award of \$25,000 under nonforum law.³⁹

At the other end of the spectrum of true conflicts are cases in which alternatives are barely a feature. In international cases, for example, when defendants argue against application of an act of Congress, courts are likely simply to construe the act to discover the extraterritorial intention of Congress. In such cases foreign law rarely enters the discussion.⁴⁰ Then there (1991) 80 GEO. L.J. 62 are cases like the well known *Laker Airways Ltd. v. Sabena Belgian World Airlines*,⁴¹ in which foreign law is

38. E.g., *Schwartz v. Consolidated Freightways Corp.*, 221 N.W.2d 665, 669 (Minn. 1974) (applying Minnesota comparative negligence rule rather than Indiana contributory negligence rule, which would have barred recovery), cert. denied, 425 U.S. 959 (1976); *Neumeier v. Keuhner*, 286 N.E.2d 454, 458 (N.Y. 1972) (applying gross negligence statute of place of injury to defeat plaintiff, as against negligence rule of forum).

39. E.g., *University of Nevada v. Hall*, 440 U.S. 410, 412 (1979); *Barkanic v. General Admin. of Civil Aviation of the P.R.C.*, 923 F.2d 957, 958 (2d Cir. 1991); *Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense*, 350 F.2d 468, 469 (D.C. Cir. 1965).

40. For an important recent example, see *EEOC v. Arabian Am. Oil Co. (Aramco)*, 111 S.Ct. 1227 (1991). Conceding that Congress has power to reach actions between Americans for employment discrimination which occurs abroad, the *Aramco* Court limited its inquiry to question of statutory interpretation and held that Congress had not intended to reach such actions in Title VII of the Civil Rights Act of 1964. *Id.* at 1230-36. (I supply interest analytic and speculative commentary on *Aramco* *infra* notes 102-09.) The classic antitrust example remains *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (construing Sherman Act as reaching conduct with intended effects in this country). For a recent application of a weak "effects" test to securities regulation, see *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989); for a recent dismissal under the "effects" test, see *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988). Reflecting the influence of comity arguments, an interest balancing test or "rule of reason" is favored today in some courts, and by the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987). For a late, well-argued view that the actual extraterritorial intention of Congress should be addressed instead, even for remedies otherwise implied in the silence of Congress, see Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677 (1990).

41. 731 F.2d 909 (D.C. Cir. 1984).

utterly barren of the needed relief.⁴² There are the “compulsion of foreign law” cases, in which foreign law prohibits what the forum would require.⁴³ Then there is the mass of cases in which foreign law would furnish a complete defense.⁴⁴ Over the spectrum of true conflicts, comity seems to be simply a defense, and the substantially parallel nonforum remedy a delusion.

There may well be cases in which foreign law does give a substantially parallel remedy to the plaintiff at a favorable forum, rather than a victory to the defendant. But if there are any, they are not the cases for which the comity theorists’ model is intended. Theirs is avowedly an approach to the resolution of *true* conflicts. Perhaps they overlook the fact that if the plaintiff could find substantially parallel justice under foreign

42. In *British Airways Bd. v. Laker Airways Ltd.*, [1984] 3 All E.R. 39, 45 (H.L.), Lord Diplock explained: “[T]he complaint [states an American] anti-trust action of ‘the garden variety’ . . . [But] even if the allegations . . . in the complaint in the American action can be proved, they disclose no cause of action on the part of Laker . . . that is justiciable in an English court [B]ecause the predominant purpose of the acts of British Airways . . . that are complained of was the defence of their own business interests . . . [any] English cause of action . . . would be ruled out” *Id.* For late comment on Laker, see George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT’L L. 589, 591-95 (1990).

43. See, e.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 354-55 (1909). Foreign bank secrecy laws in conflict with American discovery orders furnish a familiar current example. See, e.g., *United States v. First Nat’l Bank*, 699 F.2d 341, 345-46 (7th Cir. 1983) (where compliance would subject defendant’s employees to criminal penalties under Greek law, discovery order reversed and remanded for order requiring defendant to make a good faith effort to secure permission to make the information available); *United States v. Noriega*, 746 F.Supp. 1506, 1515 (S.D. Fla. 1990) (German bank secrecy laws would impose criminal penalties for compliance with American discovery order; “this Court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interests of other states” (quoting *United States v. Bank of Nova Scotia*, 691 F.2d 1384, 1391 (11th Cir. 1982) (citation omitted))), vacated as settled, Oct. 11, 1990; see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(2)(a),(c) (1987) (where compliance would subject defendant to criminal penalties under foreign law, court may order defendant to make a good-faith effort to secure permission to make the information available; however, in proper case court may make findings of fact adverse even to party that has made good faith effort to obtain permission to comply and has been unsuccessful).

44. The bulk of familiar cases fall within this category. See, e.g., *Milliken v. Pratt*, 125 Mass. 374, 376-77 (1878); *Babcock v. Jackson*, 191 N.E.2d 279, 280 (N.Y. 1963).

law, the case would be closer to a *no*-conflict case than one of true conflict. The difference between the two states' laws might even be a mere matter of detail.⁴⁵ Foreign law in (1991) 80 GEO. L.J. 63 fact might vindicate forum policy.⁴⁶ Professor Kramer himself points out this possibility.⁴⁷ But in such a case, when the forum thinks itself to be applying foreign law, very probably it is applying its own, in the sense that it recognizes that nothing in the foreign rule impinges unacceptably on its own policies.⁴⁸

2. The Myth of "Neutral" Principles

Today's comity theorists, in a very old tradition indeed, propose "neutral" rules of choice, applied uniformly by all states, and independent of the policy of any one state.⁴⁹ To avoid the curse of association with the failed rules of the past, and since modern choice of law (interest analysis)

45. The traditional approach to usury, recognizing that differences among reasonable interest rates are matters of detail, provided an alternative reference to whichever of the respective states' rates would sustain the loan. *See, e.g., Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 407-08 (1927).

46. *See, e.g., Miree v. DeKalb County*, 433 U.S. 25, 32-33 (1977) (Georgia law applied because it would vindicate national interest in airport safety). Although not decided on this ground, *see also Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 312 (1851) (local state laws requiring pilotage fees to establish pensions for local pilots arguably served national interest in maintaining skilled local ships' pilots).

47. Kramer, *Return of the Renvoi*, *supra* note 35.

48. Well-known examples include *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721 (Cal. 1978) (forum applied foreign law as better law, although the forum could have construed local law to reach the same result, and in fact did so in a later case, *Weinrot & Son, Inc. v. Jackson*, 708 P.2d 682, 691 (Cal. 1985)); *see also Haag v. Barnes*, 175 N.E.2d 441, 444 (N.Y. 1961) (unwed mother's settlement of paternity claim, valid under Illinois statute that would permit a settlement for a nominal sum, sustained in New York as well because settlement in fact generous, and thus not in conflict with New York's policy).

49. From a post-*Erie* positivist perspective, *cf.* Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 819-21 (1989), Professor Kramer apparently locates his "rules" in a kind of "national consensus law," which states "would" adopt. *Cf. In re Agent Orange Prod. Liab. Litig.*, 580 F.Supp. 690 (E.D.N.Y. 1984) (Weinstein, J.).

is, in essence, ordinary legal reasoning,⁵⁰ Professor Kramer calls his principles “canons of interpretation,” or “policy-selecting rules.” The reciprocity he has in mind is a mutual adherence to these independent neutral canons.⁵¹ Because I am about to explore the possible systemic as well as local implications of chronic departure from local law,⁵² it will be convenient at this point to consider whether “neutral” principles are in fact neutral. Are they as likely to lead to forum law as to foreign?

Of course, as an abstract proposition, a given canon might well point toward, rather than away from, forum law. Yet when a choice of forum law would conform to a neutral canon or choice, the typical proposed canon can furnish little more than a buttressing argument. The defendant *Boy Scouts* (1991) 80 GEO. L.J. 64 in the recent New York case of *Schultz v. Boy Scouts of America*,⁵³ for example, pleaded the defense of charitable immunity under New Jersey law.⁵⁴ The New Jersey plaintiffs, whose children had been molested by their scout-master on a camping trip in New York, were suing in New York precisely because New York recognized no such defense.⁵⁵ Those plaintiffs would have had no reason to start talking about neutral principles.

The trouble with forum law, from the comity theorists’ perspective, is that it is not neutral; it is law at the plaintiff’s option. But by the same measure, foreign law is not neutral either. Perhaps these writers simply have failed to understand this. In *Schultz*, for example, foreign law meant what it usually does: a win for the defendant. Indeed, defendant bias in choice of law will tend to impact more seriously on litigation than plaintiff bias will. When a plaintiff wins on a conflicts point, the likely consequence is only that the plaintiff will be allowed to try to prove its case under local law. But when a defendant wins on a conflicts point, the likely consequence is dismissal or a nonsuit or judgment for the defendant.

50. See *supra* note 27; see Weinberg, *On Departing from Forum Law*, *supra* note 8, at 600 (modern approaches come down to ordinary judicial process; modern method is to deal with extraterritorial facts as with any other facts raising legal issues).

51. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 319; Kramer, *Return of the Renvoi*, *supra* note 35.

52. See *infra* Parts II, IV.

53. 480 N.E.2d 679 (N.Y. 1985).

54. *Id.* at 686.

55. *Id.*; see also *supra* note 93.

Departures from forum law at one time might have been as favorable to plaintiffs as to defendants. The casebooks are full of familiar sad stories in which the plaintiff, forced to an unfavorable forum, must rely on foreign law.⁵⁶ But by the early 1970s, the longarm revolution in this country was complete. Today, contract creditors can shop for validating law, and have a chance of bringing the debtor to courts at home, when home law seems favorable. Take, for example, Professor Kramer's suggestion, following Professors Arthur T. von Mehren and Donald T. Trautman,⁵⁷ that facilitation of multistate activity should be a general goal of choice of law.⁵⁸ That, of course, is a policy that favors the contract creditor, typically the plaintiff in a contract case. This might indeed be a useful tiebreaker in a case in which a plaintiff must rely on foreign law. In these days of universal longarm legislation, how many such cases are there?⁵⁹

I raise the problem of the likely one-way utility of apparently neutral choice rules⁶⁰ at this point because I want to start spelling out what I have **(1991) 80 GEO. L.J. 65** been only suggesting up to now: that the consequences of chronic reciprocal *departures* from forum law may be widespread, structural, systemic, and deleterious.

3. Why Forum Law Generally is "Better"

Given the reality that the plaintiff in a true conflict case is unlikely to have any reasonably parallel remedy away from the forum, very serious questions indeed are raised by a system of rules that must function, over the run of cases, to enhance the likelihood of departures from forum law.

56. *E.g.*, *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953); *Lilienthal v. Kaufman*, 395 P.2d 543, 549 (Or. 1964).

57. ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 240 (1965).

58. Kramer, *Return of the Renvoi*, *supra* note 35.

59. *But see Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 248 N.E.2d 576, 584 (N.Y. 1969) (New York statute of frauds blocked relief for New York broker suing New Jersey customer in New York on oral agreement).

60. For an analogous insight, *see* Gary Peller, *Neutral Principles in the 1950's*, 21 J.L. REFORM 561, 566 (1988) ("neutral principles" critique of Warren Court was not neutral).

Professor Kramer insists that it is not possible to say in advance that forum law is systematically different from, and certainly not better than, foreign law.⁶¹ Kramer writes, following Professor Currie,⁶² that in a true conflict, both the forum and the sister state have plausible views of what the law should be, and that it is not possible for us to say that one view is better than the other.⁶³ But modern thinking has long outrun that understanding.⁶⁴

Except in some anticipatory actions, plaintiffs tend to enter courts as agents of law enforcement. Defendants, on the other hand, are brought to the forum unwillingly, and turn to foreign law for an excuse or other defense from liability for damaging conduct. The policies underlying the claim are broadly shared; the policies underlying the defense may be intensely local. The law of tort or contract fleshes out the policies of the sovereign in a way that is antecedent to, and more fundamental than, for example, a rule capping damages. Because defenses subordinate more fundamental policy concerns underlying a whole field of law, they tend to be disfavored both as a matter of substantive law⁶⁵ and of conflicts law.⁶⁶

61. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 319.

