

**MASS TORTS AT THE NEUTRAL FORUM:  
A CRITICAL ANALYSIS OF THE ALI'S  
PROPOSED CHOICE RULE**  
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## I. INTRODUCTORY

### A. *Conflict, crisis, and confusion at the ALI.*

*A motion is defeated.* At the May 1992 meeting of the American Law Institute in Washington, D.C., at a session on a draft choice-of-law rule for liability in mass tort,<sup>1</sup> a number of amendments were **(1993) 56**

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1. COMPLEX LITIGATION PROJECT § 6.01 (A.L.I. Tentative Draft No. 3, Mar. 31, 1992) [hereinafter Tentative Draft No. 3]. The companion rules, §§ 6.02-6.07, will not be treated here. These deal, respectively, with choice of law for mass contract actions when law is chosen by the parties (§ 6.02); for mass contract actions in the absence of party choice (§ 6.03); for statutes of limitations (§ 6.04); damages (§ 6.05); punitive damages (§ 6.06); and procedure (§ 6.07). The Proposed Final Draft, issued Apr. 5, 1993, also contains a § 6.08, for federal intercircuit conflicts.

Because the Proposed Final Draft became available in April, 1993, and as the final draft of rule 6.01 contains some clarifying changes (irrelevant to the motion referred to in the text and to the arguments in this Article), I give the final draft here. Section 6.01 of the Proposed Final Draft provides, in pertinent part:

§ 6.01. Mass torts

(a) Except [in matters governing procedure, limitation of actions, and damages, in consolidated cases transferred under previous sections of this proposal, when] the parties assert the application of laws that are in material conflict, the transferee court shall choose the law governing the rights, liabilities, and defenses of the parties with respect to a tort claim by applying the criteria set forth in the following subsections with the objective of applying, to the extent feasible, a single state's law to all similar tort claims being asserted against a defendant.

(b) In determining the governing law . . . the court shall consider the following factors for purposes of identifying each state having a policy that would be furthered by the application of its laws:

- (1) the place or places of injury;
- (2) the place or places of the conduct causing the injury; and
- (3) the primary places of business or habitual residences of the plaintiffs and defendants.

(c) If, in analyzing the factors set forth in subsection (b), the court finds that only one state has a policy that would be furthered by the application of its law, that state's law shall govern. If more than one state has a policy that would be furthered by the application of its law, the court shall choose the applicable law from among the laws of the interested states under the following rules:

- (1) If the place of injury and the place of the conduct causing the injury are in the same state, that state's law governs.
- (2) If subsection (c)(1) does not apply, but all of the plaintiffs habitually reside or have their primary places of business in the same state, and a defendant has its primary place of business or habitually resides in that state, that state's law governs the claims with respect to that defendant. Plaintiffs shall be

**ALBANY L. REV. 810** moved from the floor. One of the more modest of these was intended to provide access to the law of the state where the injury occurred, if that state's policy would be advanced by the application of its laws on the particular facts.<sup>2</sup> (When a state's policy would be advanced by the application of its laws on the particular facts, conflicts writers call it an "interested" state.) The law of the interested place of injury was unavailable in the draft rule as submitted.

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considered as sharing a common habitual residence or primary place of business if they are located in states whose laws are not in material conflict.

(3) If neither subsection (c) (1) nor (c) (2) applies, but all of the plaintiffs habitually reside or have their primary places of business in the same state, and that state also is the place of injury, then that state's law governs. Plaintiffs shall be considered as sharing a common habitual residence or primary place of business if they are located in states whose laws are not in material conflict.

(4) In all other cases, the law of the state where the conduct causing the injury occurred governs. When conduct occurred in more than one state, the court shall choose the law of the conduct state that has the most significant relationship to the occurrence.

(d) When necessary to avoid unfair surprise or arbitrary results, the transferee court may choose the applicable law on the basis of additional factors that reflect the regulatory policies and legitimate interests of a particular state not otherwise identified under subsection (b), or it may depart from the order of preferences for selecting the governing law prescribed by subsection (c).

(e) If the court determines that the application of a single state's law to all elements of the claims pending against a defendant would be inappropriate, it may divide the actions into subgroups of claims, issues, or parties. . . .

COMPLEX LITIGATION PROJECT § 6.01 (A.L.I. Proposed Final Draft, Apr. 5, 1993) [hereinafter Proposed Final Draft].

The Proposed Final Draft includes changes made in Tentative Draft No. 4 (Oct. 23, 1992).

2. The amendment would have shifted the residual place-of-conduct rule to a new subsection (c)(5), and inserted a new subsection (4), to read:

[(c)] (4) If Subsections (c) (1) through (3) do not apply, but there is a single place of accident or injury, then that state's law governs the claims with respect to that accident or those injuries, unless that state's policies would not be advanced thereby. [Plaintiffs may be considered as sharing a common place of injury if their injuries occurred in states whose laws are not in material conflict.]

A.L.I. 1992 PROCEEDINGS 211 (1993).

It should be noted that neither the place where all plaintiffs reside nor the place where all defendants reside is available either. This Article does not touch on these omissions.

This amendment, attracting the support of a broad but unlikely coalition of younger modernists and nostalgic territorialists, nevertheless was defeated by a narrow margin.<sup>3</sup> An earlier generation of interest analysts had joined members of the bar to vote the amendment down.

Why did the vote fall into this pattern? It is my purpose here, in exploring this interesting question, to examine some persisting pathologies of conflicts thinking, and to make two critiques of the ALI's proposed liability choice rule, one fairly external, the other internal, to its mechanism.

By the time this sees print, the ALI will have held its May 1993 meeting. It is quite possible that the membership would have approved (1993) 56 ALBANY L. REV. 811 the liability choice rule for mass torts pretty much as it existed in the 1992 *Tentative Draft*.<sup>4</sup> Yet I think it important to offer these critiques. The draft is in the form of codified *federal* rules, presumably to be enacted by Congress.<sup>5</sup> Even if the proposed Rules are not enacted by Congress, courts will be influenced by them; the proposed Rules represent enormous thought and labor. I would hope these critical analyses, though touching only on the proposed liability rule,<sup>6</sup> could be useful to the Reporters,<sup>7</sup> either in preparation for the 1993 meeting,<sup>8</sup> or in its wake. But whether or not that is so, it is important that critical analyses of this kind be available to Congress and the courts.

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3. The voice votes being indistinguishable to the Chair (Charles Alan Wright), the "ayes" and "noes" were asked to stand and be counted. There were 157 voting members present; the amendment was defeated by a vote of 89 to 68. A.L.I., 1992 PROCEEDINGS 216 (1993).

4. Note added in press: On May 13, 1993, the membership approved the Complex Litigation Project in its entirety, subject to minor fine tuning within the discretion of the Reporters. Proposed Final Draft, *supra* note 1. Rule 6.01, *see id.*, was given a specific vote of approval, with the understanding that the Reporters would introduce more flexible language into its loophole subsection (d).

5. Proposed Final Draft, *supra* note 1, ch. 6 introductory note.

6. Proposed Final Draft, *supra* note 1, § 6.01. The companion rules, *id.* §§ 6.02-6.08, will not be treated here. These deal, respectively, with choice of law for mass contract actions when law is chosen by the parties (§ 6.02); for mass contract actions in the absence of party choice (§ 6.03); for statutes of limitations (§ 6.04); damages (§ 6.05); punitive damages (§ 6.06); procedure (§ 6.07); federal intercircuit conflicts (§ 6.08).

7. The distinguished Reporters of the ALI Complex Litigation Project are Arthur R. Miller and Mary Kay Kane. Dean Kane is the primary author of the choice-of-law rules for the Project. For the Reporters' thinking, *see* Mary K. Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 REV. LITIG. 309 (1991).

8. I sent an early draft of this paper to the Reporters. Some of my arguments also were anticipated in sets of comments I prepared for the Members' Consultative Group or

***The policy problem.*** The “external” critique has to do with the rule’s studied avoidance of policy guidance. Here it turns out that the argument for policy guidance is connected at a deep level to the “neutral” forum envisioned by the *Complex Litigation Project* as a whole. I will try to clarify this point shortly.<sup>9</sup>

I hasten to acknowledge that explicit policy guidelines would be controversial. But the issue needs to be put before both Congress and the courts.

***The irrationality problem.*** The internal critique is more analytic, and uncovers some of the draft rule’s more inadvertent irrationalities. These, too, if not addressed by the *Project’s* Reporters, should be before the legislature and remain before the judiciary. (1993) 56 ALBANY L. REV. 812

*B. The proposed liability choice rule for mass tort.*

***The problem of mass litigation disaster in mass disaster litigation.*** The proposed choice-of-law rule for mass tort liability,<sup>10</sup> part of the ALI’s *Project on Complex Litigation*, might be read as an elegant treatment of a messy problem—messy for both federal and state courts. Both sets of courts are under constitutional obligation<sup>11</sup> in state-law mass trials, when the forum state’s interests seem de minimis, to apply the choice rules of a more interested state,<sup>12</sup> and thus to find and apply more relevant law, issue by issue.<sup>13</sup> In addition to this, in transferred state-law cases in federal

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submitted to the Reporters at various stages in the development of Chapter 6 of the Complex Litigation Project, “Choice of Law.”

9. See *infra* notes 22-25, 39-43, and accompanying text.

10. See Proposed Final Draft, *supra* note 1, § 6.01.

11. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). When the forum in a multiparty case lacks substantial governmental interest, *Shutts* requires application of the law of a more relevant state and produces a preliminary inquiry into the choice-of-law rules of each concerned state. *Id.* at 821-23.

12. In *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), seven of the Justices assumed the relevance of the question whether the reference state under *Shutts* “would” apply its own law. *Id.* at 730-34 (Scalia, J., for the Court); *id.* at 743-44 (O’Connor, J., dissenting in part, joined by Rehnquist, C.J.).

13. E.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). *Wortman* was a class action similar to *Shutts*, in which the Court was called upon to review the forum’s choices both of its own statute of limitations, *id.* at 722-30, and then of its own interest rate (adopted from an analogous federal one), *id.* at 730-34.

courts, transferee courts must apply the choice rules of the state in which each transferor court sits, in order to find and apply nonforum law, issue by issue.<sup>14</sup> Now, state choice rules today are unlikely to be the familiar *First Restatement* rules all states used to apply.<sup>15</sup> Under those rules, the law of the place of injury governed virtually every issue in a tort case, whether or not the place of injury had any interest in applying its law on the particular facts. Today, the state in which the transferor court sits is likely to have adopted some chic but eclectic and nonuniform modern “approach,” and to apply it issue by issue. The upshot is that it is infernally difficult for the transferee court in a case consolidating transferred cases from numerous states to find **(1993) 56 ALBANY L. REV. 813** ways of litigating mass torts conveniently, not only under unitary law, but even under unitary choice-of-law rules.<sup>16</sup>

Sometimes courts manage to ease these burdens by holding that all states “would” apply forum law or other unitary law.<sup>17</sup> In *In re Agent Orange Product Liability Litigation*,<sup>18</sup> Judge Weinstein held that all concerned states “would” apply “national consensus law”—apparently federal common law incorporated into state law by reference.<sup>19</sup> Two Justices of the United States Supreme Court have taken occasion to

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14. *Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). *Klaxon* requires a federal court to apply the choice rules of the state in which it sits, 313 U.S. at 496, and by extension, *Van Dusen* requires a federal transferee court to apply the choice rules of the transferor court’s state, 376 U.S. at 642. In a multistate litigation, *Van Dusen* thus entails examination into the choice rules of each transferor court, and into the substantive law of each state thus chosen—issue by issue, if the transferor state chooses law issue by issue, and most states do.

15. RESTATEMENT OF CONFLICT OF LAWS (1934).

16. For typical current judicial reactions, see, with regard to Shutts, *Duvall v. TRW, Inc.*, 578 N.E.2d 556, 561 (Ohio 1991) (holding that the trial court erred in determining that a class action was a superior method of adjudicating products liability claims arising from an allegedly defective truck steering mechanism, since the difficulties of choosing law would create “enormous case management problems”); with regard to *Van Dusen*, *In re San Juan Dupont Plaza Hotel Fire Litig.*, 745 F.Supp. 79, 81 (D.P.R.1990) (“In this type of litigation, the application of choice of law standards turns into a colossal struggle for the transferee court. . .”). For a recent four-square effort, and a rather good one, see *In re Disaster at Detroit Metro. Airport* on Aug. 16, 1987, 750 F.Supp. 793 (E.D.Mich.1989) (Cook, C.J.).

17. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-34 (1988) (affirming the unconvincing holding of the Supreme Court of Kansas that Texas, Louisiana, and Oklahoma each “would” apply an interest rate used by Kansas).

18. *In re “Agent Orange” Product Liab. Litig.*, 580 F.Supp. 690 (E.D.N.Y.1984) (Weinstein, C.J.).

19. *Id.* at 696-97.

deplore such tactics, and to propose closer scrutiny;<sup>20</sup> but the Court rejects that position, probably as impracticable.<sup>21</sup> The ALI's proposal would at least furnish a plausible unitary choice-of-law mechanism for mass torts. Moreover, by incorporating, in the more recent drafts, the powerful modern method of interest analysis, the proposed mechanism may well yield more rational results than are generally possible under codified rules. But there are very real problems with the proposal.

*The neutral forum and the choice-of-law process.* Key to an understanding of the debate is that under the draft *Project* as a whole, the law of the forum becomes substantially irrelevant. Its usual attractions<sup>22</sup> disappear. The forum becomes only a place for consolidated treatment of transferred cases. The forum is as likely to be selected for its expertise in complex litigation—or for its expertise (1993) 56 ALBANY L. REV. 814 on the particular facts, or even for the uncrowdedness of its docket—as for its being a place of significant contact with the case. The plaintiff becomes powerless over the choice of forum. This sort of “neutral forum,” although quite unreal in the run of ordinary cases, was assumed in every case by the old territorialist conflicts theorists, and sought as an ideal by the “new territorialists.”<sup>23</sup> But the apparition of a truly neutral—indeed, arbitrary—forum requires a forum-oriented modernist to scrap familiar patterns of reasoning and to think about choice of law in a fresh way.<sup>24</sup> In addition to this, litigation at a truly neutral forum disrupts patterns of reasoning about foreseeability.<sup>25</sup>

*The draft liability choice rule: Its setting.* Rule 6.01, “Mass Torts,” is only one of a set of choice rules in the ALI's proposal. There are two

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20. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 743-49 (1988) (O'Connor, J., dissenting in part, joined by Rehnquist, C.J.).

