The Choice of Law Process: Territorialism and Functionalism

Jeffrey M. Shaman
THE CHOICE OF LAW PROCESS: TERRITORIALISM AND FUNCTIONALISM

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For at least fifty years, American legal scholars have engaged in intense debate concerning the proper methodology by which choice of law decisions should be made. Beginning with the works of Walter Wheeler Cook,1 Ernest Lorenzen,2 and David Cavers,3 a substantial body of legal criticism was mounted against the traditional choice of law schema that prevailed in the courts and was enshrined in the first Restatement.4 This criticism culminated in the seminal work of Brainerd Currie,5 which not only took exception to the traditional approach, but also proposed a new theory to replace it. Currie’s “governmental interest analysis,” developed in the 1950’s and 1960’s, has garnered strong praise from most choice of law scholars,6 although it has been assailed by a small minority of scholars who defend a revised version of the traditional approach.7

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4. See RESTATEMENT OF CONFLICT OF LAWS (1934).
Although interest analysis has played a vital role in the abandonment of the traditional approach by the courts in some twenty-seven jurisdictions, courts in seventeen jurisdictions have rejected it explicitly in favor of retaining the traditional approach.\textsuperscript{8} Thus, the controversy persists in the court as well as in the academy.

**THE ROOTS OF THE CONTROVERSY: CHOICE OF LAW THEORY**

The traditional approach to choice of law is also referred to as the territorial approach, in deference to the premise upon which it is based. According to that premise, a state has authority to regulate occurrences within its territory, but no further; a state’s power terminates abruptly at its border, where the correlative power of other states begins.\textsuperscript{9} Therefore, choice of law decisions under the traditional approach follow the maxim that events are to be governed by the law of the state in which they occur.

Critics of the traditional approach question the very premise upon which it is founded.\textsuperscript{10} They point out that the premise of the territorial approach, that a state may regulate only occurrences that transpire within its borders, is nothing more than a bald assertion.\textsuperscript{11} As long as constitutional requirements are met, a state court has authority to apply whatever law it chooses to the case before it.\textsuperscript{12} The maxim of the traditional approach actually should be posed as a question: should an event necessarily be governed by the law of the state in which it occurred? Adherents of the interest analysis have demonstrated that in many cases the answer to this question is a resounding “no.” Professor Cavers pointed out that traditional choice of law rules completely ignore the content of the

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L. Rev. 104 (1973) [hereinafter cited as Twerski, Neumeier v. Kuehner]; Twerski, To Where Does One Attach the Horses?, 61 Ky. L.J. 393 (1973) [hereinafter cited as Twerski, Horses].


10. E. Lorenzen, supra note 2, at 1-18; W. Cook, supra note 1, at 48-70.

11. E. Lorenzen, supra note 2, at 1-18; W. Cook, supra note 1, at 48-70.

laws relevant to a case, and thereby often work at cross purposes to those laws. This cogent observation was developed further by Professor Currie, who explained that the mere occurrence of an event within a state does not mean that the interests of that state will be advanced by applying its laws to the event. Conversely, the interests of a state may be advanced by applying its laws to an event that has occurred outside its borders.

As an illustration of these principles, consider a case in which John Doe and Richard Roe, who are citizens of state A, execute a contract in state B. Suppose that John Doe is twenty years old and under the law of state A has full legal capacity to make contracts, but does not have such capacity under the law of state B. State B’s rule of law is based upon the policy that persons under the age of twenty-one are not competent to enter into binding agreements and therefore should be relieved from their contracts. State A’s rule of law is based upon the policy that persons over the age of eighteen are competent to enter into binding agreements and therefore parties who transact with them should be able to rely upon their contracts. Under the traditional approach, the capacity of John Doe to enter into the contract would be governed by the law of state B, the place where the contract was made. However, state B has no possible interest in regulating the contracting capacity of John Doe, a citizen of state A. State B has no interest in relieving John Doe from his contract when John Doe’s own state believes he was competent to make the contract and upholds its binding nature. On the other hand, state A has a very definite interest in regulating this transaction in order to protect the contrac-