62. *See* Currie, *Married Women's Contracts*, *supra* note 16, at 260.

63. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 339.

64. In the last half century modernist writers have recommended for the resolution of true conflicts functional guidelines pointing to remedial or validating laws. These include VON MEHREN & TRAUTMAN, *supra* note 57, at 215-311, 376-400; RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 386 (3d ed. 1986). *See also* Elliott Cheatham & Willis Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 965-69 (1952); Hessel E. Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 734-35 (1957). This intellectual history is reflected in RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 6(2)(e) (1971) (the forum should consider “the basic policies underlying the particular field of law”; the policies underlying tort and contract law are, of course, remedial, deterrent, risk spreading, and validating). In this sense most modern approaches are “better law” approaches. *See* Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 57-59 (1989); Weinberg, *On Departing From Foreign Law*, *supra* note 8, at 600 (“current approaches to the resolution of nonfalse conflicts will tend to reduce to variations on the ‘better law’ formulation of Professor Leflar . . .”).

65. In tort law, the prevailing liability theory has moved away from a purely fault-based system. *See generally* GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970); ALBERT A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951), JOHN G. FLEMING, *THE LAW OF TORTS* 9-14 (3d ed. 1965); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Clarence Morris, *Hazardous Enterprises*

Moreover, defenses, because (1991) 80 GEO. L.J. 66 of their arbitrariness, disparateness, and specificity, are vulnerable to equal protection and due process attacks.⁶⁷ Under these circumstances, it is hard to argue that foreign law is not systematically different from, and less regulatory than, forum law. I am trying to suggest that forum law is indeed generally “better.”

The late tide of feeling favoring deregulation, and the recent wave of tort reform legislation, might lead one to suppose that defenses are today’s better law.⁶⁸ To be sure, the old consensus against regulation is breaking up amid the debris of failed banks and airlines. But tort reform represents a current consensus, surely: tort reform legislation is now in force in over forty states. Yet for all this consensus, tort reforms themselves have been piecemeal and disuniform, destined to be the bread and butter of conflicts

and Risk Bearing Capacity, 61 YALE L.J. 1172 (1952). Similarly, “[t]he nationwide enactment of the Uniform Commercial Code, and the character of the Code itself, suggest that much of the law of contracts has become more validating and less preoccupied with the construction of defenses; we expect enforcement of agreements.” Weinberg, *Choice of Law and Minimal Scrutiny*, *supra* note 16, at 467.

66. For the argument that traditional as well as modern conflicts approaches tend to favor choice of remedial or validating law, *see* Weinberg, *Choice of Law and Minimal Scrutiny*, *supra* note 16, at 467. Reference to the place of injury rather than the place of defendant’s conduct will facilitate recovery where the defendant’s conduct conforms to standards at the place of conduct. *See* ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 553 (1962) (reason for rule of *lex loci* is concern for plaintiffs). Reference to the place of making of a contract rather than the place of performance will tend to validate the contract. *See Milliken v. Pratt*, 125 Mass. 374, 376 (1878); *see also* EHRENZWEIG, *supra*, at 465; Albert A. Ehrenzweig, The Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation, 59 Colum. L. Rev. 874, 876-77 (1959) (rule of validation is the true rule for choice of law in contracts cases); *see generally* Ernest Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws (pts. 1 & 2)*, 30 YALE L.J. 565, 655 (1921).

67. *See, e.g., Kenyon v. Hammer*, 688 P.2d 961, 975, 979 (Ariz. 1984) (statute of limitations purporting to abolish or limit discovery rule in medical malpractice cases violates equal protection); *Smith v. Department of Ins.*, 507 So. 2d 1080, 1088-89 (Fla. 1987) (\$450,000 cap on damages violates right of access to courts); *Bernier v. Burris*, 497 N.E.2d 763, 769-71 (Ill. 1986) (mandatory pretrial review panel in medical malpractice cases violates separation of powers); *Jiron v. Mahlab*, 659 P.2d 311, 313-14 (N.M. 1983) (mandatory review panel for malpractice cases violates right to equal access to courts).

68. For this suggestion, *see* commentary by Louise Weinberg in DAVID VERNON ET. AL., CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS 374, 383 (1990) [hereinafter CASEBOOK].

experts. The argument that these proliferated disparate defenses represent better law because they represent a consensus that liabilities are too heavy⁶⁹ is not quite a nonsequitur. But at most tort reform is a shared legislative determination to find decently acceptable ways of subordinating generally favored remedial policies to a perceived current exigency. Tort reform demonstrates widely shared fear of a litigation explosion⁷⁰ or an insurance crisis⁷¹ or both. But **(1991) 80 GEO. L.J. 67** this does not negate the basic commands of tort law. Whatever constraints on litigation seem necessary to local legislatures, the basic policies underlying tort law are “thou shalt nots.” Moses did not come down from Mount Sinai with The Ten Defenses.

A nice example of the preference for legal realist thinking in remedial law, and concomitantly for forum law in conflicts cases, is given by the Uniform Commercial Code. I read the Code as an essentially validating and enabling piece of legislation. Substantively, it seems to me, the Code favors validation over invalidation, creditors over debtors, negotiability over defenses to negotiability. The message is: “Thou shalt not leave a contract creditor holding an empty bag.” The drafters of the UCC also furnished a fundamental choice of law rule. In the absence of reasonable agreement between the parties, the forum is to apply *forum* law.⁷² In this way the Code ensures that it—the Code itself—will be applied, better law no doubt in the understanding of its drafters. The Code will be applied because it is forum law. The forum would have no occasion to consult the Code’s choice of law provisions unless the local legislature had enacted

69. *Id.* at 374, comment (4).

70. For documentation of the view that there is little to justify the perception of a litigation explosion, see DAVID TRUBEK, CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT (1983). See generally *The Litigation Explosion Debate*, 11 JUST. SYS. J. 259-387 (1986).

71. For the flavor of the empirical debate, see, e.g., George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987); *What Insurance Crisis? BUS. WK.*, Jan. 12, 1987, at 154 (editorial); FRANK BELLOTTI ET. AL., AN ANALYSIS OF THE CAUSES OF THE CURRENT CRISIS OF UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE (1986) (unpublished report prepared for the Nat’l Ass’n of Att’ys Gen.) (copy on file at The Georgetown Law Journal).

72. U.C.C. § 1-105(1) (1990) (in the absence of agreement “this Act applies to transactions bearing an appropriate relation to this state”); see Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 810-12 (1958) (discussing the choice of law provisions of the Code).

the Code. Today the Code's choice of law provisions also independently ensure that validating law will be applied, not only because the Code is generally validating, but because the plaintiff, who generally comes to court asserting a valid transaction, can choose the forum. Of course, uniform enactment of the Code has diminished the usefulness of the Code's choice of law provisions, but the machinery is instructive.

Now transfer this sort of thinking to the realm of tort. Choice of forum law helps to ensure that strongly held forum tort policies will be vindicated. A particular tort policy is rarely remedial or risk spreading only. Regulatory, deterrent, and declaratory policies "come into play."⁷³ That brings us to the key question whether collective advantage resides in collective rejection of comity arguments in favor of enforcement of forum law.

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B. IMPLEMENTING RECIPROCAL COMITY IN THE CONTEMPORARY LEGAL SYSTEM

1. The Mechanisms of Interstate Litigation and Intersystem Law Enforcement

It is intriguing to see how this discussion bears on what we know about the mechanisms of interstate litigation. What has evolved seems to be a forum shopping system. The plaintiff can sue the defendant in any number of states having "minimum contacts"⁷⁴ with, or general jurisdiction over,⁷⁵ the defendant. A forum without a legitimate interest in doing so cannot close its doors to a plaintiff pleading a sister state's transitory cause of action.⁷⁶ The forum is free to apply its own law to any

73. Donald T. Trautman, *Two Views on Kell v. Henderson: A Comment*, 67 COLUM. L. REV. 465, 467 (1967) (deterrent and admonitory policies come into play at place of injury). For general discussion of the legitimate concerns of the place of injury, see Singer, *Real Conflicts*, *supra* note 64, at 57-59; Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 66, 78-80 (1988).

74. *International Shoe Co. v. Washington*, 326 U.S. 310, 315-16 (1945).

75. *Burnham v. Superior Court*, 110 S.Ct. 2105, 2114-18 (1990) (plurality opinion).

76. *Hughes v. Fetter*, 341 U.S. 609, 611-12 (1951).

issue it has some interest in governing.⁷⁷ A rational basis is all the “minimal scrutiny” the Supreme Court will require.⁷⁸ The forum has no duty to give full faith and credit to the law of a “more” interested state.⁷⁹ The judgment obtained under such jurisdiction, under such law, is then entitled to full faith and credit in every court in the country, even in the teeth of policy to the contrary at the enforcing court.⁸⁰

The Supreme Court seems currently very active in shoring up this system. We are seeing late cases like *Burnham v. Superior Court*,⁸¹ approving the exercise of so-called “transient” jurisdiction. Then there is *Sun Oil Co. v. Wortman*,⁸² in which the Court allowed the forum-shopping plaintiff access to the longer statute of limitations of the substantially uninterested forum, reviving a case that was dead in all interested states. *Wortman* seems a considerable liberalization of even the minimal scrutiny standard of *Allstate Insurance Co. v. Hague*.⁸³ After *Wortman*, any choice of law will be constitutional, apparently, as long as it is effected by some traditional, “subsisting” (1991) 80 GEO. L.J. 69 choice of law rule.⁸⁴ In *Ferens v. John Deere & Co.*,⁸⁵ the Court construed federal transfer

77. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313-19 (1981) (sustaining constitutionality of forum law where the forum’s only contacts with the case were the after-acquired residence of the plaintiff, the employment of her decedent in the forum, and his daily commute to work there; “contacts” constitutionally sufficient in the aggregate to permit the forum to treble the liability of the insurer).

78. The Court does not itself use “minimal scrutiny” language in conflicts cases. *But see* Weinberg, *Choice of Law and Minimal Scrutiny*, *supra* note 16, at 444 (developing the “minimal scrutiny” model and assimilating constitutional review of conflicts cases with general principles of constitutional review).

79. *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 503 (1939).

80. *Fauntleroy v. Lum*, 210 U.S. 230, 240-41 (1908) (forum must enforce sister state judgment notwithstanding that the judgment violates the forum’s public policy); *see also* U.S. CONST. art. IV; § 1; 28 U.S.C. § 1783 (1988).

81. 110 S.Ct. 2105 (1990).

82. 486 U.S. 717 (1988).

83. 449 U.S. 302, 312-13 (1981)(Brennan, J.) (“for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair”).

84. 486 U.S. at 728 n.2.

85. 494 U.S. 516, 110 S.Ct. 1274 (1990).

legislation to require retention of the shopped-for forum's law, even where transfer was on motion of the plaintiff.⁸⁶ What accounts for such persistent plaintiff bias in the evolved mechanisms of interstate litigation? I have posed that question elsewhere, and my view of the answer has not changed.⁸⁷

In the multistate contract case in this country, there is a widely shared feeling that transactions should be secure as they cross state lines. It helps to make transactions secure if contract creditors are not left remediless. We have already seen that position in the choice of law provisions of the Uniform Commercial Code.⁸⁸ The mechanisms of interstate litigation help to ensure the security of multistate transactions.