21. *Wortman*, 486 U.S. 730-34 (affirming the unconvincing holding of the Kansas Supreme Court that all concerned states “would” apply an interest rate used by Kansas).

22. For the argument for forum law when the forum is an interested state, see generally Louise Weinberg, *Against Comity*, 80 GEO.L.J. 53 (1991) [hereinafter *Weinberg, Against Comity*]; Louise Weinberg, *On Departing From Forum Law*, 35 MERCER L. REV. 595 (1984) [hereinafter *Weinberg, On Departing From Forum Law*].

23. See, e.g., DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 114-224 (1965) (devising “principles of preference” to choose law without reference to the biases of the forum).

24. See *infra* notes 39-43 and accompanying text.

25. See *infra* notes 66-67 and accompanying text; notes 147-48 and accompanying text.



others for mass contract actions<sup>26</sup> (generally to be understood as another way of pleading mass torts). There is a choice rule for statutes of limitations,<sup>27</sup> two rules for damages,<sup>28</sup> a rule for conflicts of procedural law,<sup>29</sup> and, finally, a rule for federal intercircuit conflicts.<sup>30</sup> Rule 6.01 is concerned only with issues of liability and substantive defenses to liability.

***The draft liability choice rule: Its shape.*** So much for the setting of the draft rule. What is its shape? The rule contains two lists of states. The first list narrows the forum's options to a small group of contact states.<sup>31</sup> In order to sort out significant from insignificant **(1993) 56 ALBANY L. REV. 815** contact states, the forum is asked to do a preliminary interest analysis<sup>32</sup> for each issue in a case.<sup>33</sup> In other words, the forum is asked at the outset to identify false conflicts among the contact states, and

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26. Proposed Final Draft, *supra* note 1, § 6.02 (when there is a choice-of-law clause); *id.* § 6.03 (in the absence of a choice-of-law clause).

27. *Id.* § 6.04.

28. *Id.* § 6.05 (damages generally); *id.* § 6.06 (punitive damages).

29. *Id.* § 6.07.

30. *Id.* § 6.08.

31. *Id.* § 6.01(b). The rule provides some discretion to consider an unlisted state. *Id.* § 6.01(d). This discretion would seem to be essential in view of cases like *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). In that case, the place of injury/conduct was Peru. The places where the plaintiffs resided were scattered. The place where the defendant was incorporated and had its principal offices was Colombia. But an entirely different contact state, Texas, may have been the only contact state that could rationally administer all of the survivors' claims in a unitary way. Texas was the place where all the decedents had been hired by their employer, a third party. As the place of the decedents' hiring, Texas had some interest in providing for the families of the decedent employees. This was buttressed by its interest, as a place of negotiation of the contract for safe transportation for the employees, in regulating the misfeasance. For a discussion of these and other interests in that case, see Louise Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913 (1985).

32. The incorporation of interest analysis is a late development in the evolution of the ALI's mass tort conflicts rules. With COMPLEX LITIGATION PROJECT ch. 6, at 26 (A.L.I. Council Draft No. 3, Nov. 22, 1991) (incorporating a preliminary interest analysis) compare COMPLEX LITIGATION PROJECT ch. 6, at 13 (A.L.I. Preliminary Draft No. 3, Sept. 19, 1990) (silent on the point). For a brief description of interest analysis, see *infra* part III.A, notes 83-97 and accompanying text.

33. Subsection (a), and the comments thereto, acknowledge the draft rule's issue-by-issue approach, but at the same time encourage a court to find a single law for global application to all of the issues covered by the rule. Proposed Final Draft, *supra* note 1, § 6.01(a) & cmt. a.

presumably to resolve them by eliminating noninterested contact states.<sup>34</sup> Once the forum identifies a true conflict<sup>35</sup> between contact states, the second list kicks in. The second list of states is the heart of the draft rule. It is a list of preferred tie-breakers.<sup>36</sup>

It is a novel feature of the rule that the list of tie-breakers is *hierarchical*; the choices must be tested for feasibility in the prescribed order. Renvoi is rejected; there is no obvious escape from the law of a state that itself would not apply it.<sup>37</sup> All of this seeming rigidity is intended to give more guidance to courts than is given by the familiar formula of the *Second Restatement of Conflict of Laws*, directing courts to apply the law of the “place of most significant contact.”<sup>38</sup> (1993) 56 ALBANY L. REV. 816

## II. A CRITIQUE FROM POLICY

### A. *Policy at the neutral mass tort forum.*

***Whatever happened to policy?*** The reader beginning to feel some alarm at the arbitrariness of a hierarchical list of contact states for resolving true conflicts of governance in major cases is of course right. It would have been better, I think, setting to one side the question of political feasibility, to have provided substantive policy guidelines. Some writers in the field have long urged the adoption of policy guidelines toward the

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34. It is not clear that the Reporters distinguish between the “contacts” that rule 6.01(a) designates as likely to be significant, and state “interests,” which could be found only through analysis on the law-selecting rather than jurisdiction-selecting level. For example, the Reporters remark in comment a to rule 6.01 that “the particular preference rules in § 6.01(c) reflect a determination that when more than one state has an interest in controlling the dispute, the combined presence of certain factors in a single state suggests that that state has the most significant interest in having its tort law applied.” Proposed Final Draft, *supra* note 1, § 6.01 cmt. a, at 401.

35. A “true conflict” is a case in which more than one state has an interest in governing by its laws, and the laws of the respective states differ. The proposed rule 6.01(a) posits laws “in material conflict.” Proposed Final Draft, *supra* note 1, § 6.01(a).

36. *Id.* § 6.01(c).

37. Proposed Final Draft, *supra* note 1, ch. 6 introductory note, at 392. “Renvoi” occurs in choosing law when the reference is not to the chosen state’s internal law, but to its choice rules.

38. *Id.* § 6.01 cmt. a, at 400. I suspect that an additional impulse lies behind the rigidity of the draft rule. Lawyers tend to divide into two groups in their opinion of the judiciary, as in other matters. One group has had a lifelong romance with the common law. The other views judicial discretion as a positive ill. For this second group, judges with discretion are floundering, or a threat, or both.

just resolution of true conflicts in ordinary litigation.<sup>39</sup> Elsewhere I have treated their views as a collective wrong turn, not because of any disagreement with the policy content of the guidelines they have designed, but because I have been putting the modern case for forum preference in the conflict of laws.<sup>40</sup> I have been arguing that grave dysfunction occurs at the *interested* forum when it departs from its own law. Such departures can be discriminatory;<sup>41</sup> they can undermine domestic policy;<sup>42</sup> and they can defeat enforcement of law.<sup>43</sup> But the debate between proponents of forum law and proponents of policy-guided departures from forum law becomes irrelevant when drafting a mass tort rule in the context of the *Complex Litigation Project* as it is set up. Once you have a neutral transferee forum empowered to choose law for mass torts, the forum has no axes to grind, and policy guidelines indeed become very desirable. **(1993) 56 ALBANY L. REV. 817** In cases characteristically nationwide in scope, it is important to guard against inadvertent frustrations of national policy. It is regrettable, then, that the Reporters reject as inappropriate any reference to substantive outcomes.<sup>44</sup>

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39. See generally, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969) (substantive and administrative policy preferences); ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS (1965) (conflicts policy preferences); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (3d ed. 1986) [hereinafter WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS] (substantive policy preferences); Elliott E. Cheatham & Willis L.M. Reese, Choice of the Applicable Law, 52 COLUM. L. REV. 959 (1952) (substantive and administrative policy preferences); Paul A. Freund, Chief Justice Stone and the Conflict of Laws, 59 HARV. L. REV. 1210 (1946) (conflicts policy preferences); Donald T. Trautman, Toward Federalizing Choice of Law, 70 TEX. L. REV. 1715, 1740 (1992) (substantive policy norms found by national consensus).

40. Weinberg, *Against Comity*, supra note 22; Weinberg, *On Departing from Forum Law*, supra note 22. Professor Weintraub now agrees with me about this, at least for conflicts involving United States law. Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry Into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799 (1992) [hereinafter Weintraub, *Extraterritorial Application*]. For recent cases of articulated forum preference, see, e.g., *Mahne v. Ford Motor Co.*, 900 F.2d 83 (6th Cir.1990) (under Michigan conflicts approach); *In re Disaster at Detroit Metro. Airport on Aug. 16, 1987*, 750 F.Supp. 793, 801-02 (E.D.Mich.1989) (same, in mass tort setting; Michigan law applied only as to those originally filing in Michigan); *Bishop v. Twiford*, 562 A.2d 1238, 1241 (Md.1989).

41. See Weinberg, *On Departing from Forum Law*, supra note 22.

42. *Id.*

43. See Weinberg, *Against Comity*, supra note 22.

44. Proposed Final Draft, supra note 1, ch. 6 introductory note, at 387.

Perhaps room can be made for policy suggestions even yet in the Reporters' notes or comments. Whether or not these things are possible, I want to say a few words about the sort of policy guidelines writers have often proposed in the past<sup>45</sup> and the sort that the draft might have used. Among other things, these will furnish a necessary backdrop for the rest of what I have to say.

*A positivist's question: Whose policy?* Preliminarily, let me suggest that any such policy guideline for the ALI's mass tort liability choice rule be formulated as a principle of preference taken from *national* substantive policy. The *Project's* provisions for federal transfer, after all, are in the form of a proposed federal statute, and the proposed conflicts rules are in the form of a federal choice-of-law code, presumably also to be enacted by Congress.<sup>46</sup> Failing the federalization of policy, the search for policy guidance becomes circular; the forum would have to choose which state's policy to use to choose which state's law.

Now, my point—that national, rather than state, policy should guide a neutral forum choosing law for mass torts—does not rest on the national interest in effective administration of mass disaster litigation (the interest identified by the Reporters of the draft proposal)<sup>47</sup> but rather on the national substantive interest in mass disasters.

A source of hesitation in referring to national, rather than shared multistate policies, in these typically multistate cases, may be that at present mass torts generally are governed by state law. But it would be hard not to share the Reporters' conviction that Congress has power over complex litigation,<sup>48</sup> and it is even easier to reach the conclusion, **(1993) 56 ALBANY L. REV. 818** a truism today, that Congress has power over national substantive policy. I do not think a serious argument can be made that Congress cannot legislate substantively for mass torts, any more than one can be made that Congress cannot legislate substantively to regulate the markets in which mass torts occur. Mass disasters invoke national

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45. See, e.g., ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* § 107 (4th ed. 1986) (forum should choose the "better" law); VON MEHREN & TRAUTMAN, *supra* note 39, at 240-41 (forum should choose law that facilitates multistate activity); WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS*, *supra* note 39, at 359-61 (forum should choose plaintiff-favoring law). Recently Professor Weintraub has retreated from some of these views in commenting on international conflicts. Weintraub, *Extraterritorial Application*, *supra* note 40, at 1818 (acknowledging former advocacy of interest balancing, and distinguishing public law from private law cases).

46. Proposed Final Draft, *supra* note 1, ch. 6 introductory note, at 375-78.

47. Proposed Final Draft, *supra* note 1, ch. 6 introductory note, at 376.

48. Proposed Final Draft, *supra* note 1, ch. 6 introductory note, at 382.

policy as well as state policies, and invoke national substantive as well as procedural policies. National policy favoring the effective administration of the tort system is only part of the picture. More is at stake in drafting a choice rule for such cases than the national concern in having a fair and efficient choice rule. Thus I cannot think it prudent, even in the interest of supposed states' rights, to disregard overarching national policies.

*B. National policy and the remedial choice.*

*What is national policy in mass tort cases?* We do have a pretty good idea of what national substantive policy is in mass tort cases, at least on issues of liability. National policy, at bottom, must favor the integrity, security, fairness, and safety of interstate and international markets for securities, services, and goods, and the security and safety of interstate and international transportation networks.

Of course there must also exist national as well as state policies protective of enterprise, even when enterprise deservedly incurs liability. But specific national defenses to state tort liabilities will preempt state substantive law, and thus obviate any necessity for a choice of law. And identification of inchoate national policy protective of the defendant also is likely to generate federal common law preemptive of state substantive law to the contrary.<sup>49</sup> More likely to be relevant here than federal boundary policy limiting choices among state laws, is state boundary policy limiting state law.<sup>50</sup> Indeed, no law is without bounds. Each sovereign strikes its own policy balance. In light of this truth, what should be the nature of national conflicts policy? How should the neutral forum in a multistate complex case **(1993) 56 ALBANY L. REV. 819** choose among the several balances struck by the respective contact states?

*National conflicts policy.*<sup>51</sup> Interestingly, the norms of current conflicts thinking already reflect an overarching view of conflicts policy shared by all states, which I find analogous to, and suggestive of, national conflicts policy. In choosing among the balances struck in the laws of

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49. See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (fashioning federal common-law immunity for military contractors in an action under Virginia tort law, in a case of wrongful death alleging defective design in a helicopter).

50. I deal with the phenomenon of widespread tort reform *infra* notes 67-69 and accompanying text.

51. I am building here on the identification and description of "national conflicts policy" set forth in Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 463-470 (1982) [hereinafter Weinberg, *Minimal Scrutiny*].

more than one state, it has come to be widely understood that the forum should consider, primarily, the policies underlying the whole field of law, rather than those underlying a specific local defense, or even a particular defendant-protective balance; since 1969 that has been the position of the American Law Institute itself, in section 6 of the *Second Restatement of Conflict of Laws*,<sup>52</sup> and that view has a long intellectual pedigree.<sup>53</sup> The policies underlying the whole field of tort law tend to be remedial. They are compensatory, deterrent, risk-shifting, and risk-spreading. In calling for remedial choices of law, the thinking of these authorities seems to have been that, since a choice must be made, with which only one of the contenders can be satisfied in any event, the mode of choosing should not cut against the grain of enforcement of underlying norms, but should work in harmony with it.

If, as I have suggested, national substantive policy favors the safety and fairness of markets, analogous thinking suggests that the national policies affecting mass tort cases also would be deterrent, compensatory, risk-shifting and risk-spreading. A choice-of-law process that systematically chooses law that undermines these national substantive policies could not be national conflicts policy. National conflicts policy must be remedial. Yet the ALI's proposed choice rule operates on the facile and even dangerous<sup>54</sup> assumption that national conflicts policy should be substantively neutral.

*The defense bias of "neutral" choice rules.* "That is all very well," the skeptical reader may be thinking. "But we know what a (1993) 56 ALBANY L. REV. 820 remedial choice policy means. Defendants always lose." But does a remedial choice policy in fact mean that defendants always lose? The short answer is "No." When there is a true conflict of laws on liability at a noninterested forum, the remedial choice is, curiously, the neutral choice.