13. Cavers, supra note 3, at 180; see, e.g., Alabama Great S. R.R. v. Carroll, 97 Ala. 126, 11 So. 803 (1892). In Alabama Great Southern Railroad, an Alabama plaintiff employed by the defendant Alabama railroad was injured as a result of fellow employees’ negligence while the train was travelling through Mississippi. Suit was brought in the Alabama courts. An Alabama statute had abolished the common law fellow-servant defense to a charge of employer negligence. Mississippi retained the common law rule. In choosing to apply the law of Mississippi as the place of injury, the Alabama court defeated the Alabama statutory purposes of improving the railroad’s standard of care through imposition of liability and of compensating Alabama plaintiffs.
15. See id. at 183.
16. This hypothetical is a variation of one used by Currie and explained by him in fuller detail. See id. at 77-127.
vital reliance of its citizen, Richard Roe. State A's lack of territorial connection to the contract does not negate the presence of state A's interest in having the contract governed by its law. Conversely, state B's territorial connection with the contract does not give rise to a state B interest in having the contract governed by its law. The territorial aspects of the situation are absolutely irrelevant to the determination of either state's interest in the application of its law.

Interest analysis seeks to remedy the nonteleological operation of the traditional approach. According to interest analysis, choice of law decisions should not be dictated by territorial contacts, but should be made so as to accommodate the purposes or policies for which the laws germane to a case have been promulgated. This requires an identification of the policy that underlies the law of each concerned state and a determination of whether, in light of that policy, each state has an interest in having its law applied to the case. The foundation of interest analysis is the simple premise that choice of law issues present the same general problem as other legal issues, namely, interpreting and applying the content of laws. Thus, interest analysis is a functional process; choice of law decisions made under it are made for some purpose. In every case in which the interest analysis is operative, it is intended to serve the policies underlying the laws relevant in the case.17

The criticism levelled by Cook, Lorenzen, Cavers, and Currie at the traditional choice of law approach can be viewed as a microcosm of the criticism that legal realists direct toward traditional legal thought in general. Karl Llewellyn, a principal exponent of legal realism, referred to the traditional legal mode of thought as the Formal Style.18 The Formal Style, he explained, is a manner of thought19 concerned with logic, not policy. It operates on the model of "if x, then y," never inquiring as to the reason, if any, that x should produce y.20 The traditional choice of law approach

17. See generally R. Cramton & D. Currie, Conflict of Laws: Cases-Comments-Questions 252-53 (1968); Sedler, supra note 6, at 183.
19. W. Twining, Karl Llewellyn and the Realist Movement 211 (1973). "In Llewellyn's usage the term [style] refers to the manner of thought . . . rather than to . . . literary style, in so far as these are distinguishable." Id. at 210.
20. See id. at 213.
operates in like manner; if a contract is made in a certain state, then legal questions concerning it are to be governed by that state's law. There is logic, but no purpose, policy, or reason. In contradistinction to the Formal Style, Llewellyn described the Grand Style, which seeks to effectuate the policy that underlies laws.21 The model of the Grand Style is: if \( x \), then \( y \) in order to produce effect \( z \), for reason \( z \), or to remedy mischief \( z \).22 Operating in the mode of the Grand Style, the interest analysis directs that choice of law decisions be made so as to achieve the policies for which laws are enacted.

Some modern critics of the interest analysis retain faith in the territorial premise of the traditional approach.23 “Neoterritorialists” assert that events should be governed by the laws of the state in which they occur because that is what the public expects. Professor Cavers, a strong critic of the traditional approach in his early career, later converted to neoterritorialism,24 arguing that because our states and nations are “territorially organized,” a departure from the territorial premise causes “a wrench away from customary attitudes toward law.”25 This is likely to cause, Cavers suggested, a feeling that the law is discriminatory.26 Building on this theme, Professor Twerski states that expectations play a “potent role” in our lives, affecting not only conduct, but a sense of tranquility as well.27 He argues that “people have a right to expect a regularity and rhythm from the law.”28 An additional argument is that public confidence in the legal system is undermined when it operates in an unexpected manner.29

22. W. TWNING, supra note 19, at 213.
23. See generally Twerski, Neumeier v. Kuehner, supra note 7; Twerski, Horses, supra note 7.
24. Throughout his career, Professor Cavers’ views have been quite vicissitudinous. An early critic of the territorialism of the traditional approach, see Cavers, supra note 3, at 179-80, he later sought to combine the interest analysis with neoterritorialism, see D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965), and still later sought to replace interest analysis with neoterritorialism, see Cavers, Contemporary Conflicts Law in American Perspective, 3 RECUEIL DES COURS 75, 146-47 (1970).
25. D. CAVERS, supra note 24, at 135.
26. Id.
27. Twerski, Enlightened Territorialism, supra note 7, at 381-82.
28. Id. at 382.
29. See von Mehren, Recent Trends in Choice-of-Law Methodology, 60 CORNELL L. REV.
There are several possible responses to the neoterritorialist argument that laws should function on a territorial basis to meet public expectations. First, if public expectation of a law's application would work to the detriment of the policy expressed by the law, that public expectation should not be honored. Second, as Professor Sedler has described, people expect laws to operate on the territorial premise only because the legal system itself has fostered that expectation by emphasizing the traditional territorial approach. Therefore, to argue that the law should continue to be applied on a territorial basis to meet public expectations aroused by prior territorial application is not only self-serving but circular as well.