In the multistate tort case, frequently only state law governs the substantive issues. But the questions of public policy involved often transcend state lines and seem to be questions of national concern. No act of Congress generally regulates to help ensure the safety of travelers on the network of interstate highways, but the mechanisms of interstate litigation will tend to support enforcement of shared tort policies notwithstanding that multiple states may have contact with a case.⁸⁹

The mechanisms of interstate litigation seem to have evolved to regulate a great common market and rationalize a stubborn federalism. The system is imperfect and sometimes breaks down, but its great merit is that it reflects national policies that for other reasons are not implemented in national legislation. These are rational national policies in favor of safe and fair interstate commerce. The structure of the litigation system as it has evolved strongly suggests an implicit national policy in favor of the forum's unilateral enforcement of local law. It is a policy that in turn

86. *Ferens*, 110 S.Ct. at 1282. Cf. *Van Dusen v. Barrack*, 376 U.S. 612, 638-39(1964)(in case transferred under 28 U.S.C. § 1404(a), on motion of defendant, federal transferee court must choose law according to choice rules of the transferor forum state). In *Ferens*, *supra* note 85, transfer was on motion of the plaintiff.

87. Weinberg, *The Place of Trial and the Law Applied*, *supra* note 73, at 68-69; Weinberg, *On Departing From Forum Law*, *supra* note 8, at 599; Weinberg, *Choice of Law and Minimal Scrutiny*, *supra* note 16, at 463-68.

88. See *supra* note 72 and accompanying text.

89. Cf. *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980) (White, J.) (“[T]he burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including . . . the shared interest of the several States in furthering fundamental substantive social policies . . .”).

sheds light on the question of the appropriateness of the forum's unilateral enforcement of American law, federal or state, in an international case.

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2. Regulatory Failure and Global Lawlessness

When I speak of the risks of reciprocal comity, I do not refer to the obvious injustice of reciprocal remedial collapse. Rather, my concern is with a system in which plaintiffs are with some frequency disabled from capturing *enforcement* of law. When the forum subordinates its own law to some foreign defense, it opts against deterring, regulating, punishing, or even declaring wrongful the alleged injuring and violative conduct of the defendant.

Reciprocity adds another turn to that screw. The very mutuality and reciprocity that lend freshness and ingenuity to current proposals for neutral choice rules also imbue these proposals with their special danger. "Reciprocity" is simply not as safe an item as "motherhood" or "apple pie." Reciprocal comity is a kind of Kantian imperative, a golden rule, and thus addresses itself more emphatically to all courts than other normative models.⁹⁰

90. Significant here are the provisions for monitoring and retaliation recommended by both Professors Brilmayer, FOUNDATIONS AND FUTURE DIRECTIONS, *supra* note 3, § 4.2, and Kramer, *Return of the Renvoi*, *supra* note 35. The painful classic example of the results of such punitive monitoring is *Hilton v. Guyot*, 159 U.S. 113 (1895), in which private litigants were denied enforcement of a French judgment in their favor because France would not enforce a foreign judgment. The Supreme Court more recently has disapproved retaliatory judicial diplomacy of this kind. *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (courts may not scrutinize legality of acts of foreign states because to do so would interfere with the executive's conduct of foreign affairs). *But see* 22 U.S.C. § 2307(e)(2) (in certain cases American courts may not invoke Sabbatino without authorization from the executive branch); *see also Zschernig v. Miller*, 389 U.S. 429 (1968) (under Supremacy Clause state may not legislate to deny inheritance to aliens in order to retaliate against their native countries for not permitting Americans to inherit). In light of these later cases, the retaliatory feature of *Hilton*, *supra*, does not seem to be good law. In any event, *Hilton* is pre-*Erie* general common law, not binding under the Supremacy Clause. For current discussion *see* AMERICAN SOCIETY OF INTERNATIONAL LAW, INTERNATIONAL COMITY AND THE U.S. FEDERAL COMMON LAW 339, 341 (1990) (remarks of Professor Maier).

Violations of statutory law and agency regulations, like violations of common law duties, are, of course, torts. When the plaintiff pleads in tort, the plaintiff acts, in effect, as a private attorney general—even in private-law litigation. I say this notwithstanding the Supreme Court’s struggle to distinguish public from private tort litigation.⁹¹ The distinction was originally intended to separate wholly private cases from cases against governments and their agencies and officials. But under numerous acts of Congress, rights actionable against governments are modified or expanded and made actionable against private parties.⁹² The public/private distinction makes scant **(1991) 80 GEO. L.J. 71** sense in any event to an interest analyst, who is accustomed to viewing the rights of private parties from the perspective of the public purposes underlying law.

It would be comforting to believe that taking a litigational advantage from plaintiffs simply levels the playing field. But we have seen that litigation has little neutral ground. A single litigation is a zero-sum game. If forum law does not govern the dispositive issue, foreign law or dismissal are the alternatives. It is hard to avoid the conclusion that a structured, habitual avoidance of forum law in favor of law relied on by defendants means a structural bias against law enforcement. It is common knowledge that liability is imposed in a haphazard way, and with an infrequency close to statistical insignificance. Out of all litigable injuries, only a very small fraction produce claims; of these only a tiny fraction produce litigation. Of course liability is imposed in only a part of these. But even without the irrational perception that litigation is more prevalent than it is, systemic denials of law enforcement must *pro tanto* encourage predatory or injurious conduct.⁹³ International cases raise the problem

91. Compare *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 467-68 (1978) (state bar free to discipline lawyer for ethical offense of soliciting personal injury cases) with *In re Primus*, 436 U.S. 412, 431-32 (1978) (First Amendment shields nonprofit public interest group from disciplinary action for soliciting private litigants for public law cases).

92. For example, Congress used its power to enforce the Fourteenth Amendment, itself applicable only to state governments, to create much of the post-1964 civil rights legislation affecting private employers, schools and colleges, and landlords. The environmental cases against private polluters further blur any distinction between public and private law.

93. Cf. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (lawsuits are means by which justice is secured and constitutional and statutory interests are advanced).

acutely. In interstate cases, when the defendant escapes responsibility under nonforum law, the court adopts the reasonable policy of a sister state. In international cases, the foreign law can be so different from our own as to shock the conscience.⁹⁴

I do not want to be apocalyptic about this, but to the extent we have any confidence in the utility of law in courts, the scary corollary of reciprocal nonenforcement could be widespread lawlessness.⁹⁵ Reciprocal comity, then, seems to present a finite risk of erosion, *pro tanto*, nationwide or even worldwide, of the safety and security of the shared environment, of the fairness of national or world securities markets, of the safety of markets for crops and manufacturers, and of the safety of international or interstate transportation networks and other services delivery systems.⁹⁶

(1991) 80 GEO. L.J. 72 I doubt that the comity theorists mean to take us this far. Presumably they would agree that the world needs law in courts and that enforced law in courts helps to effectuate broadly shared

94. See discussion *infra* notes 107-109 and accompanying text.

95. For similar insights, see Joel R. Paul, *Comity in International Law*, 32 HARV. J. INT'L L. 1, 79 (1991) ("comity often functions as a wall to contain the domain of public regulation [A]llowing private parties to opt out of domestic regulation does not necessarily contribute to efficiency; . . . comity encourages capital flight and undermines regulatory standards"); Westbrook, *Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business*, 25 TEX. INT'L L.J. 71, 95, 97 (1990) (values of transnational regulation support unilateral regulation of multinational conduct in the absence of effective multilateral regulation); Developments, *International Environmental Law*, 104 HARV. L. REV. 1484, 1609 ("In those areas in which public international law does not protect the environment, international environmental protection is only as strong as the sum of individual states' domestic environmental regimes.").

96. These global concerns are only haphazardly or ineffectually the subject of international law and international courts. Occasionally, a court will grasp that there are no adequate alternatives to private, domestic litigation of a transnational case. A possible reciprocal shared interest in furnishing a forum for a violation of international norms may explain *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (Paraguayan relatives of victim tortured in Paraguay could bring action in U.S. against Paraguayan torturer under Alien Tort Statute, 28 U.S.C. § 1350); see also *Castanho v. Jackson Marine Corp.*, 484 F.Supp. 201, 207 (E.D. Tex. 1980) (declining to order stay in favor of English forum because of "the injustice in requiring the Plaintiff, a paraplegic, to forego suit in the forum of his choice so that he might be cast about to find justice elsewhere"), *aff'd*, 650 F.2d 546 (5th Cir. 1981); *cf. Castanho v. Brown & Root (U.K.), Ltd.*, 1981 App. Cas. 557, 572 (plaintiff's forum shopping in America legitimate litigation strategy; taking nonsuit in English case not an abuse of process).

policies. But they do not seem to have thought through their own position. Their thinking, carried to its logical conclusion, is that enforcement has no special value to commend it over nonenforcement. Their thinking, carried to its logical conclusion, also means that from time to time enforcement should be withheld, even in a state with a governmental interest in enforcement in the particular case, if another government has an interest in encouraging or protecting the defendant's conduct. That conclusion is especially disturbing because there is no question here of over-deterrence or over-enforcement. By hypothesis, in a true conflict, the law of the forum is reasonably intended for application on the facts of the case.

The trouble the comity theorists have got themselves into is probably a function of the level of abstraction on which they like to argue. It also follows from their failure to recognize the built-in differences between forum law and foreign law. It arises understandably from their correct appreciation of the consensus against judicial interference with events beyond the territorial competence of courts. But if global concerns are practically and in sentiment⁹⁷ beyond the unilateral governmental competence of any single sovereign, that underscores the magnitude of the risk of a reciprocal posture of nonenforcement of forum law.

With this risk in mind, the seeming idealism of the current case law on comity also seems naive and misguided. Consider, for example, *Helicopteros Nacionales de Colombia, S.A. v. Hall*,⁹⁸ in which the Supreme Court, concerned about fairness and comity in cases against alien defendants, allowed the defendant, a sophisticated multinational corporation doing multimillion dollar business in America, to evade responsibility in an American court—probably in any court—for harming Americans.⁹⁹ Recall also *Piper Aircraft (1991) 80 GEO. L.J. 73 Co. v.*

97. For a fair sampling of such sentiment, see Symposium, *Extraterritoriality of Economic Legislation*, 50 LAW & CONTEMP. PROBS. 3 (Summer 1987).

98. 466 U.S. 408 (1984).

99. *Id.* at 416 (defendant corporation's minimum contacts with forum state insufficient to satisfy due process). *But see* Louise Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. Cal. L. Rev. 913, 945 (1985) (concluding, *inter alia*, effect of *Helicopteros* is to immunize multinationals doing business here from liability for conduct injurious to Americans abroad).

Reyno.¹⁰⁰ Taking *Piper* seriously means allowing American defendants to escape American regulation by dismissing foreigners'—but not Americans'—suits against them for forum non conveniens when the plaintiff's injury occurs abroad. I pass over the question of discrimination raised by this treatment of the foreign plaintiff in American courts and the related question of the disparity of treatment between American defendants who have injured Americans abroad and those who are lucky enough to have injured a foreigner.¹⁰¹ Comity in the international case means, in essence, that even those plaintiffs who can survive jurisdictional and forum non conveniens challenges in our courts could be denied the benefit of rationally applicable American law. Reciprocal comity could mean that they could be denied systematically the benefit of any law.

Now the Court has decided *EEOC v. Arabian American Oil Co. (Aramco)*,¹⁰² limiting extraterritorial application of Title VII of the Civil Rights Act of 1964.¹⁰³ In refusing to enforce the Act in a case in which an American company allegedly fired an American from his job in Saudi Arabia because he was ethnically an Arab,¹⁰⁴ the Court made a more extreme regulatory retreat than it did in *Helicopteros* or *Reyno*. Neither party in *Aramco* was a nonresident.

The *Aramco* Court sought to practice a presumptive comity. The Court followed the old *Foley Bros. v. Filardo*¹⁰⁵ case. In that 1949 case, the Supreme Court held that an American could not claim overtime, under United States maximum hours legislation, against an American corporation employing him in Arabia.¹⁰⁶ The *Foley* Court reasoned, and the *Aramco* Court agreed, that, in the silence of the statute itself about its application abroad, there should be a strong presumption against

100. 454 U.S. 235, 257-58 (1981) (district court had discretion to dismiss on grounds of forum non conveniens products liability case brought by alien plaintiff against American manufacturer for injury suffered abroad).

101. *See infra* Part IV.