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52. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(e) (1969) (the forum should consider "the basic policies underlying the particular field of law"). No reference is made to the policies underlying a defense.

53. See supra note 39. Strong authority recommends remedial law in tort cases. See, e.g., WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS, supra note 39, § 6.4; Willis L.M. Reese, The Law Governing Airplane Accidents, 39 WASH. & LEE L. REV. 1303, 1305 (1982).

54. See infra notes 62-64, 80-81, and accompanying text.

The neutrality of remedial choices on issues of liability,<sup>55</sup> though it may seem paradoxical, is actually self-evident. Only a choice of plaintiff-favoring law is unlikely to amount to a decision (in effect) on the merits. The law that favors the plaintiffs is the only choice of liability law that can be made without likely formal prejudice to either party. When the plaintiff wins on a choice-of-law point, she does not win the case. In the trial court, when the conflicts issue is first joined, and when the law chosen on an issue of liability is favorable to a plaintiff, a likely result is only that she will be allowed to try to prove her case, and that the defendant will have a chance to be heard. On the other hand, when the law chosen on an issue of liability is favorable to a defendant, a likely result is dismissal, with prejudice. The plaintiff is likely to lose her day in court altogether. That is particularly so where the plaintiff's claim is not cognizable under the chosen law, or, on acknowledged facts, a complete defense appears under the chosen law. The phenomenon is seen in other (1993) 56 ALBANY L. REV. 821 forms at the appellate level. When a

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55. In the discussion that follows I do not deal with issues of limitation, damages, or procedure; those are the subject of independent rules in the ALI's Draft. See *supra* note 6 and accompanying text. Those would require independent analyses.

The proposed rules do not provide separately for choice of law on issues of indemnification and contribution. These may raise quite distinct policy problems. See, e.g., *St. Paul Surplus Lines Ins. Co. v. International Playtex, Inc.*, 777 P.2d 1259 (Kan.1989) (approving choice of forum law denying to third-party plaintiff, on grounds of public policy, indemnification of punitive damages awarded and paid to original tort plaintiff), cert. denied, 493 U.S. 1036 (1990): "A finding that Kansas public policy does not apply to the punitive damages . . . would effectively excuse Playtex from the consequences of its reckless behavior within this state." *Id.* at 1269. See generally *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638-46 (1981) (identifying various policy concerns implicated in question whether to permit contribution between joint tortfeasors in antitrust). Instead, the Reporters provide a brief note, listing courts that have and have not chosen law for contribution claims independently from the law governing the underlying claim. Proposed Final Draft, *supra* note 1, § 6.05 cmt. b n. 10.

Nor is it clear from the draft whether or not prejudgment interest should be governed under the rule on damages. There is a brief note on courts that have linked choice of law on prejudgment interest variously to liability, damages, and forum procedure. Proposed Final Draft, *supra* note 1, § 6.05 cmt. b n. 9. For recent discussions of the issues, see *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1988) (White, J.); *id.* at 342-50 (Blackmun, J., concurring in part and dissenting in part); Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1784-96 (1992). For a current opinion in a multidistrict case, see, e.g., *Johnson v. Continental Airlines Corp.*, 964 F.2d 1059 (10th Cir.1992) (reversing an award of prejudgment interest under the law chosen to govern liability, and holding that the law of the state chosen to govern damages should apply); *id.* at 1063 n. 5 (referring in an afterthought to the transferor state's choice rules).

winning plaintiff prevails on appeal on a conflicts point, judgment on a jury's verdict is sustained. When a losing plaintiff prevails on appeal on a conflicts point, all she gains is a chance to try the case on remand. But when a winning defendant prevails on appeal on a conflicts point, the court approves the plaintiff's loss of a hearing on the merits. And when a losing defendant prevails on appeal on a conflicts point, judgment on a jury verdict or its equivalent is overturned; and if the claim is now held noncognizable or the defense applicable on acknowledged facts, there will be no new trial.

Thus, remedial choices of law on liability should result in earlier recoveries for some meritorious cases by way of settlement, and greater access to the trier of fact for the remainder of meritorious claims. On the other hand, when choice rules are more explicitly "neutral," and would favor now plaintiffs, now defendants,<sup>56</sup> some fraction of the claims thus excluded would otherwise have prevailed.<sup>57</sup> To state the obvious, such "neutral" rules would yield more pretrial dismissals of otherwise meritorious claims than remedial choice rules would have.

But failures to settle, and dismissals without a hearing, of otherwise meritorious claims of needless risk or unfair dealing, some fraction of which were likely to convince the trier of fact, would seem to require some justification.<sup>58</sup> Of course, there is ample justification to dismiss a particular case of mass injury if every interested contact state would protect the defendant under the particular circumstances, (1993) 56

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56. I do not mean to suggest that the ALI's draft rule for mass torts is "neutral." For reasons that will become apparent in discussion of its residual provision, *infra* part IV.A., notes 146-54 and preceding and accompanying text, the draft rule is defendant-favoring. This lends greater urgency to the argument I am making in the text.

57. Data from federal courts are available since 1979, but state courts largely fail to collect data on trial outcomes. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1227 (1992). Professor Saks estimates that about half of the less than 10% of potential plaintiffs who file claims actually receive compensation through the tort system. *Id.* at 1183-84 (citing HARVARD MEDICAL PRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK, THE REPORT OF THE HARVARD MEDICAL PRACTICE STUDY TO THE STATE OF NEW YORK 7-1 (1990)). For the view that in federal courts plaintiffs win about half of bench trials and about a third of jury trials, see Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1137 (1992). For the view that, on the whole, plaintiffs win more trials, see Stephen Daniels & Joanne Martin, *Jury Verdicts and the "Crisis" in Civil Justice*, 11 JUST. SYS. J. 321, 328-37 (1986).

58. The fundamental policy against unjustified dismissals of meritorious claims is manifest, of course, in the rule that issues of law are to be determined on the assumption that the plaintiff will prove or has proven its case.



**ALBANY L. REV. 822** and federal law does not intervene. But dismissal becomes increasingly problematic as it appears that one or more contact states have law constitutionally applicable to a case,<sup>59</sup> which the plaintiff's action would enforce, and which dismissal would flout. Over the run of such tort cases, the question must arise, whether dismissals of true conflicts under any choice-of-law theory should systematically defeat law enforcement.<sup>60</sup> The question stings a bit more if, when you ask it, you remind yourself that no choice-of-law theory is uncontroversial.

The upshot is that choice rules designed to be "neutral" as between the parties will tend to operate, ironically, with persistent defense bias.<sup>61</sup> The more consistently neutral choice, counter-intuitively, is the remedial choice.

*The problem of the impolitic or dangerous choice.* But the argument that "national conflicts policy" is remedial is more fundamentally linked to the policy benefits of the remedial choice. Those benefits may be purely hypothetical, since they are as wanting in empirical verification as the benefits of policy elsewhere in the law.<sup>62</sup> And I do not mean to paint too rosy a picture of our inefficient and random tort system. But these unavoidable difficulties aside, the policy benefits of consistent choices of remedial law are likely to be considerable.

Obviously, plaintiffs will prevail in some fraction of the tort cases left to the trier of fact. So it is obvious that in cases left to the trier of fact, widely shared tort policies will find more enforcement than they would have if those cases had been dismissed. More risks of injury will be shifted away from the injured; interstate commerce will be more encouraged by the enforcement of standards of safe and fair dealing; and doing better business will become more feasible to the extent it is held that

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59. It should be noted that my statement in the text is not circular. In a true conflict between two states, by hypothesis both states have law that is "applicable." By "constitutionally applicable law" I mean law having a rational basis for the application—in other words, the law of a state with a legitimate interest in governance of an issue, on the special facts of the case. See Weinberg, *Minimal Scrutiny*, supra note 51; infra part III, notes 83-97 and accompanying text.

60. See generally Weinberg, *Against Comity*, supra note 22, at 70-76, 94.

61. This is true also of cases at an interested forum. See Weinberg, *Against Comity*, supra note 22, at 63-65.

62. See Saks, supra note 57, at 1286-1287 (arguing that the tort system compensates only erratically, and then it undercompensates; the system works well as a deterrent, but mainly because defendants imagine it to be more effective than it is).

one's competitors must do it too.<sup>63</sup> In other words, to give scope for application to law requiring better business is (1993) 56 ALBANY L. REV. 823 likely to be good for business.<sup>64</sup> In this thinking, it follows that the law chosen will effectuate the national interest to the extent it conforms to basic substantive tort policy. It will effectuate national policy to the extent it deters wrongs, compensates for harms, shifts and spreads risk, and sets standards for the security of markets—all familiar goals of tort law.

The risks of disregard of these policy directives are scary in proportion as one is willing to assume that case law affects behaviors. Systemic judicial refusals to scrutinize multistate markets, under available state law, for their fairness, integrity, or security, sooner or later will undermine confidence in those markets.

*The remedial choice and the problem of fairness to defendants.* Are remedial choices fair to defendants? As we have already reminded ourselves, plaintiffs do not win on the merits when they win on a conflicts point. Defendants retain their right to be heard. More fundamentally, since the remedial law chosen would be that of an interested contact state, the result could not be “fundamentally unfair.”<sup>65</sup> As the Supreme Court has said repeatedly, due process is satisfied when the governing state has a significant contact or contacts with the issue and the parties, generating legitimate interests in governance of that issue.<sup>66</sup>

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63. This argument is much more difficult to make in the face of problems of international, rather than interstate, competitiveness.

64. A similar analysis is made in Weinberg, *Minimal Scrutiny*, supra note 51, at 463-470. It may be helpful here to draw a distinction between the abstract obligations imposed by tort rules and the paperwork and other burdens imposed by administrative regulations.

65. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (“[F]or 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.”). For a typical late application of the test in a state supreme court, see *Sangamo Weston, Inc. v. National Sur. Corp.*, 414 S.E.2d 127, 131 (S.C.1992).

66. *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1982); *Nevada v. Hall*, 440 U.S. 410 (1979); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954). This modern position traces back through *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493 (1939), and *Alaska Packers Ass’n v. Industrial Accident Comm’n*, 294 U.S. 532 (1935), to *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). See discussion in Weinberg, *Minimal Scrutiny*, supra note 51 (explaining modern position as scrutiny for “rational basis”).

Nor, if the concern is for the expectations of the defendant, is the existence of the interested contact state likely to be beyond the contemplation of the mass tort defendant and its insurer. That seems transparent, but it brings me to a more interesting point. We need to remember that the exclusivity of the traditional concern for the expectations of defendants that informs ordinary litigation is misplaced **(1993) 56 ALBANY L. REV. 824** in adjudicating a mass tort at a neutral forum. In ordinary litigation, the plaintiff chooses the place of trial, and thus can control to some extent the law to be applied. Conceivably, the law applied in such a case might seem unfairly surprising to the defendant. But at the neutral mass-tort forum, a choice of law can be unfairly surprising to the plaintiffs as well. Plaintiffs may have entered the market for goods or services assuming a background of common legal understandings, or even expecting active oversight of the safety and integrity of those markets. An isolated or remote local rule shielding a defendant from the responsibilities normally imposed by tort law might not be reasonably foreseeable to the plaintiffs.<sup>67</sup>

*The little difficulty of tort reform.* Nothing in the phenomenon of tort reform affects this analysis. The question whether, in the interest of tort reform, limits should be set on the effectuation of tort policy, is a question to be answered, under present arrangements, by the law of a particular state. If a state legislature wishes to subordinate the interests of some claimants to the interests of some defendants, and can do so constitutionally, of course it may. In so doing, the state legislature affects, in the main, members of its own local polity—those who vote in local elections and pay local taxes. Tort reforms have not been uniform, but have been tailored in each state to meet the specific perceived needs, at the time of enactment, of local professionals and businesses. In these qualities modern tort reforms do not differ fundamentally from other once widely-enacted defense-favoring rules. The problem of nonremedial or inferior law in a contact state is the essential problem of the law of conflict of

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67. For criticism of the view that defendants ought to be entitled to the law of the place where they act, and, more particularly, to laws with which they specifically complied, see *infra* part IV, notes 146-55 and accompanying text. Although the Reporters acknowledge that there may be undue hardship on plaintiffs if foreign manufacturers of goods sold in the United States are able to avoid American standards of care, Proposed Final Draft, *supra* note 1, § 6.01 cmt. d, at 443, as of the time of this writing the Reporters have not grasped the general effect of the neutral forum on the parties' relative positions in the mass tort case. The notes and comments retain from earlier drafts a general non-neutral concern for the expectations of defendants only. *Id.* § 6.01 cmt. d, at 431-32.

laws. Tort reforms do not differ in this respect in any essential way from familiar, earlier examples of widely-adopted but nonremedial law, like the fellow-servant rule, the guest statute, or the cap on recovery for wrongful death. Such law in its heyday was not especially isolated or aberrational, although when statutory it tended to be specific and nonuniform. But because it was nonremedial, it did not conform to underlying policy. Inevitably, courts found ways to avoid applying it, (1993) 56 ALBANY L. REV. 825 and under this pressure, many of these old defenses eventually all but disappeared—just as now, courts will declare a particular tort reform unconstitutional,<sup>68</sup> or choose other law.<sup>69</sup>

There are those who feel strongly that, notwithstanding any interest of the forum to the contrary, the forum's conflicts rules should extend comity to sister-state defenses. But the weight of American authority has been that the interested forum's choice rules should not operate to bar a claim meritorious under underlying shared tort policies, by choosing to apply a defense special to only one of the concerned states. A fortiori, overarching national choice rules at a neutral forum are best designed not to export a specific local defense to meritorious claims actionable in other states. Rather, as the Reporters of the current ALI proposals acknowledge, the aim should be to impede as little as possible the broad and widely shared policies underlying the development of tort law itself.<sup>70</sup>

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68. E.g., *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So.2d 414 (Ala.1991) (striking down statute removing presumption of correctness of punitive damages awards under state constitutional separation-of-powers provisions); *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla.1987) ( \$450,000 cap on noneconomic damages, included in Florida's tort reform statute, held unconstitutional as violative of the "open courts" provision in Florida's constitution); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H.1991) (same, under state equal protection clause); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991) (striking down cap on damages for pain and suffering in medical malpractice cases under state due process clause).

69. E.g., *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239 (N.J.1990) (tort reform statute providing defense to manufacturers and sellers, for harms caused by products whose dangerous propensities are known to ordinary users, held not to have retroactive application; because products liability action was commenced before provision was enacted, defendants were unable to rely upon added defense); *Vest v. St. Albans Psychiatric Hosp., Inc.*, 387 S.E.2d 282 (W.Va.1989) (holding resident plaintiff need not comply with tort reform legislation at place of conduct, even assuming that to be place of wrong).