102. 111 S.Ct. 1227 (1991).

103. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000h-6 (1988)).

104. *Aramco*, 111 S.Ct. at 1233-34.

105. 336 U.S. 281 (1949).

106. *Id.* at 290-291.

extraterritoriality.¹⁰⁷ No one argued in either *Aramco* or *Foley* that Arabian law would give the American worker any such protections, even if Arabian law might give analogous protections to Arab workers. Thus, these cases hold, in effect, neither sovereign, and thus no authority at all, would control the overreaching or injurious conduct of the American defendant.

Actually *Aramco* presented what conflicts specialists call a “false conflict”— **(1991) 80 GEO. L.J. 74** a case in which only one of the concerned states has a governmental interest. Certainly the United States, as joint domicile, had an interest in applying the act of Congress to protect the American employee from discrimination by the American employer. Saudi Arabia, on the other hand, as the place of injury, had no conceivable interest in authorizing discrimination on its soil against an American of Arab origin. Thus, as the Supreme Court should have seen, the law of the only interested sovereign, the United States, should have applied. Nothing in Title VII reads to the contrary.

But lurking in the background of *Aramco*, I suspect, was a more generalized conception of the case. Though both parties were Americans, *Aramco* might not present a false conflict after all, once the general interests of both nations are taken into account. One may speculate that the *Aramco* majority was moved in part by the specter of the more likely general case that *Aramco*’s novel facts did not present. What if the plaintiff had been an American Jew? How could American employers do business comfortably in Saudi Arabia if not permitted to discriminate against Jewish American employees? And how could the Court refuse to enforce Title VII in the case of a Jewish American employee if it had enforced Title VII in the case of an Arab American employee? Indeed, some of my readers may conclude, on this thinking, that the result of *Aramco* was a practical necessity, particularly at a time when hundreds of American companies are competing for contracts to rebuild Kuwait. But others, with me, will feel any such anticipatory accommodation to Arab anti-Semitism, if it occurred in *Aramco*, to be an embarrassment. American women are at risk in this context too, a point raised by amici curiae.¹⁰⁸ This is a vivid example of how “comity” can mean

107. *Id.* at 285; *Aramco*, 111 S.Ct. at 1230.

108. See Brief Amici Curiae of the NAACP Legal Defense and Educ. Fund, Inc., The Amer. Jewish Comm., The Amer. Jewish Congress, the Anti-Defamation League of

accommodation to values repugnant to this country.¹⁰⁹ If the economic stake (1991) 80 GEO. L.J. 75 in this sort of “comity” influenced the Court, the Court was embarrassed enough not to mention it. Instead, the Court offered inconclusive legislative history and implausible readings of the text.¹¹⁰

Comity may help explain the result in an otherwise irrational case like *Aramco*, but interest analysis supplies the theory one needs to think about the case. From an interest analytic perspective, even if one were willing to posit that Saudi Arabia had a legitimate interest in authorizing the sort of discriminatory conduct that occurred in *Aramco*, that would mean only that the case presented what interest analysts call a “true conflict”—one in which either state’s laws could rationally govern. If we assume that Saudi Arabia had law authorizing discriminatory firing even of the employee

B’Nai B’rith, and the Women’s Legal Defense Fund, *Aramco*, 111 S.Ct. 1227 (No. 89-1845).

109. For United States policy on the Arab boycott as it affects American Jews, see Anti-Boycott Law, Pub. L. No. 95-52, 91 Stat. 235 (1977) (reenacted as part of the Export Administration Act of 1979, Pub. L. No. 96-72, 95 Stat. 503 (1979)) (codified at 50 U.S.C. §§ 2401-2420 (1988)). Under the Act, American companies may not participate in a foreign country boycott by refusing to employ or discriminating against a United States citizen on the basis of race, religion, sex or national origin. 50 U.S.C. § 2407(1)(B); see also *Abrams v. Baylor College of Medicine*, 581 F.Supp. 1570, 1581 (S.D. Tex. 1984) (Export Administration Act provides an implied cause of action for religious discrimination in employment). See generally *Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. (1975). The Justice Department consistently takes the view that such legislation operates on American companies worldwide, as does the Equal Opportunity Employment Commission. See *Discriminatory Arab Pressure on United States Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 1st Sess. 88 (1975) (statement of Antonin Scalia, Assistant Att’y Gen.). But note that Justice Scalia argued in his *Aramco* concurrence that the views of the agency were not entitled to deference. 111 S.Ct. at 1236 (Scalia, J., concurring). See generally Winterscheidt, *Employment Discrimination—U.S. Employers in Foreign Countries: Is Customer Preference a Bona Fide Occupational Qualification?*, 31 KAN. L. REV. 183 (1982); Debra L.W. Cohn, Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L. REV. 1288 (1987); Janelle M. Diller, Note, *Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise*, 73 GEO. L.J. 1465 (1985); Robert H. Lande, Comment, *The Arab Boycott and Title VII*, 12 HARV. C.R.-C.L. L. REV. 181 (1977).

110. *Aramco*, 111 S.Ct. at 1233-34 (construing clause excluding alien employees injured abroad as also excluding American employees injured abroad).

fired in *Aramco*, and that *Aramco* were a true conflict, certainly Saudi Arabia rationally could apply this law in its own courts. But the identification of a true conflict does not require that an American court disregard an act of Congress. The classic interest-analytic prescription is for the interested forum to apply its own law, even in a true conflict case.

The modern functionalists, more sympathetic to the ideals of comity, certainly recommend non-forum law for a true conflict case, but only if that law is “better” law—remedial, validating, less anachronistic. It is hard to believe that any of them would endorse what was done in *Aramco*. Indeed, it is hard to believe that the comity theorists themselves would embrace it.

There is a complementarity,¹¹¹ as Niels Bohr would have put it, between comity and governance. To the extent that an interested forum strives for comity and reciprocity in choice of law, it abnegates responsibility for providing justice. Many plays of the litigation game have produced mechanisms of interstate litigation that have little to do with comity, but encourage unilateral enforcement of law. So maximum mutual advantage may not depend on comity at all. Rather, maximum mutual advantage seems a function of (1991) 80 GEO. L.J. 76 tough, independent, and powerful courts, determined to do justice each in its own way.

III. LOST CAPTAINS AND LOOSE “CANONS”

One would hope that the rules, canons, or principles that the comity theorists seek to impose on the states would be helpful and sensible. Their faith is that a regime of comity can be helpful and sensible. Before we examine their proposed mechanism in detail, it would be instructive, I think, to look at the Supreme Court’s approach. As it happens, the

111. “Complementarity” is a concept attributed to the Danish physicist, Niels Bohr. In a talk he gave in 1928 at Como, Italy, he used the term to describe the relationship between two things that can have no meaning if they are assumed to go on at the same time. The Como talk is written up in Niels Bohr, *The Quantum Postulate and the Recent Development of Atomic Theory*, 121 NATURE 580 (1928). Bohr applied the term widely; a favorite example was the complementarity between truth and clarity—“Klarheit und Wahrheit.” Lawyers accustomed to the chronic necessity of stating a legal position with as much accuracy as it can bear, and thus with a jumble of exceptions and qualifications, will grasp Bohr’s meaning.

Supreme Court has long been an umpire of interstate extraterritoriality under the Commerce Clause.

A. THE MYTH OF THE NEUTRAL ARBITER: THE COMMERCE CLAUSE

The idea of reciprocal interstate comity already has been given real play under the Commerce Clause. The attempt has not been a success. When a state applies its own law in such a way that the law's extraterritorial impacts are perceived as disproportionately burdensome to out of state interests—in other words, discriminatory—the Supreme Court will strike it down;¹¹² but that rule seems administrable only to the extent it is congruent with the Equal Protection Clause.¹¹³ The state must have power to make reasonable distinctions between residents and nonresidents.¹¹⁴

When the Court perceives extraterritorial impacts as disproportionately burdensome to interstate commerce itself—in other words, to the common market—the Supreme Court has engaged in interest balancing.¹¹⁵ Using this not very persuasive technique, the Court, acting under the Commerce Clause, will strike down even the reasonable, nondiscriminatory law of an interested state.¹¹⁶ That technique, it seems to me, is not administrable,¹¹⁷ and is not desirable. It is not necessarily advantageous to interstate commerce to strike down evenhanded local

112. See, e.g., *Edgar v. MITE Corp.*, 457 U.S. 624, 641-46 (1982) (striking down, under Commerce Clause, Illinois anti-takeover law as applied to Illinois target corporation).

113. See generally Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885 (1985).

114. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 334 (1972) (state or municipality may restrict franchise to bona fide residents).

115. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). A state statute must be upheld if it “regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental. . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Id.*

116. E.g., *MITE*, 457 U.S. at 640.

117. See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

legislation protective of state economic or other interests. Fortunately, there are signs that the Court is coming to see that when a state acts within its legitimate sphere of governmental (1991) 80 GEO. L.J. 77 interest, extraterritorial impacts of the state's action ought not to raise a constitutional question.

Consider the recent controversy over state anti-takeover laws. In *Edgar v. MITE Corp.*,¹¹⁸ the Court struck down under the Commerce Clause the Illinois Business Takeover Act¹¹⁹ because the Act had extraterritorial reach.¹²⁰ *MITE* has a bizarre ring for those of us who think about conflicts. Justice White, writing for the *MITE* plurality, said that the Commerce Clause “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.”¹²¹ But the place of conduct has never held such a preclusive place in American conflicts thinking.¹²² Justice White also wrote that the state “has no legitimate interest in protecting nonresident shareholders.”¹²³ But surely the state of

118. 457 U.S. 624 (1982).

119. Ill. Rev. Stat., ch. 121 1/2, 137.52-9 (1979) (repealed 1983).

120. *MITE*, 457 U.S. at 641-46.

121. *Id.* at 642-43; *see also Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

122. The Supreme Court’s own view of the reach of American law goes well beyond conduct in this country. *See, e.g., Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 544-46 (1987) (notwithstanding Hague Evidence Convention, discovery abroad may be obtained pursuant to FED. R. CIV. P.). United States criminal laws are regularly applied to conduct abroad. *See United States v. Verdugo-Urquidez*, 110 S.Ct. 1839 (1990) (while the fourth amendment did not protect a foreigner arrested abroad by federal agents, federal criminal law could reach the foreigner’s conduct abroad). Under traditional choice rules in the United States, the law of the place of injury, rather than the place of conduct, governed. *See* RESTATEMENT OF CONFLICT OF LAWS § 145 (1934). With some exceptions, the federal rule for antitrust and securities cases has been the “effects test” laid down in *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443-44 (2d Cir. 1945); *cf.* 15 U.S.C. §§ 6(a), 45(a)(3) (1988). Even courts that would like to pull back from *Alcoa* would not limit the reach of Congress to conduct in this country. *See Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3rd Cir. 1979) (courts considering applying American law in cases with foreign elements should perform balancing of factors). Today, most courts in this country, federal or state, will apply the law of the place of most significant contact; this place is not necessarily the place of conduct. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

123. *MITE*, 457 U.S. at 644.

incorporation of the target company, as Illinois was in *MITE*, must have power to protect all shareholders of the company. Nevertheless, in *MITE*, shareholder protective policies may have had less to do with the Illinois law than counsel for Illinois thought it prudent, given the antiprotectionist flavor of Commerce Clause jurisprudence, to argue. In an intriguing footnote, Justice Powell, concurring in part, pointed out that the Court's purposive analysis was too narrow, limited as it was to shareholder-protective concerns. Could not Illinois act to protect its resident incumbent management? Matters important to the community—local arts, and property values—might be riding on the stability of local managements.¹²⁴ The protected target company in *MITE* was an Illinois corporation; (1991) 80 GEO. L.J. 78 an interest analyst would assume that Illinois must have had some power to regulate Illinois corporations, as well as to protect its communities. The state could have legislated to strike a policy balance between the conflicting interests of management and shareholders of an Illinois corporation, even if nonresident shareholders were affected by the legislation.¹²⁵ *MITE* does not seem to jibe with reasonable understandings of state power.