70. "The places listed generally represent those states having significant contacts with the parties or events in light of the policies underlying tort law." Proposed Final Draft, *supra* note 1, § 6.01 cmt. a, at 398. Unfortunately for these good intentions, without analysis there is no knowing in a particular case whether the law of any of the listed contact states would advance the policies underlying the development of tort law.

No doubt the phenomenon of widespread tort reform disrupts the familiar argument of those who would resolve nonfalse conflicts in an instrumental way, and who like to reason that the forum should prefer law that is in the trend of the cases to law that is obsolescent.<sup>71</sup> But the phenomenon of widespread tort reform in no way disrupts our understanding of what the underlying policies of tort law are. (1993) 56 ALBANY L. REV. 826 Nor is it particularly salient that these days tort “reform” policies are also widely shared and will be manifest in the laws available for choice. In the false conflict case, when all interested contact states would endow the defendant with a particular defense, no choice-of-law issue can arise. In the true conflict case at a neutral forum, when any interested contact state would “give the remedy,”<sup>72</sup> the correct choice is the remedial choice.

### *C. Might-have-beens.*

*How to do it.* So on balance it appears to me that remedial policy guidelines would have been better than the draft rule’s hierarchical method. This conclusion seems right without regard to the rule’s internal infirmities. The rule’s spurious neutrality, policy-blindness, and confined systematics too strongly suggest the possibility of unintended outcomes that needlessly frustrate national policy.

The Reporters could have preserved the existing structure, only substituting for their hierarchy of preferences a set of simultaneously available alternative references, accompanied by a brief policy directive.<sup>73</sup> This sort of alternative reference is a classic conflicts technique.<sup>74</sup> It is quite familiar to federal courts.

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71. See VON MEHREN & TRAUTMAN, *supra* note 39, at 377 (state with an emerging or current policy should be preferred to state with a “waning policy”); WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS, *supra* note 39, at 360 (apply law favoring the plaintiff in nonfalse conflicts, unless that law is “anachronistic or aberrational”); Freund, *supra* note 39, at 1216 (law diverging from main stream of cases might be passed by).

72. See the famous language from *The Sea Gull*, 21 F.Cas. 909, 910 (C.C.D.Md.1865) (No. 12, 578) (Chase, J.: “[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.”).

73. Note added in press: I offered a motion from the floor to this effect at the May, 1993 annual meeting. The motion did not carry. A.L.I., 1993 PROCEEDINGS (forthcoming 1994); see *infra* note 155 and accompanying text.

74. See Russell J. Weintraub, A Proposed Choice-of-Law Standard for International Products Liability Disputes, 16 BROOK. J. INT’L L. 225 (1990); Russell J.

My favorite example is the old federal rule of civil procedure which governed the reception of evidence in federal courts prior to the enactment of the Federal Rules of Evidence. The old rule, 43(a), provided that either state or federal law could be chosen to govern the admissibility of evidence. But the rule neither left judges at sea on how to choose nor dictated the choice abstractly. Instead, it provided a clear policy directive. It instructed the court to choose whichever of the two laws *avored the reception of the evidence*. This policy directive not only ensured that probative evidence would not be excluded when to do so would needlessly frustrate substantive national enforcement (1993) 56 ALBANY L. REV. 827 policies, but also provided enhanced predictability and uniformity. An objection to evidence would be sustained only if the laws of both sovereigns would exclude the evidence.

Similarly, in the leading case on alternative reference, *Seeman v. Philadelphia Warehouse Co.*,<sup>75</sup> the Supreme Court held (under the pre-Erie general common law) that either the place of contracting or the place of performance could govern the permissible interest rate on a loan, depending on which of the two rate ceilings would *sustain the transaction*. Thus, the rule of the case gave assurance that contractual obligations would be enforced, giving effect to national substantive policy favoring the flow of interstate commerce across state lines. It also gave enhanced predictability and uniformity. A loan agreement would be unenforceable only if the laws of both contact states would invalidate it as usurious.<sup>76</sup>

Occasionally today one sees similar thinking in cases choosing, for example, the longer of two periods of limitation.<sup>77</sup>

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Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129; see also Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105, 121 (proposing a model rule); Reese, *supra* note 53, at 1305 (choice-of-law rules should further the policy of the underlying substantive law).

75. 274 U.S. 403 (1927).

76. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1969) (embodying the rule); see Philip A. Trautman, *Choice of Law in Washington—The Evolution Continues*, 63 WASH. L. REV. 69, 88-90 (1988) (discussing judicial misadventure notwithstanding § 203).

77. E.g., *Reed v. United Transp. Union*, 488 U.S. 319 (1989), (choosing longer state statute, rather than statutory six month period set forth in the National Labor Relations Act, for suit brought under the Labor-Management Reporting and Disclosure Act of 1959); *Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482 (9th Cir.1987) (holding, in true conflict of limitations law, California would apply the longer foreign statute to benefit its plaintiff); *Marshall v. Kleppe*, 637 F.2d 1217, 1224 (9th Cir.1981) (holding that the longer of two state statutes of limitations should govern: “[W]e follow the principle ‘that if a substantial question exists about which of two conflicting statutes of limitations to apply, the court should apply the longer as a matter of policy.’” );

*The costs of policy blindness.* In contrast, the proposed mass tort rule, with its hierarchical list of references, takes a stolid policy-”neutral” position.<sup>78</sup> The Reporters assume that a choice rule on liability would have been too substantive had it taken into account the **(1993) 56 ALBANY L. REV. 828** effect of likely outcomes on national policy.<sup>79</sup> Perhaps they forget that choices of law will affect the administration of substantive policy. Disregard of likely outcomes means only that substantive policy will be affected inadvertently, not that it will be unaffected.

The Reporters may well be right if they believe policy guidelines would have stirred too much controversy for ALI membership support. But it seems paradoxical that the Reporters describe their avoidance mechanism as setting statutory “standards.”<sup>80</sup> The costs of policy blindness can be heavy. Any system that chronically fails to vindicate national concerns about the safety of products on the national market, the safety of the nation’s transportation network, the fairness of the nation’s markets, and the security and expectations of participants in those markets, cannot be in the national interest, and indeed will impact adversely on the national interest. And in the long run it will be manipulated or evaded by judges,<sup>81</sup> or, if need be, legislatively corrected.

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Celotex Corp. v. Meehan, 523 So.2d 141 (Fla.1988) (holding, in reversing and remanding consolidated asbestos cases, that under its borrowing statute, Florida would borrow the newly enacted current law of another state so as to revive a claim that had been barred under an earlier law of that state). It is true that the typical borrowing statute bars an action if it is barred by the place where the cause of action accrued (i.e. chooses the shorter of two statutes). But it is common to make an exception that will give a resident plaintiff the benefit of the forum’s longer statute. See Canadian N. Ry. v. Eggen, 252 U.S. 553, 562-63 (1920) (sustaining borrowing statute’s discrimination against nonresidents). See also Louise Weinberg, Choosing Law: The Limitations Debates, 1991 U. ILL. L. REV. 683, 688-89 (noting surprising judicial hospitality to longer of two statutes); id. at 718 (raising possibility of shared reciprocal interest favoring court access).

78. Cf. Gary Peller, Neutral Principles in the 1950’s, 21 U. MICH. J. L. REF. 561 (1988) (arguing that the “neutral principles” that the Warren Court’s critics believed should have restrained the Court’s development of civil rights law were in fact not neutral).

79. Proposed Final Draft, supra note 1, ch. 6 introductory note cmt. c, at 387.

80. Proposed Final Draft, supra note 1, ch. 6 introductory note, at 376.

81. One cannot do better than to refer to the widely documented experience under the seemingly rigid conflicts rules spelled out in the 1934 Restatement of Conflict of Laws. Artless courts implacably produced policy-defeating outcomes. See generally DAVID H. VERNON ET AL., CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS §§ 4.05 to 4.09 (1990) [hereinafter VERNON ET AL.] (reviewing the traditional system for choice of law in the United States). But more adroit courts demonstrated that the more

*Is any blind tiebreaker a good one?* It may be some comfort to critics of the proposed draft rule to remember that the tidy formulas the rule does offer are intended only for true conflicts, and to recognize that any choice in a true conflict case will be somewhat arbitrary but also somewhat justifiable. At least, it is hoped, it will be rational.<sup>82</sup> Once the *Project* eliminated plaintiffs' traditional litigational advantages; optimistically incorporated a preliminary interest analysis; and rejected policy guidelines, the draft rule became in conception as serviceable as any other policy-blind, abstract tie-breaker. (1993) 56 Albany L. Rev. 829

### III. A CRITIQUE FROM REASON

Our inquiry, then, narrows down to problems *internal* to the proposed rule.

#### A. Reason and the "interested" place of injury.

*A preliminary word on interest analysis.* For those not comfortable with the term, let me say that "interest analysis" is today the common, perhaps predominant method of choosing law in this country. Using this method, courts determine whether there is a rational basis for the application of law. Of course this is the familiar reason-for-the-rule analysis of the common law; it is well understood that a court that identifies the likely policy supports of a given rule can then say whether the rule reaches the facts of the particular case. In just this way, a court that identifies the likely policy supports of a given rule can then say whether the rule reaches the extraterritorial facts of the particular case.

I qualified my opening remark that interest analysis is "predominant" with a "perhaps," because most American courts do not formally adopt "interest analysis." Rather, most courts tend to adopt the *Second*

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evasive or manipulative their use of the traditional rules, the more rational the outcome. Id. §§ 4.10 to 4.15 (reviewing escape devices); e.g., *Milliken v. Pratt*, 125 Mass. 374 (1878), the famous case in which the court deftly escaped from forum law by locating the place of contracting—notwithstanding the mailbox rule—in another state. The court accomplished this feat by insisting that the contract was a unilateral one.

82. This is a very optimistic statement. Anyone reading cases as they are handed down must be aware that judges are not doing the job of interpretation of law which would enable them to identify true or false conflicts persuasively. The contact-counting systematics of the Second Restatement have not worked well for conflicts jurisprudence. See *infra* note 85 (citing examples).



*Restatement of Conflict of Laws*.<sup>83</sup> Although the *Second Restatement* incorporates interest analysis,<sup>84</sup> courts using the *Second Restatement* unfortunately tend to equate contacts with interests, even while stoutly maintaining that they are doing no such thing.<sup>85</sup> **(1993) 56 ALBANY L. REV. 830** Indeed, such courts are likely to equate difference with conflict.<sup>86</sup> They wind up choosing places, not laws.

Interest analysis as a preliminary method for determining the extraterritorial scope of state power has turned out to be more than sound. As conflicts theory, it has turned out to be inevitable. The inevitability of

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83. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1969). The trend seems to be accelerating. See, e.g., *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63 (S.D.1992) (abandoning *lex loci*, adopting the Second Restatement in part because that is the approach of the majority of courts, and citing cases); see also *Travelers Indem. Co. v. Lake*, 594 A.2d 38 (Del.1991) (adopting the Second Restatement); *Hataway v. McKinley*, 830 S.W.2d 53 (Tenn.1992) (same).

84. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b), (c) (1969) require courts choosing law to consider the interests of the forum state and of other concerned states. For a serviceable recent interest analysis under the Second Restatement, see *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 249-50 (5th Cir.1990) (under Texas law).

85. For a particularly depressing example, see *Barron v. Ford Motor Co.*, 965 F.2d 195 (7th Cir.) (Posner, J.) (affirming judgment in favor of a defendant manufacturer under the law of the noninterested place of injury, after identifying the false conflict), cert. denied, 113 S.Ct. 605 (1992). For an example of reasoning about contacts as if they were interests in a state supreme court in the very case abandoning *lex loci* and adopting the Second Restatement—although reaching the right result—see *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47-48 (Del.1991). For another example of the same phenomenon, see *Hataway v. McKinley*, 830 S.W.2d 53, 57, 59-60 (Tenn.1992) (rejecting law of place of injury as irrelevant because of “ ‘the increased mobility of our population’ ” (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 7 introductory note, at 413 (1969)), adopting the Second Restatement and applying law of the joint domicile and forum, without mentioning the content of the respective states’ laws). The problem appears also in cases purporting to apply other modern approaches. E.g., *Hoppe v. G.D. Searle & Co.*, 779 F.Supp. 1413, 1423-24 (S.D.N.Y.1991) (under Minnesota’s “choice-influencing considerations” approach, holding that Minnesota was an interested state because the defendant had numerous contacts with Minnesota).

86. For a recent example see *Hataway v. McKinley*, 830 S.W.2d 53, 55 (Tenn.1992) (“Given the difference between comparative fault in Arkansas and contributory negligence in Tennessee, as well as the difference between the wrongful death statutes, we conclude that there is a conflict between Arkansas and Tennessee law which is a necessary predicate to deciding which state’s law should govern this wrongful death action.”).

interest analysis<sup>87</sup> is a function both of its realism and its rationality.<sup>88</sup> Inevitably, in thinking about state power, we come to acknowledge that a sovereign's sphere of interest can and often does extend beyond its borders, and can and often does overlap the spheres of interest of other sovereigns. We also come to see that although a state may have a rational basis for application of its law extraterritorially, a state can have no rational basis for the exercise of extraterritorial power outside its sphere of interest. Something of this quality of inevitability may be gleaned from the Supreme Court's due process review of choices of law. The Court uses a simple, explicit interest analysis<sup>89</sup> to determine whether there is a rational basis for the state's governance of an issue.<sup>90</sup> Interest analysis has become, explicitly, (1993) 56 ALBANY L. REV. 831 the Supreme Court's method in due process review of conflicts cases.<sup>91</sup>

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87. Even critics of the modern method tend to adopt it for thinking about conflicts problems. E.g., Lea Brilmayer, *The Other State's Interests*, 24 CORNELL INT'L L.J. 233 (1991).

88. See generally Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924) (Cook, one of the great legal realists, argued that the choice-of-law problem is simply the question whether the facts are within the scope of forum law, as construed by purposive reasoning.).

89. See *supra* notes 65-66 and accompanying text; *infra* notes 91-94 and accompanying text. See generally Weinberg, *Minimal Scrutiny*, *supra* note 51.

90. The Court's interest analysis in these cases simply determines the existence or not of a rational basis for application of the law chosen. The Court uses neither the term "rational basis" nor "minimal scrutiny," but those terms are descriptive of the conflicts cases. See, for this assimilation of constitutional review of conflicts cases with more general principles of constitutional review, Weinberg, *Minimal Scrutiny*, *supra* note 51.