Justice Powell had his chance to put the Court in a more intelligible posture in his opinion in *CTS v. Dynamics Corp. of America*,¹²⁶ sustaining the Indiana anti-takeover law.¹²⁷ Justice Powell brushed *MITE* aside as the opinion of a “plurality.”¹²⁸ He reasoned that Indiana must have power to regulate its own corporations.¹²⁹ Concurring, Justice Scalia pointed out that the notion of discrimination against, or burden upon, commerce itself made little sense. That could only be judged by balancing the policy decisions of the state against some presumed notion of better market policy. Yet the Court was not equipped to say what the nature of interstate commerce itself should be. “As long as a State’s corporation law governs

124. *Id.* at 646 (Powell, J., concurring in part).

125. I do not discuss the preemption wing of *MITE*, but it has obvious bearing on the state’s interest in its incumbent managements. *Cf. Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 503 (7th Cir. 1989) (“Nothing in the Williams Act says that the federal compromise among bidders, targets’ managers, and investors is the only permissible one.”). *See infra* note 136.

126. 481 U.S. 69 (1987).

127. *Id.* at 94.

128. *Id.* at 80.

129. *Id.* at 89.

only its own corporations and does not discriminate against out-of-state interests, it should survive this Court's scrutiny under the Commerce Clause, whether it promotes shareholder welfare or industrial stagnation. . .¹³⁰

Consider also the recent case of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*,¹³¹ in which the Supreme Court struck down, as discriminating against interstate commerce, the special nonresident tolling provision of Ohio's statute of limitations.¹³² Of course, nonresidents are harder to sue, thus justifying the tolling law. Nonresidents remain harder to sue even if the state has long-arm legislation. Here, however, Ohio corporations doing no business at all in Ohio did not come under the tolling provision, while foreign corporations doing business in Ohio did. Even so, Ohio corporations had a designated agent for service which distinguished them. For such reasons, nonresident tolling statutes had earlier withstood challenge under the Equal Protection Clause.¹³³ Nevertheless, in *Bendix Autolite*, the Court, per Justice **(1991) 80 GEO. L.J. 79** Kennedy, held it unduly burdensome to commerce to require corporations to submit themselves to the general jurisdiction of the state in order to avoid the tolling provision.¹³⁴

Chief Justice Rehnquist dissented:

[I]f Ohio could have insisted that [defendant] appoint a statutory agent before it engaged in that portion of its transaction with [plaintiff] which was intrastate commerce, I see no reason why it may not also treat [defendant] as it would treat any other entity which has done intrastate business in Ohio, incurred liability, and thereafter withdrawn from the State. Ohio seeks to do no more, I think, when it applies its [law] to [this case].¹³⁵

130. *Id.* at 95-96 (Scalia, J., concurring).

131. 486 U.S. 888 (1988).

132. *Id.* at 894. The Ohio provision tolled the statute of limitations for claims against corporations not present in the state or failing to appoint an agent for service of process.

133. *See G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 (1982) (New Jersey nonresident tolling provision does not deprive foreign corporations of equal protection of the laws).

134. *Bendix Autolite*, 486 U.S. at 894-95.

135. *Id.* at 899-900 (Rehnquist, C.J., dissenting).

The Chief Justice's point makes *Bendix Autolite* seem as hollow as *CTS* makes *MITE*. It is hard to believe, despite all the *CTS* language about a state's own corporations, that after *CTS* a state could not similarly protect corporate managers in their local principal places of business. If not, why not? In showing up *MITE*, *CTS* reveals some of the pitfalls awaiting attempts to regulate the extraterritorial impacts of otherwise valid state legislation.

In these Commerce Clause cases, a central, independent authority has come forward to umpire extraterritoriality. Yet the result of this care is only, arguably, impairment to national well being. In *MITE*, Supreme Court intervention cost the state of Illinois its power to protect Illinois corporate executives and their communities from the effects of hostile takeovers. Yet national law clearly was not doing that job.¹³⁶ Today, there is some doubt about the economic wisdom of the 1980s. There are complaints that the nation's industrial base has been mortgaged and reduced.¹³⁷ Against this background of reappraisal, it is at least arguable that nothing in the Illinois law could have hurt interstate commerce overall. If today we seem to be watching **(1991) 80 GEO. L.J. 80** otherwise profitable and healthy airlines and department store empires seek bankruptcy protection or foreign ownership, can we say with confidence that the risks of virtually unregulated junk bond takeovers were

136. The alternative ground of decision in *MITE* was preemption by federal antitakeover legislation, the Williams Act 15 U.S.C. §§ 78 m(d)-(e) and 78 n(d)-(f)(1968), which differed from the Illinois act precisely in that it was intended to provide no special protection for incumbent management. *Edgar v. MITE Corp.*, 457 U.S. 624, 633-34 (1982).

Delaware law was not doing the job either. *Cf. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180, 182 (Del. 1986) (directors' decision to implement antitakeover measures in response to a hostile takeover bid puts burden on directors to prove reasonable grounds for believing there was danger to the corporation; if company can be deemed to be for sale, duties of the directors switch to maximization of the company's value for the shareholders). After *Revlon*, when more than one offeror appears, directors of Delaware corporations cannot seek to preserve the company but become, in effect, auctioneers. New Delaware antitakeover legislation provides greater shareholder protection than the Williams Act, but has little effect on *Revlon*, DEL. CODE ANN. tit. 8, § 203 (Supp. 1988).

137. Business magazine and newspaper editorial sources are collected throughout Michele M. Jochner, *The Detrimental Effects of Hostile Takeovers, Leveraged Buyouts, and Excessive Debt on the Airline Industry*, 19 TRANSP. PRAC. J. 219 (1990).

not too great? These arrieres pensees may underlie the change of heart in *CTS*.

The Court in *CTS*, as well as Chief Justice Rehnquist in *Bendix Autolite*, and Justice Scalia in *MITE*, are trying, through the doctrinal fog, to trace the outlines of the state's police power. Although these must be blurred, it is becoming increasingly clear that there is little sense in strict scrutiny of reasonable, nondiscriminatory state law. If law is reasonably based on state interests, its indirect extraterritorial impacts are tolerable, and in fact tolerated. The world is too untidy a place to imagine successfully confining a state's regulatory power along arbitrary territorial lines. Indeed, the mechanisms of interstate litigation suggest a profoundly different understanding of state power. As we have seen, those mechanisms suggest that exercises of state regulatory power within the state's sphere of legitimate governmental interest have been important to the health of the regulatory climate in a federal union.¹³⁸

B. GIVING "NEUTRAL PRINCIPLES" A TRY: THE CANONS

Can the comity theorists do better than the Supreme Court has done under the Commerce Clause? We ought now to take a closer look at the choice of law principles actually proposed by the comity theorists. If these principles have real appeal, the risks they may entail will not have the weight in our thinking they otherwise might have had. If these canons seem to work, comity might well assume the sort of importance that law enforcement has.

In an interesting article in the *Columbia Law Review*, Professor Kramer proposes a set of formal "canons" for solution of true conflicts.¹³⁹ This is a rather hazardous endeavor. The reader, with me, may be reminded of Karl Llewellyn's famous list of canons of statutory interpretation.¹⁴⁰ For every familiar and beloved old canon there was an equally familiar and beloved old canon to the contrary.

138. See *supra* notes 76-89 and accompanying text.

139. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 323. It should be said, in fairness to Professor Kramer, that he advances these proposals "tentatively." *Id.* at 329, 330.

140. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950).

Kramer's canons fall into two groups. The first of these I will call "piggyback" canons, because they seem—but only seem—to codify the prescriptions of most modernists for resolution of true conflicts. The second of these I call the "creative" canons, named for Kramer's clever adaptation of traditional canons of statutory interpretation to the conflict of laws.

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1. The Piggyback Canons

Most modernists disagree with me, and reject the view that the true conflict should be resolved by reference to forum law. They think *lex fori* as arbitrary and mechanical as *lex loci*. These are the modernists of the so called "functional"¹⁴¹ and "better law"¹⁴² schools of thought. These writers directly¹⁴³ or circuitously¹⁴⁴ recommend plaintiff favoring law for true conflicts rather than forum law. Of course, under today's long-arm

141. Self-styled functionalists include Professors von Mehren and Trautman, *supra* note 57, at 376-435; and WEINTRAUB, *supra* note 64, at 386; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). For background on this thinking, *see* Cheatham & Reese, *supra* note 64, at 965-69; Paul Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946); Yntema, *supra* note 64, at 734-35.

142. The better law approach was suggested by LEFLAR, *AMERICAN CONFLICTS LAW*, *supra* note 24. Its current proponents include Singer, *Real Conflicts*, *supra* note 64. As a practical matter the "functionalists," so-called, are also proponents of "the better law." *See supra* notes 24, 64. The approach is formally adopted in Minnesota, *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973); Arkansas, *Wallis v. Mrs. Smith's Pie Co.*, 550 S.W.2d 453 (Ark. 1977); New Hampshire, *Clark v. Clark*, 222 A.2d 205 (N.H. 1966); and Wisconsin, *Hunker v. Royal Indem. Co.*, 204 N.W.2d 897 (Wis. 1973); and used electrically in Hawaii, *Peters v. Peters*, 634 P.2d 586 (Haw. 1981), and Massachusetts, *Bushkin Assocs., Inc. v. Raytheon Co.*, 473 N.E.2d 662 (Mass. 1985).

143. *E.g.*, WEINTRAUB, *supra* note 64, at 360 (in true conflicts apply law that favors the plaintiff). For the argument that overtly plaintiff-favoring methods should not be used to justify departures from forum law, *see infra* Part IV.

144. *E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(e) (1971) (in absence of a choice by the parties, forum should choose law considering policies underlying the whole field of law). In other words, the forum should weigh the general concerns underlying the provision of a remedy, rather than the special concerns that might underlie a particular defense.

legislation this means that most modernists come out generally favoring forum law as well as remedial law.

Among Professor Kramer's "piggyback" canons encompassing functionalist arguments is a proposal for a "comparative impairment" canon.¹⁴⁵ This canon purports to pick up California's announced method,¹⁴⁶ in turn taken from a proposal by Professor William F. Baxter.¹⁴⁷ Using comparative impairment, a court would resolve a true conflict by applying the law of the state whose policy would be more greatly impaired by a failure to apply it. In somewhat surprising early implementation, comparative impairment, unlike other functionalist approaches, became, in effect, a rule of comity. The technique was used to justify California's most famous cases of departure from forum law, such as *People v. One 1953 Ford Victoria*.¹⁴⁸ In that famous (1991) 80 GEO. L.J. 82 old California case, then Justice Roger J. Traynor managed to withhold the full weight of California law in a proceeding confiscating a car for transportation of narcotics; and yet he did not seriously subordinate California's policies. California's narcotics enforcement effort would not be impaired importantly by paying off the innocent Texas mortgagee out of the proceeds of the judicial sale of the car.

Professor Kramer goes both beyond and not quite up to Baxter and Traynor. He writes, "If there is a conflict between two states' laws, and failure to apply one of the laws would *render it practically ineffective*, that law should be applied."¹⁴⁹ Professor Kramer correctly thinks even his

145. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 323.

146. *Bernhardt v. Harrah's Club*, 546 P.2d 719, 722 n.1 (Cal. 1976) (formally adopting "comparative impairment" approach to resolution of true conflicts).

147. William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 4-22 (1963).

148. 311 P.2d 480, 482-83 (Cal. 1957); *see also Bernkrant v. Fowler*, 360 P.2d 906, 910 (Cal. 1960). Later uses of comparative impairment tend to yield forum law, as do other modernist approaches, a result, presumably, that would be less agreeable to Professor Kramer than the result in *Ford Victoria*. *See, e.g., Hall v. University of Nevada*, 141 Cal. Rptr. 439, 442 (Cal. App. 1977) (applying California law to question of Nevada's sovereign immunity thus allowing California plaintiff to recover against Nevada, where the plaintiff had been run down by University of Nevada truckdriver), *aff'd*, *Nevada v. Hall*, 440 U.S. 410 (1979); *Bernhardt*, 546 P.2d at 725 (applying California dramshop liability rule allowing Californian to recover against defendant tavern owner who supplied plaintiff with alcohol).

149. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 323 (emphasis added).

version of the approach not generally useful, but, significantly, he uses it to justify, not the result in *One 1953 Ford Victoria*, an apparent true conflict, but rather the widely criticized result in an acutely true conflict, *Lilienthal v. Kaufman*.¹⁵⁰ In that case, a California creditor sought recovery on a California contract against an Oregon debtor. The debtor's contracts had become unenforceable under Oregon law because he had been declared a spendthrift. The Oregon legislation was intended to protect Oregon dependents from the drain on family assets caused by an improvident family member.¹⁵¹ Professor Kramer reasons that failure to apply the forum's defense would have rendered it "wholly ineffective." But it is hard to think of a true conflict case in which a defense would not be rendered wholly ineffective by applying law that does not recognize it.

Although I am among the few writers who agree with Kramer on the propriety of the result in *Lilienthal*,¹⁵² it is very hard to agree with him about his use of the comparative impairment canon for that case. Remember, Kramer's argument from reciprocity strongly suggests that he intends courts using his canons to reach the same result no matter where a case is tried. This sounds wonderful to traditionalists who have noble aspirations of uniformity and predictability. But interest analysts cannot live with a *Lilienthal* (1991) 80 GEO. L.J. 83 result in California as well as Oregon. They have never liked the *Lilienthal* result in Oregon.¹⁵³ If today, under modern long-arm legislation,¹⁵⁴ a modern *Lilienthal* sued on

150. 395 P.2d 543 (Or. 1964); see Kramer, *Rethinking Choice of Law*, *supra* note 3, at 323-24.

151. *Lilienthal*, 395 P.2d at 548-49.

152. For my views on *Lilienthal*, see Weinberg, *On Departing From Forum Law*, *supra* note 8, at 603-05. I argued there that, contrary to the views of the functionalists, *Lilienthal* correctly applied forum law. Departure from forum law would have created an irrational classification between two sets of Oregon families: those whose breadwinners contracted at home and those whose breadwinners contracted out of state. The classification would be irrational because the distinction between the two sets of families would be irrelevant to the purposes of the legislation. Departure from Oregon law also would have undermined local policy for the next wholly domestic case. See also *infra* Part IV.

153. See, e.g., DAVID CAVERS, *THE CHOICE-OF-LAW PROCESS* 192 (1965); WEINTRAUB, *supra* note 64, at 385.

154. Hans Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEX.L.REV. 141, 160 (1967) (with modern long-arm legislation plaintiff could have recovered in California and the Oregon

the contract at home in California, Kramer would force California, an interested state, to apply this outre piece of Oregon legislation on behalf of a party whose conduct even the Oregon court labeled “a species of fraud.”¹⁵⁵ The desperation of Kaufman’s dependent Oregon family is very touching, but for all we know, *Lilienthal* had an equally desperate family in California. It is inconceivable that California would not protect them under its own law in its own courts. It is hard to think of anyone who would agree with Kramer on this.

If we focus here on the tendency of Professor Kramer’s thinking, we will see that Kramer nearly always would favor a defendant who acts under the specific protections of home law.¹⁵⁶ Of course he is happy with *Lilienthal*, then. Of course he would go so far as to export this hard case to the creditor’s home state’s courts. That may even be a plausible position where the defendant acts at home;¹⁵⁷ but in *Lilienthal*, the defendant went to the plaintiff’s state to contract. As the dissenting judge in *Lilienthal* pungently remarked, Kaufman went to California to take *Lilienthal* “captive” and drag him “down the road to insolvency” with him.¹⁵⁸ And whether defendants act at home or not, Professor Kramer does not see the problem of defendants’ structuring their arrangements so as to act injuriously under the law of a state that permits it.¹⁵⁹

family’s assets would have been reachable because Oregon would have had to enforce the California judgment).

155. *Lilienthal*, 395 P.2d at 549.

156. For what this is worth, Professor Kramer’s article, *Rethinking Choice of Law*, *supra* note 3, is reprinted at 40 DEF. L.J. 1 (1991).

157. *Cf.* CAVERS, *supra* note 153, at 49 (one principle of preference gives defendant the benefit of his home law when he acts on his own territory). *But see* David Cavers, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 647, 650 & n.14 (1968) (defendant should not benefit from his home law when acting in another state).

158. *Lilienthal*, 395 P.2d at 553 (Goodwin, J., dissenting).

159. The phenomenon of incorporation at a known “haven” to avoid regulation is an extreme instance. Given the relative homogeneity of states’ laws, true “havens” are likely to be offshore. The phenomenon of the race to the bottom is more familiar, notably in the “Delawarization” of American corporate law. For a recent comment urging federalization of corporate law, *see* Joel Seligman, *The Case for Federal Minimum Corporate Law Standards*, 49 MD. L. REV. 947 (1990). A less intrusive way of dealing with the problem might be through choosing the law of the interested forum rather than the law of the state of incorporation. *Cf.* Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS. 161, 179-97 (Summer 1985).

Professor Kramer certainly avoids the hobgoblin of consistency. Amusingly, (1991) 80 GEO. L.J. 84 a second piggyback canon flies at once in the face of his first. Professor Kramer picks up Professor Russell Weintraub's suggested functional rule for resolution of the true conflict in contract cases,¹⁶⁰ itself with a long intellectual history.¹⁶¹ Weintraub proposes that, where the parties do not stipulate for governing law, the court should apply "*whichever law validates the contract.*"¹⁶² Here, of course, Professor Kramer must confront the relentless reciprocity he favors, which would force Oregon's *invalidating* rule on California, under his first canon, if *Lilienthal* were brought there, but would force the opposite result in both courts under his validation canon. Professor Kramer does seem to see the difficulty. His response is to say, in effect, that the result will vary, depending on the facts.¹⁶³ In other words, courts will have little more guidance with Professor Kramer's "canons" than without them.

A third piggyback canon picks up the functionalists' argument that law that is archaic or obsolescent should be disfavored.¹⁶⁴ The trouble with this canon is that it seems to be substantially irrelevant to Professor Kramer's project. Obsolescence is that condition attending law that is

160. WEINTRAUB, *supra* note 64, at 397-98 (apply the law that would validate the contract unless the contract is one of adhesion; several qualifications).

161. *See generally* Ehrenzweig, *The Statute of Frauds in the Conflict of Laws*, *supra* note 66, at 874 (rule of validation is "true rule" for choice of law in contracts cases); Lorenzen, *supra* note 66, at 655 (same). *See Kossick v. United Fruit Co.*, 365 U.S. 731, 741 (1961) (holding, in admiralty, that shipowner's oral promise to seaman was enforceable on general principles of validation); *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927) (in case presenting conflict of interest rates, applying rate that would sustain the validity of the loan agreement); *Pritchard v. Norton*, 106 U.S. 124 (1882) (under general common law, choosing law of place of performance of contract rather than invalidating rule at place of making contract, it being the presumed intention of the parties to make a valid contract).

162. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 329.

163. *Id.* at 333-34.

164. VON MEHREN & TRAUTMAN, *supra* note 57, at 80, 435; WEINTRAUB, *supra* note 64, at 360, 387; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); Hessel E. Yntema, *supra* note 64, at 734-35; Cheatham & Reese, *supra* note 64, at 980. This view of the significance of anachronism in choice of law probably appears for the first time in postwar writing in Freund, *supra* note 141, at 1216.

losing current policy support.¹⁶⁵ So this canon is irrelevant to the solution of *true* conflicts. At best it could identify certain cases more accurately as cases of no conflict. The classic case of *Milliken v. Pratt*¹⁶⁶ provides an example. Chief Justice Gray of the Supreme Judicial Court of Massachusetts treated the case as presenting, in effect, a true conflict between the validating law of Maine, where the creditor resided, and the incapacity defense of Massachusetts, where the debtor resided. But late in his celebrated opinion, Gray pointed out that the Massachusetts defense had been repealed some time after the (1991) 80 GEO. L.J. 85 events in suit.¹⁶⁷ From an interest analyst's point of view, at this point it becomes apparent that there was no conflict between the two states' laws. Any interest of the defendant's state collapsed with its repeal of the defense before the time of trial. Similarly, in the recent Massachusetts case of *Pevoski v. Pevoski*,¹⁶⁸ the court retroactively applied its judicial abrogation of a former rule of interspousal tort immunity, in effect converting a true conflict into a no-conflict case. Courts do not need an obsolescence canon to resolve false conflicts.

2. The Creative Canons

Professor Kramer also adds suggestions drawn from the body of traditional common law maxims and canons of statutory interpretation. He suggests, for example, a canon about party expectations: "Where two

165. For the modern classic treating the general problem of obsolescence of law, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

166. 125 Mass. 374 (1878).

167. *Id.* at 383. For an interesting example of the recent recognition by courts that taking a subsequent repeal into account does nothing retroactive, but rather, legitimately applies living law, see *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1282-83 (7th Cir. 1990) (remand for fresh determination under current law of whether American reinsurer was entitled to discover matter which would have been "service secret" under former Romanian law). In a concurring opinion, Judge Easterbrook commented, "Revolution in Romania means that yesterday's secrecy laws are of little moment." *Id.* at 1283.

168. 358 N.E.2d 416 (Mass. 1976). In *Pevoski*, changing the forum's "worse" domestic rule was clearly correct. The alternative to better law elsewhere need not be "worse" forum law, unless the forum's interests are compelling. See, e.g., *Maguire v. Exeter & Hampton Elec. Co.*, 325 A.2d 778, 780 (N.H. 1974) (refusing to apply decedent's state's "better" law which would permit unlimited recovery for wrongful death where forum is domicile of defendant).

laws conflict, but the parties actually and reasonably relied on one of them, that law should be applied.”¹⁶⁹ This actual reliance requirement is stiffened further by the fact that Kramer seems to want inquiry into the expectations of both parties.¹⁷⁰ This is a couple of notches tighter, of course, than loose talk about “the presumed intention of the parties.” His example, again, is *One 1953 Ford Victoria*.¹⁷¹ There, he argues, both parties expected, according to their agreement, that their car finance deal would be governed by Texas law.¹⁷² In that case, it will be recalled, the Texas mortgagee intervened in a California forfeiture proceeding to protect its interest in a motor vehicle that had been used in the transportation of narcotics in California. When the car was financed in Texas the mortgagee could not have known it would be driven out of the state; the contract provided expressly to the contrary. But, as the California court saw, *One 1953 Ford Victoria* was only apparently a true conflict. In fact, the policy underlying California’s forfeiture law would not be significantly impaired by confiscation of the car subject to the claim of the innocent mortgagee. True, the California legislation in terms required a **(1991) 80 GEO. L.J. 86** reasonable character investigation; the Texas company had not performed one. Texas law required no such investigation. The California Supreme Court dealt with this by expressly holding that the California law could not reasonably be construed to impose duties on an out-of-state mortgagee without notice.¹⁷³ Thus, *One 1953 Ford Victoria* is a case in which local law is construed away. With neither state interested in defeating the mortgagee’s claim, it turned out to be another no-conflict case rather than a true conflict.

Even if a true conflict case could be found to which this expectations-and-reliance canon could apply, the canon may be taking Professor Kramer where he does not want to go. At only a very slight remove from the cases he seems to have in mind are libraries full of cases in which both parties at least know the nature if not the source of governing law, and act with that knowledge. They are the cases in which the plaintiff and defendant alike know that a tort was committed or a contract broken.

169. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 336.

170. *Id.* at 338.

171. 311 P.2d 480 (Cal. 1957).

172. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 338.

173. *One 1953 Ford Victoria*, 311 P.2d at 482.

Because policies underlying tort and contract recoveries are so basic and widely shared, the parties can expect that every sovereign will enforce contracts and remedy torts. The law that will tend to surprise the parties is a rule that makes available some defense.¹⁷⁴

In another of his creative canons, Professor Kramer suggests that substantive law generally should trump procedural law, unless the forum's procedural interests would support dismissal for forum non conveniens.¹⁷⁵ (At this point, it is only sporting to put to one side the logical conclusion that comity should not trump enforcement of forum law.) In application this canon would seem to be a plaintiff-favoring one. It might mean, for example, that in the rare case in which the plaintiff files suit in a restrictive forum, despite a more advantageous alternative forum elsewhere, the claim state with a longer statute of limitations could open the courthouse doors of the state with a shorter statute. I have argued elsewhere that this is an unprincipled result,¹⁷⁶ notwithstanding the Ninth Circuit view of the matter in *Ledesma v. Jack Stewart Produce, Inc.*¹⁷⁷ Legislation protecting the forum **(1991) 80 GEO. L.J. 87** from stale claims does not authorize the forum to borrow plaintiff-favoring foreign law. As I explain in the next part of this article, the avoidance of local legislation can result in grave dysfunction at the forum.

174. See Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 1023, 1036-39 (1984).

175. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 324.

176. CASEBOOK, *supra* note 68, at 409-410; Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. (1991) (forthcoming).

177. 816 F.2d 482, 486 (9th Cir. 1987). For my views on *Ledesma*, see also CASEBOOK, *supra* note 68, at 410:

When a state's general policies cannot be vindicated by application of local law, it has been the modern method to say that the state lacks an interest—not that it has an interest in applying another state's laws. Can a state with an interest in applying its statute withhold the benefit of its law from the defendant without the appearance of discrimination?

See also Weinberg, *Choosing Law: The Limitations Debates*, *supra* note 176. But see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 comment e (1987) (*Ledesma* cited as “espousing the modern view”).

In international cases there is a special danger in this last canon's preference for substance over procedure. Swiss bank secrecy laws, under this canon, would trump the federal discovery rules.¹⁷⁸ Again, we are looking at the risk of nonenforcement identified earlier in this paper.

IV. TWO KINDS OF LOCAL DYSFUNCTION

Professor Kramer, like other functionalist writers, believes, with surface plausibility, that departures from forum law must be appropriate in some true conflict cases. To quarrel with such a view would be brash, since today virtually every modernist writer and judge is a functionalist in the sense that he or she shares that view. But brashly I have raised the question here whether such departures incur systemic risks. On another occasion I argued, also brashly, that departures from forum law incur local risks as well.¹⁷⁹ It is worth revisiting these problems because they seem to arise in almost every case in which an interested forum departs from its own law.

When, in the name of comity or for any other reason, an interested forum departs from its own law, there is a likelihood of irrational and discriminatory classification of litigants with equal claims to forum governance. An interesting example of this phenomenon can be seen in cases under the amended Jones Act. The amended Act withdraws the benefit of American maritime remedies from foreign oil workers injured on floating rigs in foreign waters even in cases against American defendant rig owners.¹⁸⁰ The Act seems obviously discriminatory because it creates an irrational classification.¹⁸¹ There are rational distinctions between residents and nonresidents of the United States, but those do not

178. See *supra* note 43 and accompanying text.

179. Weinberg, *On Departing From Forum Law*, *supra* note 8 at 611-12.

180. 46 U.S.C. § 688(b)(1)(A) (1988); see *Merchant Marine Misc.—Part 3: Hearings on Jones Act Liability—H.R. 6705 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 2d Sess. 197, 206-10 (1980).

181. For a judicial expression of the view that the Jones Act amendment is discriminatory, and that dismissal for forum non conveniens would also be discriminatory in cases covered by the amendment, see *Munusamy v. McClelland Eng'rs, Inc.*, 590 F.Supp. 891, 893 (E.D. Tex. 1984) (dictum); *Munusamy v. McClelland Eng'rs, Inc.*, 579 F.Supp. 149, 156-57, 159 (E.D. Tex. 1984).

support the Jones Act amendment. The policies that support the provision of American maritime remedies to American rig workers are largely remedial, but deterrent policies cannot be discounted wholly. Because it is a legitimate national concern to remedy workplace accidents suffered by Americans,¹⁸² obviously it becomes a concern to deter the workplace hazards that lead to such accidents. Whoever else that policy concern can reach, clearly it can reach American owners and operators of the floating rigs. But there is no way an American rig owner can keep the workplace safe for American workers while leaving it unsafe for Norwegians or Scots. Once the national interest in safety aboard the American rig is identified, national law cannot be withheld from some of the beneficiaries of that interest without discrimination. Even if an American rig owner abroad hired only foreign rig workers in order to take advantage of this unwise amendment, the amendment still would seem to some degree discriminatory, in the way that it seems discriminatory, in some circumstances, to permit American manufacturers to export dangerous products banned on our home market.

To take a more familiar, nonstatutory example, let us return to *Schultz v. Boy Scouts of America*.¹⁸³ Recall that there, a troop of scouts from New Jersey went camping in New York, and on the trip some of the boys were sexually molested by a scoutmaster. The New York Court of Appeals held the Boy Scouts immune under New Jersey law.¹⁸⁴ Some courts and commentators (erroneously) would call this a false conflict; they suppose the place of injury is always fortuitous, and they assume only the joint domicile of the parties can have an interest in resolving their dispute.¹⁸⁵

182. The negative inference, that an American injured under the same circumstances would enjoy the benefit of the American statute, is not always certain. See *Aramco*, *supra* note 102, in which the Supreme Court held that Title VII does not apply to an American employer's extraterritorial discriminatory practices against an American employee. For further comment on *Aramco*, see *supra* notes 102-109 and accompanying text.

183. 480 N.E.2d 679 (N.Y. 1985).

184. *Id.* at 681 (forum, the place of injury, would apply nonforum law of joint domicile of parties to grant defendant charitable immunity in personal injuries case).

185. See, e.g., the first of the three "rules" announced in *Neumeier v. Keuhner*, 286 N.E.2d 454, 457 (N.Y. 1972) (Fuld, C.J.). There, seeking to fashion choice of law rules for guest statute cases, Chief Judge Fuld first prescribed the law of the joint domicile for all guest statute cases in which the parties were from the same state. In this, Fuld apparently assumed that all cases in which the parties were from the same state

Others have argued that the place of injury does generally have very real interests in assuring the safety of the territory and encouraging or discouraging particular activities.¹⁸⁶ The *Schultz* court itself indulged in some over-refined analysis. The court reasoned that the purpose of the defense was cost-allocating, and that only the joint domicile had an interest in allocating the costs of this (1991) 80 GEO. L.J. 89 injury as between the parties.¹⁸⁷ The court failed to consider the purposes underlying New York's own liability rule in a case in which New York was the place of injury. The upshot was that an interested forum departed from its own law.

As I have argued at greater length elsewhere,¹⁸⁸ and as Professor Joseph William Singer argues,¹⁸⁹ New York rationally cannot withhold the protection of its law from a visitor.¹⁹⁰ Its police, for example, cannot

would be false conflicts. He believed, apparently, that the place of injury is never an interested state, but is simply fortuitous.

186. See CASEBOOK, *supra* note 68, at 315 para. (7); Trautman, *supra* note 73, at 467 (deterrent and admonitory policies come into play at place of injury). For a general discussion of the legitimate concerns of the place of injury, see Weinberg, *The Place of the Trial and the Law Applied*, *supra* note 73, at 78-80; and see Singer, *Real Conflicts*, *supra* note 64, at 57-59 (place of injury has deterrence and general compensatory interests).

187. 480 N.E.2d at 683.

188. CASEBOOK, *supra* note 68, at 354, 432; Weinberg, *The Place of Trial and the Law Applied*, *supra* note 73 at 91-92; Weinberg, *Conflicts Cases and the Problem of Relevant Time*, *supra* note 174 at 1028.

189. Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197 (1991).

190. The argument that a state may not withhold the benefit of its laws from newly arrived residents or visitors to its territory may find some support in *Hooper v. Bernalillo*, 472 U.S. 612, 622-23 (1985) (state may not reserve veterans' preference for veterans who were residents at time of Vietnam war; all resident veterans, whether newly-arrived or not, are entitled to equal protection of the state's laws); *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (state may to distribute unequal excess revenue rebates to residents, the amounts of the rebates calibrated to the length of residency in the state; all residents are entitled to equal protection of the state's laws). I have argued the position repeatedly. See CASEBOOK, *supra* note 68, at 354, 432; Weinberg, *Conflicts Cases and the Problem of Relevant Time*, *supra* note 177, at 1028 (may be unconstitutional for state to withhold protection from late-arrived resident even if breach occurred in another state before resident moved); Weinberg, *The Place of Trial and the Law Applied*, *supra* note 73, at 91-93 (same); see also *supra* note 181 and accompanying text.

constitutionally distinguish between New Jersey and New York boy scouts in coming to their defense. It would be arbitrary and irrational to do so, because there is no way New York can make its territory safe for residents without making it safe for visitors too. If it is unsafe for visitors it is unsafe for residents. Additionally, it would be irrational in the extreme for New York in the midst of its “I love New York” tourism campaign to declare open season on visiting boy scouts. Thus, the *Schultz* court created an irrational classification between residents and nonresidents on the facts of that case.

A second problem attends the decision of cases at the interested forum departing from its own law. It will become awkward for a forum to apply a rule it previously excepted in a conflicts case. Consider a variant on *Intercontinental Planning v. Daystrom*,¹⁹¹ a case in which a New York broker sued a New Jersey defendant for a broker’s fee. Making a strategic error, the New York broker sued at home in New York, where the statute of frauds rendered oral brokerage agreements unenforceable.¹⁹² New Jersey, the defendant’s state, would enforce an oral agreement for a broker’s fee.¹⁹³ An interest analyst might at first assess *Daystrom* as an unprovided for case—one in which neither state was interested. The purpose of the statute of frauds seems likely to be to protect a New Yorker from having to defend trumped up claims, but **(1991) 80 GEO. L.J. 90** there was no New York defendant here to protect. The purpose of New Jersey law enforcing oral broker agreements, of course, was to ensure that New Jersey brokers are paid for their services. But there was no New Jersey broker in the case. Despite this unprovided-for quality, the New York Court of Appeals treated the case as a false conflict—one in which New York was the only interested state. The court did see that New Jersey had no interest in enforcing a New York contract on behalf of a New York plaintiff.¹⁹⁴ But it reasoned that the purpose of the New York statute of frauds was to protect customers of New York brokers from trumped up claims. This protective policy embraced not only New York customers, but all customers. There was a rational basis for this view. New York was an enterprise state, with much brokerage business. New

191. 248 N.E.2d 576 (N.Y. 1969).

192. *Id.* at 580.

193. *Id.* at 583.

194. *Id.* at 584.

York had an interest in protecting nonresident customers of New York brokers from having to defend trumped up claims, because to do so would encourage them to deal with New York brokers. Thus, New York applied forum law, as that of the only interested state.¹⁹⁵

But suppose *Daystrom* had gone the other way. Suppose that in the case of *Daystrom Otherway*, the New York Court of Appeals identified the interest it identified in *Daystrom*, but then went on to say: “However, this interest is not compelling enough in a case by a nonresident to overcome the state’s multistate policy in favor of comity. We follow a set of neutral principles in choosing law, and we encourage sister states to follow the same set, to our mutual advantage (citing Professor Kramer). One of these neutral principles is that in an action on a contract, that law should be chosen which validates the agreement (citing Professors Weintraub and Kramer). Therefore, we should apply New Jersey law against the New Jersey defendant, in part because New Jersey will then be encouraged to reciprocate with a mutual preference for validation. That means it will validate a New Jersey broker’s agreement against a New York customer in its courts, and it also will apply its validating law against its own defendants in its own courts when our plaintiffs sue on contracts in New Jersey, notwithstanding any local defenses that otherwise might be available under New Jersey law (citing Professor Kramer again). We hold that New Jersey law applies on the statute of frauds issue. A New York broker should be allowed to try to recover its finder’s fee if it can prove an oral agreement with a New Jersey customer.”