In other contexts, in reviewing the constitutionality of assertions of state power, the Court frequently resorts to the very different technique of "interest balancing." See the intriguing essays in a former issue of this Law Review, in *Conference on Compelling Governmental Interests: The Mystery of Constitutional Analysis*, 55 ALB. L. REV. 535-745 (1992).

"Interest balancing" must be distinguished from "interest analysis." The Court has specifically rejected any requirement that a state choosing law must "balance" its interests against those of a sister state. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939) (disapproving, on that point, *Alaska Packers Ass'n. v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935)).

91. See cases cited *supra* notes 65-66 and *infra* note 93. For a late case properly applying forum law to a false conflict through constitutional rather than interest-analytic reasoning, see *Gustafson v. International Progress Enters.*, 832 F.2d 637 (D.C.Cir.1987). See generally Weinberg, *Minimal Scrutiny*, *supra* note 51; Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 1023 (1982); Louise Weinberg, *The Place of Trial and the Law*

This theoretical congruence of conflicts and constitutional methods<sup>92</sup> is connected at a deep level to the nature of law. It is common ground that law that has outrun its rationally inferable policy supports ceases to be law. Like the Soviet nuclear arsenal after the collapse of Russian will to oppose the West, law that has lost its policy supports—law that lies awaiting new rationales but not finding current policy supports—becomes irrelevant, even while it remains a very real threat. In adroit judicial hands such “law” will be rejected as obsolete, construed away, or struck down as arbitrary and irrational. In maladroit judicial hands, such “law” is woodenly applied. But precisely because it lacks a rational basis, in theory such “law” cannot be applied constitutionally.<sup>93</sup>

The other side of that coin is that the law of an *interested* state will survive the minimal constitutional scrutiny the Supreme Court affords ordinary conflicts cases.<sup>94</sup>

One can see, then, that the real use of the method in cases of conflict is only preliminary to their attempted resolution—precisely the use that the proposed mass tort rule makes of it. What interest analysis does, in the main, is identify conflicts. It is impotent to resolve them.

So the real use of interest analysis is only to sort out the cases. There will be some cases in which only one of the putatively concerned **(1993) 56 ALBANY L. REV. 832** states is interested—a so-called “false conflict.”<sup>95</sup> The rational “solution” in such cases is to apply the law of the only

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Applied: Overhauling Constitutional Theory, 59 U. COLO. L. REV. 67 (1988) [hereinafter Weinberg, Overhauling Constitutional Theory].

92. It should be noted, however, that the Court will not strike down law chosen through a “traditional and subsisting” choice-of-law rule. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727-29 (1988) (sustaining the longer limitations statute of a substantially noninterested forum). Cf. *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975) (per curiam) (permitting, without scrutiny, application of the law of the noninterested place of injury). For both the under-inclusiveness and the over-inclusiveness of Supreme Court review of conflicts cases, see *VERNON ET AL.*, supra note 81 at 423-459; Gene R. Shreve, *Interest Analysis as Constitutional Law*, 48 OHIO ST. L.J. 51 (1987); Weinberg, *Overhauling Constitutional Theory*, supra note 91.

93. E.g., *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 650 (1974) (striking down irrational substantive law under Due Process Clause); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (striking down irrational choice of law under Due Process Clause). For discussion, see generally Guido Calabresi, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); Edward L. Rubin, *Due Process Review and the Administrative State*, 72 CAL. L. REV. 1044 (1984); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

94. See supra note 66 and accompanying text.

95. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 107-10 (1963) (“false problems”).

interested state.<sup>96</sup> On the other hand, if interest analysis identifies a “true conflict,” there is no obvious “solution.” At a truly noninterested forum, devising a solution to a true conflict of laws has to be a profound exercise in jurisprudence. The various alternative modern methods of solution adopted by courts are all attempts to resolve conflicts identified by interest analysis as true conflicts. These methods of solution are not part of interest analysis; rather, when not formalistic, they tend to involve some form of interest “balancing,” which is something else.<sup>97</sup>

There is no doubt that, no matter how formalistic the draft rule’s tie-breaking mechanism, the Reporters intended to incorporate the powerful preliminary technique of interest analysis. A sophisticated court probably can read that aspect of the draft rule in a sophisticated way. But because the Reporters turned toward interest analysis at a late stage in their thinking, their notes and comments remain somewhat uncomprehending—as do parts of the rule itself—and would support naive results, as will appear in this discussion.

*The interested place of injury.* The particular problem that I will use as a fulcrum for the discussion that follows is a less serious one than the policy gap I have already described.<sup>98</sup> It is also a less serious one than the problem presented by the draft’s residual rule, to which I turn later.<sup>99</sup> But it is one that is more easily curable. This is the proposed rule’s treatment of the law of the place of injury. The difficulty is this: The place of injury figures prominently on the rule’s preliminary list of allowable contact states, but its law is *never allowed to apply*. The law of the place of injury applies only if that place is also the place of conduct, or the place where the plaintiffs reside.<sup>100</sup> The place of injury, if not also having one of these other (1993) 56 ALBANY L. REV. 833 contacts with a case, is excluded from governance. Why should that be so? When members of the Institute

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96. Id. at 96 (the contrary result would be “purely perverse”). Even traditionalist courts today recoil from such a result. See, e.g., *Owen v. Owen*, 444 N.W.2d 710 (S.D.1989) (refusing to apply the guest statute of the place of injury to bar suit between forum spouses, holding that the guest statute was contrary to the forum’s public policy), overruled by *Chambers v. Dakota Charter, Inc.*, 488 N.W.2d 63 (S.D.1992) (formally rejecting *lex loci*).

97. See generally VERNON ET AL., *supra* note 81, §§ 4.24 to 4.27 (discussing alternative methods for resolving nonfalse conflicts); see *infra* note 125.

98. See *supra* notes 39-81 and accompanying text.

99. See *infra* part IV. A, notes 146-54 and accompanying text.

100. Proposed Final Draft, *supra* note 1, § 6.01(c)(1), (3).

sought to restore the place of injury to the list, why was the place of injury again rejected?<sup>101</sup>

To be sure, only in those few mass tort cases in which injury is concentrated at a single place of accident would the law of the place of injury be feasible. In other cases, a place-of-injury rule is unlikely to yield the sort of unitary governance one might find at the place of conduct. That remains true even if one may aggregate like-minded states where injury occurred. But why thrust the place of injury from consideration in those mass tort cases in which its law *is* feasible?

If a unitary place of injury, without other contacts with a mass disaster, has legitimate governmental interests in applying its law, it would seem questionable to stifle these interests without considering them. What are the interests of the place of injury? Without knowing the content of the laws at the place of injury, it is not possible to say what its specific governmental interests are in a particular instance. Interest analysis in conflicts cases is *law-selecting*, not *jurisdiction-selecting*; we cannot choose law unless we know its content. But we can come at our question from another direction. A contact state has general concerns—obvious rational aims—which would support some kinds of law and not others. What sort of law would the interested place of injury’s general concerns support?

Suppose that a hotel skywalk has collapsed, or a plane has crashed near an airport. In order to isolate the place of injury, let us say that the conduct causing the skywalk collapse was an engineering decision in another state taken by a defendant residing away from the place of injury; or that the conduct causing the plane crash was a negligent safety inspection in another state, again by defendants not residing at the place of injury. In either of these settings a heterogeneous group of nonresident travellers suffers death, leaving surviving families in other states. Thus, in either of these settings, the place of injury is a place without other contacts with the case.

Breezy critics of interest analysis like to posit an irrational state.<sup>102</sup> For them the place of injury might bloodthirstily seek to encourage mayhem on its territory. Declaring open season on nonresidents, the crazy state strives to discourage commerce and tourism. But of course interest analysis is constrained by reason. The state that legislates in order to encourage injury to visitors does not exist. Instead, the obvious **(1993) 56 ALBANY L. REV. 834** general concerns of the place of injury have to do

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101. See *supra* note 3 and accompanying text.

102. See, e.g., Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985).

with the safety of the territory. Bystanders, after all, might have been injured, among them residents. Safety at the territory protects residents and also encourages tourism and commerce there. If an accident is likely to require public outlays—police services, public medical services, firefighting services, rescue and cleanup services—the state gains additional deterrent interest because of the possibility of such outlays, whether or not the state can recoup in subsequent litigation. Thus, we can say that the place of possible injury would have general, rational policy concerns which would favor deterring<sup>103</sup> injury on the territory, and compensating anyone injured there—residents and nonresidents alike.<sup>104</sup>

*The plaintiff-oriented place of injury.* But this means that the general concerns of the place of injury are ratcheted one way only. The general concerns of the place of injury permit the place of injury only to apply law that is plaintiff-favoring, in the sense that those concerns cannot rationally explain law that is defendant-protecting. That does not mean that the place of injury cannot have defendant-protecting law. It means only that the place of injury, without more contacts with a case, will be an interested state if—and only if—its law on the particular facts happens to favor plaintiffs. If the place of injury happens to have defendant-favoring law, it would have no legitimate governmental interest in having that law applied. To do so could only thwart or diminish the claims of nonresidents injured by foreign conduct;<sup>105</sup> application of the law to nonresidents and out-of-state events becomes extraterritorial and irrational. The likely policy supports of defendant-favoring law are interests in protecting resident<sup>106</sup> defendants, or perhaps in encouraging the socially beneficial local enterprises engaged in by defendants. Neither of these interests can be advanced by applying defendant-favoring law to nonresident defendants, or encouraging socially beneficial enterprises in other states. **(1993) 56 Albany L. Rev. 835**

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103. See Donald T. Trautman, *Kell v. Henderson: A Comment*, 67 COLUM. L. REV. 465, 467 (1967).

104. For this point, not always understood, see Weinberg, *Overhauling Constitutional Theory*, supra note 91, at 79.

105. As Justice Brennan pointed out, writing separately in *Sun Oil Co. v. Wortman*, 486 U.S. 717, 737 (1988) (Brennan, J., concurring in part and concurring in the judgment): “The claim State does not, after all, have any substantive interest in not vindicating rights it has created.”

106. See CURRIE, supra note 95, at 85: “What married women? Why, those with whose welfare Massachusetts is concerned, of course—i.e., Massachusetts married women.”

Now recall that the ALI's proposed mass tort rule requires a preliminary interest analysis. No contact state may govern an issue unless it is an interested one. The abortive amendment proposed in May, 1992, that would have allowed access to the law of the place of injury,<sup>107</sup> used redundancy to drive home the point that only the law of the *interested* place of injury was intended. The law of the place of injury would be a bad choice only when it would not survive the required interest analysis—that is, when the law of the place of injury was defendant-favoring, but the place of injury was not the place where the defendant was located or was engaged in beneficial activities.

So we can now see that by rejecting the amendment, the membership was excluding from the proposed administration of mass tort a source of remedial law for those cases. It is true that an escape from the rule's hierarchical list is offered by a loophole subsection.<sup>108</sup> But since that loophole does not explicitly mention the option of the interested place of injury, and is available only to correct arbitrariness, or in the interest of justice, it is unlikely that a court would have reliable access under the loophole to the law of the interested place of injury.

*B. Two cheers for the place of injury.*

***Lex loci and paranoia.*** I suspect that paranoia had something to do with the 1992 ALI vote rejecting the law of the interested place of injury for mass torts. First-generation interest analysts seem to regard the law of the place of injury with fear and loathing. In the monstrous catalogue of bad old cases familiar to students of conflicts, too many entries applied the law of the place of injury. One remembers the typical false conflict, in which a court, rejecting rational application of the law of the only interested state, instead applied the law of the noninterested state—the place of injury. These awful cases are even amusing for the stern judicial resolve with which they reach their embarrassing results. It is droll to see a court justifying an impolitic result with formalisms, when other formalisms, used by more adroit judges, are available.<sup>109</sup> But a case of

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107. See supra note 2 and accompanying text.

108. Proposed Final Draft, supra note 1, § 6.01(d).

109. E.g., *In re Barrie's Estate*, 35 N.W.2d 658 (Iowa 1949) (applying the law of the situs of real property, Iowa, to invalidate a revocation of an Illinois will, where the testator died domiciled in Illinois; the revocation had been held valid in Illinois probate under Illinois law; and all claimants to the property were residents of Illinois; also, refusing to construe the Uniform Recognition of Wills Act, validating wills valid where made, as similarly validating revocations), cert. denied, 338 U.S. 815 (1949); see also the classic of the field, *Alabama Great S.R.R. v. Carroll*, 11 So. 803 (Ala.1892). There, an

this kind becomes depressing (1993) 56 ALBANY L. REV. 836 as the reader visualizes its consequences, which go beyond the ousting of rationally applicable law in favor of the law of a state without any interest in the matter. The reader envisions the tortfeasor undeterred, still putting the public at risk; the potential tortfeasor shrugging off admonitions to exercise a due care; the insurer handed a windfall of undistributed paid-up insurance; and the injured victim, deprived of a chance to try to prove her case, bearing, with her innocent dependents, the uncompensated costs of her injury.<sup>110</sup>

But revulsion at the law of the *noninterested* place of injury in a false conflict does not justify rejection of the law of the interested place of injury in a true conflict.<sup>111</sup> Rather, the ALI members who voted against the law of the interested place of injury seem to have been afraid—with reason—of the harm the noninterested place of injury can do, and surely is still doing, in the hands of doubtless well- (1993) 56 ALBANY L. REV. 837 meaning judges who really do think the place of injury to be invariably “interested.”

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Alabama employee was denied compensation under Alabama law by an Alabama court in a case against an Alabama employer. The court steadfastly refused to do anything so unprincipled as to reason from the Alabama contract of employment that the law of the place of contracting should govern, or even to use ordinary statutory interpretation of Alabama legislation clearly applicable to the case, to forestall the irrational, but in its view, required, application of the law of the place of injury. Alabama still stands by its old principles. See *Fitts v. Minnesota Mining & Mfg. Co.*, 581 So.2d 819, 823 (Ala.1991). It should be noted that, in *Fitts*, the place of injury was not a noninterested state. See *id.* at 819.

110. The problem of windfall to the insurer is presented starkly in the interspousal tort immunity cases; cf. *Buckeye v. Buckeye*, 234 N.W. 342 (Wis.1931), overruled, *Haumschild v. Continental Casualty Co.*, 95 N.W.2d 814 (Wis.1959). The tort victim in any other case would have been able to obtain compensation from the tortfeasor’s insurer, out of the paid-up proceeds of the policy; and in any other case the insurer would have had to cover the liability of the insured tortfeasor. Interspousal immunity perhaps is intended to shield insurers from collusive suits. But when the immunity state is neither the joint domicile of the parties nor the place where the insurer is located, but only the place of injury, application of the immunity rule is irrational—at least if the immunity state is not also the forum. I add the qualification because a rule of interspousal immunity finds some policy support in the desirability of protecting the courts from collusive litigation.

111. For a recent exasperating refusal to recognize the interests of the place of injury, see *Nailen v. Ford Motor Co.*, 873 F.2d 94 (5th Cir.1989) (affirming dismissal under the limitations period of the wrongful death act of the state of the plaintiff’s residence, although that state was not the forum, and although the plaintiff’s residence itself would have entertained the claim under the limitations law of the place of injury). In *Nailen*, the court seems unaware that it is insisting on the law of a noninterested contact state in a false conflict case.



**Getting it wrong.** One sees so many states abandoning the rule of *lex loci*, and adopting the *Second Restatement of Conflict of Laws*.<sup>112</sup> They perceive the *Second Restatement* as a rational and workable modern approach—certainly the chief modern approach in American courts. But then we also see courts unthinkingly accepting the *Restatement's* presumptive choice of the law of the place of injury as the place of “most significant contact,” or even solemnly finding that the place of injury is the place of “most significant contact.”<sup>113</sup> A court will state confidently, without noticing the content of the state’s law, that the place of injury “has an interest” in regulating events on its territory.<sup>114</sup> We seem unable to convey to these judges that they are getting it wrong. So the ALI membership is quite justified in assuming too many courts are going to continue to get it wrong.

Yet the ALI membership would evidently tolerate the same risk elsewhere in the draft rule. Subsection 6.01(c)(3) provides that the law of the place of injury applies if it is also the place where the plaintiffs reside, and if the previous two options have not been feasible. **(1993) 56 ALBANY**

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112. For late instances, see, e.g., *Chambers v. Dakota Charter, Inc.*, 488 N.W.2d 63 (S.D.1992) (abandoning *lex loci*, adopting the *Second Restatement* in part because that is the approach of the majority of courts, and citing cases); see also *Travelers Indem. Co. v. Lake*, 594 A.2d 38 (Del.1991) (adopting the *Second Restatement*); *Hataway v. McKinley*, 830 S.W.2d 53 (Tenn.1992) (same).

113. See generally David E. Seidelson, *Interest Analysis or the Restatement Second of Conflicts: Which is the Preferable Approach to Resolving Choice-of-Law Problems?*, 27 DUQ. L. REV. 73 (1988). For a recent lukewarm assessment of the *Second Restatement* by its Reporter, see Willis L. M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501 (1983); see also Harold P. Southerland, *A Screaming Comes Across the Sky—Tort Choice-of-Law Doctrine in Florida Under the Second Restatement of Conflicts*, 40 MERCER L. REV. 781 (1989) (criticizing the Florida Supreme Court for its treatment of choice-of-law problems).

114. In *Hoffman Equip., Inc. v. Clark Equip. Co.*, 750 F.Supp. 1222, 1231 (D.N.J.1990), the court, purporting to apply New Jersey’s “governmental interest analysis” approach, nevertheless wound up holding that the place of injury had “significantly greater contacts” than the forum state, and applied nonforum law to bar the resident plaintiff’s action for indemnification. The court thought that New Jersey did not have “a substantial interest in this suit,” listing contacts with the case that were not located in New Jersey, and discounting the plaintiffs’ incorporation and principal place of business in New Jersey because the insurer was the real party in interest. *Id.* at 1231-32. The New Jersey court also complained that the New Jersey plaintiffs were forum shopping. (!) *Id.* at 1232. While reciting the necessity of doing so, the court never identified the policies underlying either sovereign’s laws. New Jersey, of course, had an interest in giving the resident corporation and its insurer the benefit of its liberal indemnification rule.

**L. REV. 838** Yet there is no guarantee that an artless court will not presume the place of injury to be “interested” when it is also the domicile of the plaintiffs—simply because it is a state that boasts both contacts. The Reporters’ early commentary suggested as much.<sup>115</sup> Yet the place of injury, having defendant-protective law, is a non-interested state, whether or not the plaintiffs reside there—if it has no other connections with the case. There is no way the state can advance its defendant-protecting concerns by protecting defendants residing elsewhere, or its enterprise-encouraging policies, when the enterprise is going on elsewhere—no matter where the plaintiffs reside.

If the thrust of the present rule, with its preliminary interest analysis, is sufficiently reassuring so as not to awaken a latent phobia about the place of injury when it is also the place where the plaintiffs reside, then it should also be sufficiently reassuring to permit incorporating the law of the interested place of injury no matter where the plaintiffs reside.

*C. A burden of explanation.*

Perhaps the Reporters shrink from the task of spelling out in notes and comments that the interested place of injury must have plaintiff-favoring law. But the explanation is overdue; and it needs to be made whether the rule is ultimately amended as I suggest or not. Without such an explanation the Reporters should not permit reference, as they do now, to the law of the compound place of injury/place where plaintiffs reside.

*D. The “fortuitousness” mistake.*

The reluctance of some modernists to permit any reference to the law of even the interested place of injury may spring from another **(1993) 56**

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115. Tentative Draft No. 3, supra note 1, § 6.01 cmt. b, at 108 (opining that the place of injury/plaintiffs’ residence would have an interest in “controlling the compensation available to them”). But that is not the result interest analysis reaches. The interests of the place of residence of the plaintiffs or of the place of injury can be advanced only if that state has remedial law. Neither place has any abstract interest in “control,” and aggregating the two contacts in one state does not change that fact. Apparently in response to a draft of this Article, the Proposed Final Draft corrects this slip in comment b. For the mistaken supposition of an interest in willful governance, see Brillmayer, supra note 102; P. John 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). For comment, see VERNON ET AL., supra note 81, at 308-09. For a critique of the composite injury/plaintiff reference found in the second “Neumeier” rule, *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y.1972) see infra notes 136-38 and accompanying text.

**ALBANY L. REV. 839** source. Even acknowledging that the place of injury can be found to have “interests,” this faction may feel that one should not be fool enough to do such an analysis. From the point of view of the Reporters, and of many of those who voted against the proposed amendment, dignifying a place of injury with an interest analysis could be utterly inappropriate. The place of injury might seem to them likely to be too fortuitous to merit that kind of consideration. Yet it is strange to suggest, as the Reporters’ comments repeatedly do, that—*after* an interest analysis has determined that the place of injury is an interested state—the place of injury is likely to be “fortuitous” or “arbitrary.”<sup>116</sup>

*Fortuitousness: A nonissue?* It is odd that the label of “fortuitousness” should so thoroughly displace reason. Labeling a state’s connection with a case as “fortuitous” can advance no inquiry, whether the contact really is in some sense “fortuitous” or not. Either the contact state is an interested one or it is not, and the only way to determine that is to reason about it: to do an interest analysis.

But even if fortuitousness were a helpful desideratum, the place of injury in the sort of case in which there is likely to be a unitary place of injury hardly fits the description. We have been talking about the concentrated-injury sort of case: the collapsing skywalk, the air crash. Even if we could glean anything from the “fortuitous” label, clearly there is little that is fortuitous about the collapse of a structure where it has been erected. The Reporters suggest that the place of injury in an air crash case is especially likely to be arbitrary.<sup>117</sup> But that seems doubtful. Most crashes occur at or near airports. It is not often that either the place of departure or of landing would be arbitrary; generally they define or mark scheduled stages in a planned trip. But even if a plane, nowhere near an airport, falls out of the sky, the danger to residents, and the public clean-up and rescue costs at the place of injury, must invoke the state’s legitimate deterrence policies, and those policies can rationally support the application of plaintiff-favoring law, if the place of injury has it.

*Fortuitousness: A neurosis of New York courts.* Yet the “fortuitousness” of the place of injury is an old hobgoblin in conflicts cases.<sup>118</sup> It is a particular neurosis of New York courts. The perception (1993) 56 **ALBANY L. REV. 840** of blanket fortuitousness of the place of

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116. Proposed Final Draft, *supra* note 1, § 6.01 cmts., at 401, 402, 412, 414-16.

117. Proposed Final Draft, *supra* note 1, § 6.01 cmt. b, at 401.

118. For a current example see *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63 (S.D.1992).

injury seems to trace to *Kilberg v. Northeast Airlines, Inc.*,<sup>119</sup> and thence to Chief Judge Fuld's opinion in *Babcock v. Jackson*.<sup>120</sup> But the argument from fortuity is essentially hollow and should never have engaged the intellect. As Judge Keating of the Court of Appeals famously argued in the later New York case of *Tooker v. Lopez*,<sup>121</sup> the place of injury might indeed be "adventitious"; the parties' place of temporary residence in that case might be "adventitious"; any of the facts in the case might be "adventitious."<sup>122</sup> "The fact is, however, that . . . as a result of all these 'adventitious' occurrences, [*Tooker*] is dead and we have a case to decide."<sup>123</sup>

The reason Ontario was a noninterested state in *Babcock* was not that the place of injury was "fortuitous" or invariably noninterested; rather, it was that Ontario could not advance its obvious deterrent and compensatory interests by *barring* the plaintiff's claim.<sup>124</sup>

If in *Babcock* New York had been the guest statute state, and Ontario's law had made recovery in negligence available, labeling Ontario's connection with the case "fortuitous" could only have impeded analysis even if it *was* fortuitous—even if Mr. Babcock had simply wandered into Ontario without ever having intended to enter it. As place of injury, Ontario's legitimate governmental interests in deterring unsafety on the territory and protecting the well-being of those present there—residents and accidental sojourners alike—rationally would have supported application (in this hypothetical transposition of the laws of the two sovereigns) of Ontario's more generous rule. That is not to say that the New York forum in the hypothetical case should *apply* Ontario law, but only to explain that the case would have ceased being a false conflict, and would instead have become a **(1993) 56 ALBANY L. REV. 841** true

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119. 172 N.E.2d 526 (N.Y.1961).

120. 191 N.E.2d 279, 282 (N.Y.1963) (discussing emphasis on fortuitousness of place of injury in *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 526 (N.Y.1961)).

121. 249 N.E.2d 394 (N.Y.1969).

122. *Tooker*, 249 N.E.2d at 399-400.

123. *Id.* at 400.

124. As Justice Brennan pointed out in *Sun Oil Co. v. Wortman*, 486 U.S. 717, 737 (1988) (Brennan, J., concurring in part and concurring in the judgment): "The claim State does not, after all, have any substantive interest in not vindicating rights it has created."

one—a case in which either state’s laws, though conflicting with the other’s, rationally could apply.<sup>125</sup>

***Fortuitousness and the Neumeier Rules.*** The folly of “fortuitousness” as a desideratum can be seen in the first of the well known “*Neumeier* rules.” In *Neumeier v. Kuehner*,<sup>126</sup> the New York Court of Appeals, per Chief Judge Fuld again, announced a set of conflicts rules for guest statute cases,<sup>127</sup> rules he first suggested in his separate opinion in *Tooker v. Lopez*.<sup>128</sup> The *Neumeier* rules have been followed from time to time in other states, sometimes for tort cases not involving guest statutes.<sup>129</sup>

Under the first *Neumeier* rule,<sup>130</sup> when the plaintiff and defendant reside in the same state, that state’s law applies, rather than the law of the place of injury. Concededly, that is what happened in *Babcock*. But the first *Neumeier* rule would also apply in cases very different from *Babcock*. It is a rule, as Chief Judge Fuld evidently intended, aimed at false conflicts. It assumes that the joint domicile is the only interested state; and that the place of injury elsewhere is invariably noninterested, probably because of its “fortuitousness.” But none of these assumptions is sound. Not all joint domicile cases, with places of injury away from the joint domicile, are false conflicts; the interested place of injury remains interested wherever the parties reside.<sup>131</sup>

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125. See *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493 (1939) (holding that the law of either interested contact state in the case could apply constitutionally, and rejecting a requirement that the forum balance its interests against that of another state).

126. 286 N.E.2d 454 (N.Y.1972).

127. *Neumeier*, 286 N.E.2d at 457-58 (Fuld, C.J.).

128. 249 N.E.2d 394, 404 (N.Y.1969) (Fuld, C.J., concurring).

129. See, e.g., *First Nat’l Bank v. Rostek*, 514 P.2d 314, 319-20 (Colo.1973) (adopting the first and second *Neumeier* rules for guest statute cases, and the Second Restatement for other torts conflicts). But see *Dworak v. Olson Constr. Co.*, 551 P.2d 198, 200 (Colo.1976) (finally adopting the Second Restatement in all cases).

130. “1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.” *Neumeier*, 286 N.E.2d at 457 (quoting *Tooker v. Lopez*, 249 N.E.2d 394, 404 (N.Y.1969) (Fuld, C.J., concurring)).

131. See *supra* notes 102-06 and accompanying text.

The second *Neumeier* rule,<sup>132</sup> apparently intended to cover all true conflicts, does not. The rule provides that, generally, in cases in (1993) 56 ALBANY L. REV. 842 which the parties reside in different states having differing laws respectively favoring them, the tie-breaker should be the law of the place where the defendant acted, if the defendant acted at home, and the place of injury if the defendant acted away.<sup>133</sup> I pass over the inadvertent overruling of New York's famous *Kilberg* case,<sup>134</sup> at least in cases in which the place of injury is the same as the place of conduct. I postpone discussion of the disadvantages of resort to the place of conduct as tie-breaker.<sup>135</sup> But the rule fails to provide for the cases misappropriated by the first rule: cases of true conflict between the law at the interested place of injury and the law of the joint domicile. As for the cases for which its use is suggested, the law of the place of conduct cannot furnish an invariably reasonable resolution of a true conflict. The place of conduct's rule might be unrelated to conduct. It might be a rule of charitable immunity, for example; such a rule, of course, is defendant-protective and within the legitimate sphere of interest of the state where the defendant resides; but it is not within the sphere of interest of the state

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132. "2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense." *Neumeier*, 286 N.E.2d at 457-58 (quoting *Tooker v. Lopez*, 249 N.E.2d 394, 404 (N.Y.1969) (Fuld, C.J., concurring)).

133. The proposal seems to follow the late Professor Cavers' second "principle of preference." See DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 146 (1965). Cavers reasoned that the plaintiff has come into the defendant's state, and therefore that it is reasonable to submit the plaintiff to the laws there; and that it is unreasonable to require the defendant to conform its conduct to laws in other states. *Id.* at 146-47. For discussion of this latter suggestion see *infra* note 150 and accompanying text.