Suppose now that, in a subsequent case, *Jersey Variant*, brought in New Jersey, a New Jersey broker sues a New York customer on a New York brokerage agreement. The New York customer argues the New York statute of frauds. The New Jersey court, of course, rightly applies its own law to **(1991) 80 GEO. L.J. 91** enforce the oral agreement in favor of the New Jersey broker. But in the course of doing so, it says: “Although we do not intend any formal adoption of the technique of renvoi,¹⁹⁶ we

195. *Id.*

196. The renvoi (wren VOY for those who prefer anglicizing such terms) is a forum reference to the whole law of another state, including that state’s own conflicts rules. The familiar example is *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), under which a federal court adjudicating state law issues must apply the whole law of the state in which it sits, including that state’s choice rules—in other words, the law that that state would apply.

find support for our view in a reference to what a New York court would do. In a recent case on similar facts, *Daystrom Otherway*, New York applied New Jersey law. More importantly, *Daystrom Otherway* shows that the policy underlying New York's statute is weak. In *Daystrom Otherway*, New York did not apply its statute of frauds to a New York brokerage agreement, but applied a principle of validation instead. This is yet another of the exceptions that New York allows, among other factors which will take a case out of the statute. Therefore, New York's policy would be much less impaired by our applying New Jersey law here, than ours would be if we applied New York's law (citing Kramer and Baxter)."

Now suppose yet another subsequent case in New York, a wholly domestic case, *Domestic Daystrom*.¹⁹⁷ In *Domestic Daystrom*, a New York broker brings suit in New York on facts identical to those in the original *Daystrom*, except that both parties are New Yorkers. Now, just as the defendant argued in *Jersey Variant*, the plaintiff in *Domestic Daystrom* can argue, "The defense doesn't always apply. There are factors that take a case out of the statute. For example, in *Daystrom Otherway*, the statute was not applied in an action in which the customer was a nonresident."¹⁹⁸

197. I pass over the problem of discrimination now confronting the New York court. If it properly applies the statute in the wholly domestic case, it creates two classes of New York brokers with oral agreements: those who can recover because they had the luck to deal with nonresidents, and those who are left holding an empty bag under local law. Yet, once New York's interest in the defense is seen, there is no rational basis for distinguishing between brokers based on the state affiliation of their customers; indeed, encouraging the out-of-state customer to come in would seem to be at least as high a priority for New York as encouraging the local customer to deal at home.

198. For an interesting Supreme Court case exhibiting an analogy to this phenomenon in a federal/state choice-of-law context, see *Kansas v. Utilicorp United, Inc.*, 110 S.Ct. 2807 (1990). In *Utilicorp*, one issue was whether indirect purchasers' claims could be cognizable in antitrust. Under the rule affirmed in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), only direct purchasers have antitrust standing. One argument on behalf of the indirect consumers should have been that the Court had recently undermined the rule of *Illinois Brick*, by holding that state courts could choose their own law on the question of indirect-purchaser standing in antitrust type suits. *California v. ARC America Corp.*, 490 U.S. 93, 105-06 (1989). Justice Kennedy, writing for the Court in *Utilicorp*, refrained from dealing with the problem of *ARC America*. Justice White, though, joined by Justices Brennan, Marshall, and Blackmun, dissenting, remarked, "Indeed, just last Term we observed that under *Illinois Brick* 'indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them.'" 110 S.Ct. at 2819 (White, J., dissenting) (quoting *ARC America*, 490 U.S. at 102 n.6). In this example, as Justice

Thus, the policy underlying the statute is weak, and I would submit that where an oral agreement can be (1991) 80 GEO. L.J. 92 proved, it is not intended that the statute apply.” In short, the departure from forum law in *Daystrom Otherway* has undermined the identified local policy of encouraging brokerage dealings by protecting customers of New York brokers from having to defend trumped up claims. That policy is now less compelling not only in other courts, but at home.

This problem becomes acute when the interested forum departs from its own law on the ground that foreign law is better. Suppose that in our hypothetical *Daystrom Otherway*, the New York court, in deciding for its broker under New Jersey law, goes on to say: “Besides, law that validates agreements is clearly better law (citing Professor Robert Leflar¹⁹⁹ and *Pritchard v. Norton*²⁰⁰). Our legislation is entirely unambiguous, but should not be exported to cover contracts valid under the law of another interested state (citing *Milliken v. Pratt*,²⁰¹ von Mehren and Trautman,²⁰² Weintraub,²⁰³ Kramer,²⁰⁴ and other authorities).” Then, in the subsequent case of *Domestic Daystrom*, the forum will have to deal with the argument that in a recent case it explicitly disfavored the local statute, and held that validating law was better. If the statute is not truly unambiguous, as suggested, or if the disfavored local rule is one of decisional law, the chances are high that the court, having identified its own validating policy, will simply construe away the explicitly disfavored rule in this later case.

White points out, the Court anticipated the problem as it decided to depart from its “own” law in *ARC America*.

199. Robert Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966) (better law is that which upholds a fair transaction entered into in good faith).

200. 106 U.S. 124, 128-29 (1882) (under general common law, place of performance as well as place of making contract could govern, whichever would validate the contract, it being the presumed intention of the parties to enter a valid agreement); *see also Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 407-08 (1927) (in case presenting conflict of interest rates, applying law which would sustain the validity of the loan agreement).

201. 125 Mass. 374, 382-83 (1878) (It would be unjust and inconvenient to put creditors to the burden of ascertaining law of domicile; thus contract is valid if valid where made).

202. VON MEHREN & TRAUTMAN, *supra* note 57, at 240.

203. WEINTRAUB, *supra* note 64, at 384-85.

204. Kramer, *Rethinking Choice of Law*, *supra* note 3, at 329.

Should not the court have done that the first time around, in the conflicts case? Resort to “canons” has simply obscured and delayed the common-law process.

The familiar California case of *Offshore Rental Co. v. Continental Oil Co.*²⁰⁵ is a good example of this sort of dysfunction. There, California decided not to apply an unusual and ambiguous provision of the California labor code.²⁰⁶ The court reasoned that the provision, arguably providing a corporate cause of action for injury to a key employee, was aberrational, archaic, and unrealistic. The injured employee had already recovered; the defendant corporation had already defended once; and the plaintiff corporation **(1991) 80 GEO. L.J. 93** easily could have insured itself for any loss. So the court applied the better rule of Louisiana.²⁰⁷ The difficulty emerged in the next, wholly domestic case.²⁰⁸ The court was faced with the job of having to apply explicitly disfavored law. California then did the job of construing away its ambiguous code provision.²⁰⁹ Surely this could have been done, and in intellectual honesty should have been done, in a cleaner, more direct way in *Offshore Rental* itself.²¹⁰

Finally, the forum departing from its own law because nonforum law is better, identifies its own policy, but blocks its chance of progressive evolution toward better law of its own. For a good example of a court seizing that opportunity and rejecting foreign law I would return to the Massachusetts case of *Pevoski v. Pevoski*.²¹¹ There, faced with an outdated rule of interspousal tort immunity at home, and law at the place of injury that would enable the defendant Massachusetts spouse to obtain the benefit of his insurance, the court rightly rejected a flight to foreign

205. 583 P.2d 721 (Cal. 1978).

206. *Id.* at 728.

207. *Id.* at 729.

208. *Weinrot & Son, Inc. v. Jackson*, 708 P.2d 682 (Cal. 1985).

209. *Id.* at 691; *see also Thompson v. Estate of Petroff*, 319 N.W.2d 400, 407 (Minn. 1982) (striking down under state constitution a law the forum had subordinated to “the better law” of a sister state in *Bigelow v. Halloran*, 313 N.W.2d 10 (Minn. 1981)).

210. *See Weinberg, On Departing From Forum Law, supra* note 8, at 601-03 (comparing departure from federal law in *Miree v. DeKalb County*, 433 U.S. 25 (1977) with cleaner, more direct change of forum law in *Pevoski v. Pevoski*, 358 N.E.2d 416 (Mass. 1976)).

211. 358 N.E.2d 416 (Mass. 1976).

law and instead allowed the plaintiff spouse to go to the jury under *changed* local law.²¹²

From this review it can be seen that when an interested forum subordinates its own policies, it may generate irrational and discriminatory classifications, and undermine forum policy for future cases. Such dysfunction at the forum departing from its own law means that it is a mistake for courts to bow to otherwise persuasive “better law” and “functional” arguments in favor of non-forum law, even to ensure that defendants do not escape responsibility. The enforcement advantages of a principled preference for forum law must be tempered, then, by the forum’s obligation to give the defendant **(1991) 80 GEO. L.J. 94** the benefit of its laws when the defendant is within the rational application of defenses at the forum. Of course, under modern long-arm legislation, such cases are infrequent.

ENVOI: CONFLICTS THINKING AND THE POLICE RESPONSIBILITIES OF POWER

Earlier opposition to interest analysis appears to be giving way.²¹³ While the new comity theorists are still trying to snatch from the fire as many of the excellences of the traditional approach as possible,²¹⁴ they do

212. *Id.* at 418. Note that the local immunity already had been abrogated judicially; *Pevoski* was a retroactive application of the change. But obviously the court would have made the change in *Pevoski* itself had it not done so already. This tactic, or course, is subject to legislative revision. It also may backfire if the forum chooses its own law as better and the legislature disagrees. For example, after *Bernhardt v. Harrah’s Club*, 546 P.2d 719, 725 (Cal. 1976), applying a common law rule of dramshop liability to a Nevada nightclub, the California legislature reacted by legislatively repealing not only the choice of law rule in *Bernhardt* but the underlying common law rule as well. CAL. BUS. & PROF. CODE § 25602 (Deering 1976). Similarly, after *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (sustaining Minnesota’s choice of its own law as after-acquired residence of the plaintiff to treble the liability of an insurer on a policy made in Wisconsin), the Minnesota legislature attempted to overturn the law applied in the Minnesota courts, and overshot its target, making Minnesota the only state in the country absolutely to prohibit the substantive remedy employed by its courts in *Hague*. MINN. STAT. ANN. § 65B.49(3a)(6) (West 1985).

213. *See supra* notes 3, 50.

214. *See, e.g.*, BRILMAYER, FOUNDATIONS AND FUTURE DIRECTIONS, *supra* note 3, at 155; Brilmayer, *The Other State’s Interests*, *supra* note 3, at 237 (arguing that in evaluating other state’s interests, forum should apply irrational choice rules of other

now seem prepared to use purposive reasoning to identify true conflicts. But the comity theorists' perception—accurate as it is—that courts are eager for neutral, independent principles of choice, is leading them to follow an older generation up the garden path. There are no super-rules.²¹⁵ As Professor Singer might remind us, this is not a “game,” but the “real” world.²¹⁶ Rather than abstractions like comity and reciprocity, what the world needs is effective control of spoliation and predation, and administration of law free of local dysfunction and systemic risk.

Advice to courts matters, because decisions of courts matter. Some day the world may have wise and effective universal substantive law. Until that millennium, there is no substitute—as generations of plays of the litigation game²¹⁷ suggest—for powerful, independent courts, determined under the oath of office, when their sovereign interest is invoked, to take unilateral responsibility for the enforcement of law.

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state); Kramer, *Rethinking Choice of Law*, *supra* note 3, at 303 n.75; Kramer, *Return of the Renvoi*, *supra* note 35.

215. See Larry Kramer, *Judicial Asceticism*, 12 CARDOZO L. REV. 1789 (1991) (identifying recent conflicts writing by himself as formalist, *id.* at 1793-94 n.18; stating that formalist reasoning shows a “tendency to simplify complicated questions,” *id.* at 1797; concluding that formalism is incompatible with the common law, *id.* at 1798).

216. Singer, *Real Conflicts*, *supra* note 64, at 8, 19 n.58.

217. See game theory discussion, *supra* notes 13-25 and accompanying text.

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