A general predilection for formal, mechanical tie-breakers is also seen in the *Neumeier*-like proposals of Professor Brilmayer. LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 229-30 (1991). Professor Brilmayer's ideology requires her to think of true conflicts as unprovided-for cases (cases in which neither state has an interest), and vice versa. For either sort of case, her solution is the old First Restatement rule. For a wry critique of these efforts, see Patrick J. Borchers, *Professor Brilmayer and the Holy Grail*, 1991 WIS. L. REV. 465, 487-89.

134. *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 526, (N.Y.1961) (holding, where the plaintiff was a resident of the forum and the defendant a resident of the place of injury, that New York would not apply the place of injury's cap on damages because to do so would violate New York public policy).

135. See *infra* part IV.A, notes 146-49 and accompanying text.

of conduct as such. There is no reason why the place of conduct, if not “interested” qua place of conduct, should be called upon to resolve a conflict between two interested states. Nor is the place of injury an improvement over the place of conduct for this purpose. The injury/plaintiff state’s pro-plaintiff rule probably could apply rationally, whatever it is; but the composite reference is redundant for this purpose. The remedial concerns of the place of injury and the place where the plaintiff resides do buttress each other, but either reference furnishes a rational basis for the (1993) 56 ALBANY L. REV. 843 application of remedial law. Home truths like these<sup>136</sup> help to explain why neither of the two major contending schools of thought on this problem suggest a territorial referent toward its solution. The two leading schools of modern conflicts thinking propose respectively, that the interested forum apply its own law,<sup>137</sup> or, if the better law is at the other state, that the forum apply the better law of the other state.<sup>138</sup>

The shallowness of thinking in the *Neumeier* rules is seen in the third rule as well.<sup>139</sup> This last rule would generally resolve the residuum of

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136. For the general inutility of composite choice rules like those of the second *Neumeier* rule, see *infra* Part III.F, notes 144-45 and accompanying text. For the separate fallacy of supposing defendants, wherever they reside, to be entitled to the benefit of the laws at the place at which they act, see *infra* notes 150-54 and accompanying text. The second *Neumeier* rule’s composite injury/plaintiff reference may have inspired the injury/plaintiffs reference of the Complex Litigation Project’s rule 6.01(c)(3). The Reporters also may have supposed that the residence of the plaintiff, without more, lacks power to give its plaintiff the benefit of its laws, another obvious but common fallacy. See, for the correct position, e.g., *Hooper v. Bernalillo*, 472 U.S. 612 (1985) (requiring state to give even after-arrived but bona fide resident the equal protection of its laws); *Zobel v. Williams*, 457 U.S. 55 (1982) (same).

137. For the modern argument, see Weinberg, *Against Comity*, *supra* note 22; Weinberg, *On Departing From Forum Law*, *supra* note 22. For the classic argument, see CURRIE, *supra* note 95, at 119; Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the “New Critics,”* 34 *MERCER L. REV.* 593 (1983). See also Bruce Posnak, *Choice of Law: Interest Analysis and its “New Critics,”* 36 *AM. J. COMP. L.* 681 (1988). Arguing for a presumption in favor of forum law, see Joseph W. Singer, *Real Conflicts*, 69 *B.U. L. REV.* 1 (1989). See also Weintraub, *Extraterritorial Application*, *supra* note 40 (same); Professor Weintraub now agrees with me that, at least in conflicts involving United States law, American courts should not depart from forum law. *Id.*

138. See authors cited *supra* note 45.

139. “3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing

cases under the law of the place of injury. But if the place of injury was too fortuitous to control in the first *Neumeier* rule, and, under the second rule, does not govern when the defendant acted at home, why is it to be the place of governance here? Perhaps the *Neumeier* court is trying to deal out choice rules, like cards, to provide each sovereign player with a hand. For all we know, some such notion of abstract inclusiveness may also in part explain the ALI's proposed hierarchical list of choices for conflicts of liability law in mass tort cases. But governance-spreading—to coin a phrase—has never before been suggested as a choice-of-law ideal. If we have been inattentive to the ideal of governance-spreading, perhaps that is for (1993) 56 ALBANY L. REV. 844 the very good reason that there could scarcely be anything more pointless.

*E. The joint domicile mistake.*

*The place of injury and the joint domicile.* Contributing to the prevailing confusion about the place of injury is the prevailing perception of the joint domicile.<sup>140</sup> Ever since *Babcock*, and going further back, ever since Brainerd Currie's charts,<sup>141</sup> we have been led to suppose that when one state is the place of injury and the other the joint domicile, the case is a false conflict. This is a very sturdy conviction. We saw it reflected in the first *Neumeier* rule.<sup>142</sup> But it happens to be unsound. When the place of injury has plaintiff-favoring law, and the joint domicile does not, the

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great uncertainty for litigants.” *Neumeier*, 286 N.E.2d at 458 (quoting *Tooker v. Lopez*, 249 N.E.2d 394, 404 (N.Y.1969) (Fuld, C.J., concurring)).

140. A persistent variant of this misunderstanding is the Savigny-inspired overemphasis on the “seat of the relationship,” for which we probably have to thank CAVERS, *supra* note 133, at 166-80. A state may well be an interested one if it can be labeled the “seat” of a relationship; and it often happens that when there is such a state, the other apparently concerned state is a non-interested one. But the “seat-of-the-relationship” label does not advance the necessary inquiry; and the interests of other concerned states do not melt away when one state can be labeled the “seat” of a relationship. For an interesting and rightly decided—but muddled—struggle with these verities in the current English reports, see *Johnson v. Coventry Churchill Int’l Ltd.*, [1992] 3 All E.R. 14 (Q.B.D.).

141. CURRIE, *supra* note 95, at 84 (Table 1, using four contact states, and showing the possible variations among the contact states’ laws in all possible two-state cases). From Currie’s chart, one can conclude that all cases in which the parties are from one state, and the place of transaction or occurrence is in another, are false conflicts—a conclusion Currie spells out in Table 6. *Id.* at 95.

142. See *supra* note 130.



case is a true conflict,<sup>143</sup> not a false one. Either state is likely to have legitimate claims to governance, depending on the issue.

*F. The composite rule mistake.*

We have already seen that the draft rule's composite reference, if rational, to the place of injury when it is also the residence of the plaintiffs, is simply a reference to the place of injury. It may lessen the "fortuity," if any, of the place of injury if it is also the place where the plaintiffs reside; but it cannot change the outcome of a simple reference to the law of the interested place of injury. The (1993) 56 ALBANY L. REV. 845 place of injury cannot rationally apply its defendant-favoring law in the absence of other contacts with a case, and it certainly cannot do so if its only other contact with a case is that the plaintiffs reside there.

*The ALI's injury/conduct rule.* A similar mistake is seen, in somewhat subtler aspect, at proposed rule 6.01(c)(1), allowing the place of injury to govern if it is also the place of conduct. The Reporters explain that here, the place of injury is not "fortuitous" because it is also the place of conduct.<sup>144</sup> Possibly they feel justified in this because the place of conduct can be an interested state, depending on the facts, whether its law is plaintiff-or defendant-favoring.<sup>145</sup> Yet if the place of injury/conduct has defendant-favoring law rather than conduct-encouraging law, but has no contact with the defendant, it is a noninterested state.

Suppose, for example, that a plane crashes because of simple pilot error. The plane falls down out of the blue over Kansas. Suppose that Kansas bars actions against airline companies absent proof of gross negligence. Clearly Kansas may impose this heightened burden of proof in cases involving a local airline, an airline that is incorporated or doing business in Kansas. But as applied to an airline merely flying over, the requirement makes little sense. Kansas has no interest in insulating nonresident carriers from negligence actions. Nor does it have an interest in encouraging pilot negligence in its airspace. Nor does it have an

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143. See, e.g., *Pevoski v. Pevoski*, 358 N.E.2d 416 (Mass.1976), in which the forum faced with this situation changed its own law, in effect, to provide relief for the plaintiff under forum law. But see, on similar facts, *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63 (S.D.1992) (applying the interested forum's law to deny relief to the plaintiff in a true conflict case in which the place of injury would have permitted suit; reasoning that the place of injury was not an interested state on the issue of contributory negligence).

144. Proposed Final Draft, *supra* note 1, § 6.01 cmt. b, at 402.

145. See *infra* note 146 and accompanying text.

interest even in encouraging planes to fly over it without landing or taking off there. Kansas' only interests as place of injury/conduct on these facts are remedial and deterrent, and these interests cannot be advanced by applying its defendant-protecting law.

Or, again, suppose that a skywalk collapses at a hotel in Kansas, because of negligent on-site decisions by a Texas construction company. Suppose Kansas bars cases against construction companies absent proof of gross negligence. Plainly, the same analysis will show that Kansas has no interest in barring the plaintiff on those facts.

Unless the place of injury is an interested state, the injury/conduct rule and the residual place-of-conduct rule are duplicative, each being only a place-of-conduct rule. But, of course, the draft rule *ex hypothesi* requires that the place of injury, if it is to count at all, must be an interested state. Since the interests of the place of injury, as we have seen, are ratcheted one way, toward plaintiffs, only the plaintiff- (1993) 56 ALBANY L. REV. 846 favoring law of the place of injury in this composite rule can matter. The interested place of injury can derive no additional interests when it is also the place of conduct. It is an interested state only if it has plaintiff-favoring law. The booby-trap the old modernists feared lurking in the place of injury, then, also lurks in the composite injury/conduct rule, as it does in the composite injury/plaintiffs rule. It invites irrational choice of the defendant-protecting law of the non-interested place of injury.

*Trumping the joint domicile.* There is a further danger. Because of the ordering of the draft rule's hierarchical list of preferences, there is the risk that, when an artless court irrationally applies the defendant-favoring law of the place of injury/conduct, it will oust the rationally applicable law of the joint domicile. The draft rule makes a reference to the law of the joint domicile, but because of its hierarchical ordering, only permits application of the law of the joint domicile if there is no composite place of injury/conduct. Thus, in the case of an air crash in New Mexico caused by pilot error in New Mexico, where the defendant airline is a Massachusetts airline and all of a subclass of passengers is from Massachusetts, the artless court could suppose it must apply the defendant-favoring law of New Mexico—possibly a noninterested state—despite rationally applicable remedial law at the joint domicile. That is because, under the rigid hierarchy of preferences, the court will not even seem to have access to the law of the joint domicile. The sophisticated court will avoid the trap through interest analysis; the less sophisticated but wary court through an overbroad exercise of the measure of discretion the rule provides. But the artless court would profit from explicit commentary warning against such a result.

#### IV. THE PLACE OF CONDUCT AS RESIDUAL CHOICE

***Postponing the residual law.*** There is another reason why it would be desirable to add the interested place of injury to the rule's hierarchical list of preferences. To do so would cut down on resort to the rule's residual provision. It would do so more effectually than the other priority choices, since those depend on unlikely aggregations of facts. Let me explain why postponing recourse to the residual provision would be a good thing. **(1993) 56 Albany L. Rev. 847**

##### A. *What is wrong with the place of conduct?*

***The uses of the place of conduct.*** The salient feature of the draft rule is that, at bottom, it is a place-of-conduct rule. The place of conduct is last on the hierarchical list of preferences, but it is the residual, grab-bag rule. It must apply in the lion's share of cases, because the choices higher up on the list depend on unlikely aggregations of contacts. Although there are many torts in which the place of injury is also the place of wrongful conduct (the initial preference listed at subsection (c)(1)), there are few *mass* torts of which that can be said. Not only would the event probably have to be a sudden localized disaster, like an air crash, in order to qualify, but also it would have to be caused by local conduct—like pilot error. Even less likely are mass tort cases in which the place of injury is also the place in which most plaintiffs reside (the preference listed at subsection (c)(3)), or in which the plaintiffs and defendants are joint domiciliaries (the preference listed at subsection (c)(2)). Most mass tort cases then, under the proposed rule, will be governed by the law of the place of wrongful conduct. In many ways that is a disquieting choice.

It may seem odd, at first consideration, to find fault with a residual choice of the law of the place of conduct. After all, the law of the place of conduct is the obvious choice. There seems to be no realistic alternative. The place of conduct is more likely to yield unitary law, while the places of injury and where plaintiffs reside may be scattered all over the country. (The law of the place where the relevant defendant resides would be about as good for this purpose, were it not that a corporation resides in too many places.)

Moreover, unlike any of the other contact states except for the joint domicile—this last a rarity in mass tort cases—the place of conduct in theory can apply its law rationally either way: to benefit the plaintiff or to

benefit the defendant.<sup>146</sup> If the law of the place of conduct would benefit the plaintiff, the place of conduct might have a rational basis for applying it, since the state would have an interest in regulating the conduct of the defendant in order to encourage others to transact in or visit the state, assuring them that local activities must meet high standards. If, on the other hand, the law of the place of conduct would benefit the defendant, there might well be a **(1993) 56 ALBANY L. REV. 848** likely rational basis for its application too, since the place of conduct might have an interest in protecting and encouraging the defendant's activity within the state. In sum, the place of conduct often can opt either to encourage the socially beneficial aspects of defendant's conduct there, or to regulate that conduct strictly, in order to reassure the market, and to protect residents and visitors from danger.

*The inevitable defendant bias of the place of conduct.* But that does not mean that over the run of cases applying the law of the interested place of conduct we are going to see an evenhanded distribution of favorable outcomes between plaintiffs and defendants. The reality is that the interested place of conduct is not a neutral place. Over the run of cases, the law of the interested place of conduct will tend to favor defendants. Defendants can select a place, perhaps outside this country, in which to conduct their risk-incurring or substandard activities. They can choose a place where those activities are permitted or even encouraged, or where there is some more general defense. So over the run of cases the law of the place of conduct is likely to enable mass tortfeasors to evade responsibility for their torts, and to deprive plaintiffs of a day in court.

*Why the draft proposal makes all this worse.* Under the special exigencies of complex litigation, the place of conduct is particularly non-neutral, an effect exacerbated under the proposed *Complex Litigation Project* recommendations. Complex litigation defendants will have enjoyed the option of shopping for favorable law at the time they established their enterprise or began their liability-engendering activities; and the ALI proposals would bestow on defendants the full fruition of their hopes with its residual place-of-conduct rule for mass torts. Plaintiffs in these cases, on the other hand, may be from numerous, scattered states,

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146. It should be noted that the place where defendant is doing business also might have rationally applicable regulatory or compensatory policies, even in cases where the tortious conduct occurred in another state. For example, the state in which an airline has its principal place of business might have law favoring recovery against airlines which could apply rationally, even where out-of-state conduct causes a crash out of state.

where the particular defendant did not choose to conduct operations. Yet the current *Draft* effectively strips from plaintiffs their traditional litigational advantage<sup>147</sup> of shopping (1993) 56 ALBANY L. REV. 849 for favorable law when filing suit.<sup>148</sup> Thus, under this *Draft* the place of conduct carries heightened defendant bias.

***The impolitic place of conduct.*** A problem even more serious than the place of conduct's want of neutrality is that the place of conduct is among the least likely of the contact states to have law conforming to the national policies I earlier sketched out.<sup>149</sup> Unlike plaintiff bias, defendant bias works against the grain of law—against the substantive policies likely to be shared by the states in which the defendant has not chosen to conduct operations. With its substandard law, the place of conduct is a choice notorious for inviting a race to the regulatory bottom.

*B. Are defendants entitled to the law of the place of conduct?*

***The interests of other states.*** Many lawyers share the conviction that a defendant ought to have the benefit of the permissive laws under which it acted.<sup>150</sup> The hold this view has on the imagination is explained, in part, by the feeling that, if liability is to be imposed upon the defendant, it should be done under law foreseeable to the defendant at the time of its conduct. But of course at the time of conduct in a case presenting a risk of mass injury, the likelihood of governance by other states is also likely to be present to the defendant.

In single-situs mass torts, it may seem inappropriate to expect the defendant to accommodate itself to the unknown home law of every visitor. That argument carries special weight when the place of conduct is

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147. For Supreme Court articulation of the traditional position, not unsympathetic to forum shopping, see *Van Dusen v. Barrack*, 376 U.S. 612, 630, 633, 636 (1964); see also *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (extending *Van Dusen* to transfers on plaintiffs' motions). The Court is less tender toward foreign plaintiffs. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981). For a current state-court recognition of the legitimacy of the plaintiff's traditional litigational advantage, see *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 46 (Del.1991). For an interesting recognition by the Law Lords of the legitimacy of the plaintiff's traditional litigational advantage, see *Castanho v. Brown & Root (U.K.) Ltd.*, [1981] 1 All E.R. 143 (H.L.), 1981 App.Cas. 557 (H.L.).

148. This is accomplished in Chapters 3, 4, and 5 of the Complex Litigation Project. See Proposed Final Draft, *supra* note 1.

149. See *supra* notes 49-64 and accompanying text.

150. See *Cipolla v. Shaposka*, 267 A.2d 854, 856-57 (1970); *CAVERS*, *supra* note 133, at 146-47.

not an isolated one, but is also the place of injury, and the defendant's established place of business, or the place where the defendant has set up a special business premises or site.<sup>151</sup> The place of conduct is also so frequently entangled with the place of injury that the isolated place of conduct seems a rarity. But if we do posit an **(1993) 56 ALBANY L. REV. 850** isolated place of conduct in a mass disaster setting, the problem of defendant's accommodating to every wanderer's law, surprisingly, does not seem to emerge. For example, suppose the isolated conduct in question is a failure to do a safety check of an airplane during a stopover. The plane crashes in another state, causing death to all passengers and crew. It would be astonishing if the defendant airline and its insurer did not anticipate that the passengers would be from scattered locations, and that some of their survivors would file suit in their home states, seeking the benefit of their home laws, the defendant being amenable to process there. At the same time, to lodge exclusive governance in the stopover state over the rights of numerous nonresidents against a nonresident airline, is not obviously more reasonable than to try the defendant under the law of the place of injury or some other place. The place of stopover is an interested state, but there is no reason why its interests should invariably prevail over the interests of other contact states.

***Compliance with the conduct state's law.*** There is an even stronger and more widespread conviction that a defendant should have the benefit of a defense of specific compliance with a regulation or requirement at the place at which the defendant acted.<sup>152</sup> For those sharing this belief, in cases in which there is a defense of compliance, the law of the place of conduct should not be postponed; indeed, in their view it should be more than residual; it should be imperative.<sup>153</sup>

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151. Compare *Eger v. E.I. du Pont De Nemours Co.*, 539 A.2d 1213 (N.J.1988) (barring New Jersey worker's suit against New Jersey employer under immunity rules at place of injury; apparently applying the law of a noninterested place of injury in a false conflict case) with *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir.) (Friendly, J.), cert. denied, 439 U.S. 1034 (1978) (under New York choice-of-law approach, permitting a New York widow to sue a Virginia company for death of the husband at a Virginia worksite; applying the law of the forum in a true conflict case).

152. But see, e.g., *Cipollone v. Liggett Group Inc.*, 112 S.Ct. 2608 (1992) (compliance with federal duty to warn is not a defense to tort claims based on defendant's conduct apart from failure to warn); *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (fashioning a federal common-law defense of compliance with government specifications by a military contractor, in order to displace the otherwise applicable law of Virginia to the contrary).

153. See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 320 (1992)

Now, a defendant in a multistate case might indeed have thought it sufficient to act in specific compliance with significantly lower local **(1993) 56 ALBANY L. REV. 851** standards than would be imposed in other states in which the impact of its conduct might be felt. But the legitimate interests of states affected by the risk the defendant has incurred do not evaporate even when the defendant has acted in specific compliance with, or perhaps reliance upon, another state's law.<sup>154</sup>

Notwithstanding all this, if we are not to have policy-guided alternative references, but instead must be content with an abstract hierarchical list, there would seem to be no realistic alternative to the law of the place of conduct as a codified residual choice rule for mass torts.

*C. Full circle: The obvious solution.*

What has been said thus far about the infirmities of the law of the place of conduct as residual governing law for mass torts should be sufficient to point toward the obvious palliative. The ALI's proposed mass tort choice rule could be rendered far less capable of mischief, and far more rational in application, with very little adjustment. This can be achieved by converting the proposed hierarchical list of preferred states to a set of *alternative* references.<sup>155</sup> This would obviate the necessity for the

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(commenting on the snow-shoveling hypothetical in Louise Weinberg, *On Departing From Forum Law*, 35 *MERCER L. REV.* 595, 623-24 (1984)). In that hypothetical, the defendant, a landlady, fails to shovel snow from her walk. Instead she places there a sign warning of danger, in fulfillment of all requirements of local law. The hypothetical raises the hard question whether the contrary rule of the plaintiff's home state could apply in an action in the home state's courts (presuming jurisdiction). To the extent the argument against such a result depends on the landlady's expectations, it is not as strong as might be supposed. Despite the defendant's reliance on local law, the plaintiff's injury was clearly within the risk foreseeable to the defendant when she decided not to shovel away the snow. The protective interest of the defendant's state, fully vindicable in its own courts, does not wipe out the compensatory interest of the plaintiff's state, constitutionally vindicable in its own courts. See *supra* note 151 and accompanying text.

154. For example, in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), Virginia tort law would not have furnished a defense of compliance with specifications in a products liability action. The United States Supreme Court, per Justice Scalia, fashioned a federal common-law defense of compliance with government specifications by a military contractor, thus displacing the otherwise applicable law of Virginia to the contrary.

155. Note added in press: I offered a motion to this effect at the ALI's May 1993 meeting. A voice vote being too close to call, the Chair called for a show of hands. No actual count was made, the Chair concluding that the motion did not carry. 61 *U.S.L.W.* 2710 (May 25, 1993); *A.L.I., 1993 PROCEEDINGS* (forthcoming 1994); see *supra* text accompanying note 73 and accompanying text.

present rule's discriminatory and impolitic determinate mandatory residual choice. With the concerned states' respective interests in governance set out fully before the forum, this neutral forum should be empowered to consider the interests of all concerned states free of arbitrary commands to elevate some and disregard others. In this way the forum can best achieve justice and overall fairness. Nor need the choice among interested states be left to the unguided discretion of the neutral forum. The forum could, and I would argue should, be instructed unambiguously to choose law, if an interested state would provide it, that will advance the policies of deterrence, compensation, and risk-spreading which underlie tort law, and the national policies favoring the safety and fairness of multistate transactions and the security of those participating in national (1993) 56 ALBANY L. REV. 852 markets.<sup>156</sup> Only if all interested states would subordinate such policies should the forum do so, as long as state law governs mass torts.

#### V. A LITTLE TRAP

*The potential popularity in interested forums of a rule devised for a neutral forum.* The ALI's draft choice rule for mass torts exhibits quite a few of the pathologies still characteristic of choice-of-law thinking. Yet, even if Congress does not enact the proposal, the rule could have significant impact on courts. In courts influenced by it, law will be chosen arbitrarily, without regard to national policy, under rules of pronounced defendant bias and inadequate foundation in reason.

This influence will not be muted by the Reporters' explicit statement that the choice rules of the *Complex Litigation Project* are intended for federal courts only.<sup>157</sup> The limitation seems doubtful, given that, under the current *Draft*, Congress is urged to create transferee consolidation forums in the states. Since those transferee forums will be creatures of federal law, it is hard to see why supreme federal choice rules in mass tort should not displace state rules in them; any objection grounded in notions of federalism and states' rights, however worthy, would be equally applicable in the federal courts to which the Reporters now limit the proposed rules. Limiting the new choice rules to federal courts would

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156. For examples of policy-guided rules of alternative reference see supra notes 73-77 and accompanying text.

157. Proposed Final Draft, supra note 1, ch. 6 introductory note, at 379.



generate disparate outcomes in like cases, thus having the unintended effect of further delegitimizing the federal choice rules.<sup>158</sup>

In any event the rules need not be applicable formally for them to be persuasive to courts, state as well as federal. As we have seen, the draft rule for mass torts will yield impolitic or irrational results. But I suspect some judges will like the rule's systematics, and tend to be uncritical about impolitic or irrational results. **(1993) 56 Albany L. Rev. 853**

In the absence of action by Congress, federal transferee courts will continue to sit in mass tort cases under special constitutional commands to apply the law of more interested states,<sup>159</sup> and special common-law commands to apply the choice rules of transferor states,<sup>160</sup> with little room for further misadventures under the ALI's new mass tort choice rule—unless it is expressly adopted by a given state for choice of law for mass torts, and a federal transferor court sits in that state. But some courts administering concentrated mass disasters will sit as original forums in interested states. Such courts are free of the familiar struggle to find law for mass torts under those special constitutional and common-law commands.

The prospect of a non-neutral forum taking the advice of the draft rule ought to stir the *Project's* Reporters to insert clear warnings, in vivid language, against an interested original forum in a mass disaster case or indeed any other tort case making any use whatsoever of the *Project's* choice rules. *The draft rules are exclusively for cases in which the forum is neutral; they are unsuitable for cases in an interested state.* And in the handful of concentrated, localized mass disaster cases tried in state courts or brought in a federal court, the forum is *likely* to be an interested one. This would be the plaintiffs' chosen forum, and thus its law is very likely to be plaintiff-favoring. Plaintiff-favoring law is likely to be rationally applicable in any contact state.<sup>161</sup>

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158. This point, and related issues, have been much discussed in the literature. E.g., Barbara A. Atwood, *The Choice-of-Law Dilemma in Mass Tort Litigation: Kicking Around Erie, Klaxon and Van Dusen*, 19 CONN. L. REV. 9 (1986); Andreas F. Lowenfeld, *Mass Torts and the Conflict of Laws: The Airline Disaster*, 1989 U. ILL. L. REV. 157; Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623 (1992); Georgene M. Vairo, *Multi-Tort Cases: Cause For More Darkness on the Subject, or a New Role For Federal Common Law?*, 54 FORDHAM L. REV. 167 (1985).

159. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); see cases cited supra notes 11, 16 and accompanying text.

160. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

161. See supra notes 98-105 and accompanying text (place of injury); supra text accompanying note 146 (place of conduct); supra text following note 145 [“Trumping the joint domicile”] (joint domicile). Even the place where the defendant resides is not

In such cases, what delusions of neutral choice will the new mass tort rule bestow on judges attracted to it? What perverse departures from the law of the interested forum will bring tears to the eyes of the incredulous reader? Will the interested forum/place of injury oust its own law, to bar, under the law of the place of conduct, the (1993) 56 ALBANY L. REV. 854 otherwise meritorious claims of an injured class? We can only wait and see.

## VI. ENVOI

In the ALI's proposed liability choice rule for mass torts we have a pretty package. Despite its several inadvertent irrationalities, it purports to incorporate some modern thinking. It will be enticing to those for whom a seeming simplicity is worth some sacrifice of reason or even of justice. Yet with very little change, the retrograde systematics of the rule could be adapted to a set of alternative references, accompanied by a policy guideline.

As it stands, the proposed liability choice rule for mass torts would take numerous parties, all plucked up from local litigations and plunked down again in some arbitrarily designated place, and sweep away their rights and duties under the law chosen by their original forums and very probably expected by them. But the governance the rule would impose is not as haphazard as one might think, although arrived at by means that might seem as unthinking as the spinning of a roulette wheel. Rather, this is a roulette wheel that omits some numbers altogether, among them, notably, the interested place of injury, a state that traditionally has furnished and continues to furnish governance in tort cases, and that could provide a source of remedial law in this otherwise markedly defense-oriented mechanism. Moreover, this roulette wheel is weighted to come to rest, in most spins of the wheel, at one place of governance: the interested place of conduct, a state that too often is chosen in advance by defendants.

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invariably averse to holding its resident responsible for injury. The place of incorporation of an airline, for example, might have a legitimate governmental interest in applying plaintiff-favoring law in such a setting. Cf. *Johnson v. Spider Staging Corp.*, 555 P.2d 997 (Wash.1976). But see (although perhaps more relevant to the draft rule on punitive damages than to rule 6.01), *In re San Juan Dupont Plaza Hotel Fire Litig.*, 745 F.Supp. 79 (D.P.R.1990) (under Puerto Rico's "significant contacts" approach, applying the law of Puerto Rico, which was the forum state and the place of injury, to deny punitive damages to the nonresident plaintiffs, where the forum also was the place where the defendant was located); *In re Air Crash Disaster at Sioux City, Iowa*, on July 19, 1989, 734 F.Supp. 1425, 1432-33 (N.D.Ill.1990) (barring punitive damages under the law of the defendant's principal place of business, where all other relevant contacts were in states that would have permitted recovery of punitive damages).

The rule is not only discriminatory, but also dangerous, in its insensitivity to the goals of tort law and its inattentiveness to the requirements of national policy. Because of the risks the rule presents to the enforcement of legal norms, in the end the rule would tend to erode standards of integrity, fairness, security, and safety in the national markets and transportation networks.

Thus, with all due respect to the diligence and sincerity of those who authored the ALI's proposed choice rule for liability issues in mass tort cases, it would be imprudent for Congress to enact this choice rule or for any court to adopt it.

**Other writings by Louise Weinberg are available at**

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