The final and strongest response to the neoterritorialists is to question their belief that people expect laws to operate territorially. At first blush that belief may seem correct, but on further consideration it becomes highly questionable. In an attempt to prove that there is a public expectation that laws operate territorially, Twerski presents an unduly complicated hypothetical. He describes a young married couple dining at the home of Mr. and Mrs. X. The young husband makes a remark about his mother-in-law that leads to a nasty argument between the couple. The next morning, Mrs. X phones the young bride to offer advice, and the incident is a topic of conversation in the hosts' home for at least a week. Twerski asserts that the results would be quite different had the argument occurred at some other place and had Mr. and Mrs. X been told about it rather than having been witnesses to it. In the latter situation, Twerski claims that the argument "certainly" would not be discussed in the X household for a week and that Mrs. X "definitely" would not call the bride to offer advice. Twerski implies that the argument in the first situation is within the concern of the X's, because it occurred in their house, while the argument in the second situation is not within their concern because it occurred elsewhere. This implication is manifest from Twerski's statement following the hypothetical that "one factor

927, 945-46 (1975).
30. See generally Sedler, supra note 6, at 208.
31. Id. at 207.
32. Twerski, Enlightened Territorialism, supra note 7, at 383.
33. Id.
which leads human beings to react is the very sight of an injustice." For emphasis, he adds that "seeing is reacting."

I find Professor Twerski's suppositions about human nature quite unconvincing. To the contrary, it is not "certain" that the argument in the second situation will not be discussed for a week in the X household. If Mr. and Mrs. X find the topic interesting, discussion of the argument is just as likely in the second situation as in the first. Nor is it "definite" that in the second situation Mrs. X will not call the bride to offer advice. If Mrs. X possesses a sympathetic nature or is a close friend of the bride, she might be just as likely to call in one situation as in the other. At best, Twerski has selected a rather arguable hypothetical to prove his point; rather than prove it, he opens it to question.

A variation on Twerski's hypothetical demonstrates that people do in fact expect some rules to have extraterritorial effect. Suppose that some time prior to dining at the X's, Twerski's young husband had made the same joke about his mother-in-law at his own dining room table. Further suppose that his wife was insulted by the joke and asked her husband to refrain from making such remarks about her mother. The husband agreed to this "rule," the purpose of which was to prevent affronting his wife. Obviously, the husband and wife expected this rule to govern behavior beyond the confines of their own home. That is, they expected the rule to have extraterritorial effect. Indeed, to accomplish its purpose of avoiding insult to the wife, the rule must be given extraterritorial application.

People expect that some rules will have extraterritorial effect, while others will not. When parents promulgate the rule that their child may not eat candy, they expect the child to obey that rule irrespective of location. On the other hand, when parents promulgate a rule that their child may not play blaring music on the stereo, they expect that rule to apply only in their own home. If the child's friends' parents allow loud music in their homes, that is their own business. To some degree, the expectations considered here reflect the purposes for which the rules have been adopted. Because parents prohibit their children from eating candy in order

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34. Id. at 384.
35. Id.
to safeguard their health, the rule is expected to apply outside of the family household; otherwise its purpose will be defeated. However, when parents prohibit their children from playing blaring music, their purpose is to secure peace and quiet in the home. The rule is not expected to apply at other households in which the residents are not bothered by loud music. Thus, the expectations in the described hypotheticals are functional; they are consistent with the purposes for which the rules were adopted.

It is salutary when public expectation concerning the interpretation of a law is consistent with the effectuation of the law's purpose. Unfortunately, this correlation does not always exist. Regardless of public expectations, rules should be applied to effectuate the purposes for which they were enacted. Some rules are meant to regulate occurrences within a territory, while other rules have purposes that are extraterritorial. The interest analysis easily accommodates those laws that should be acknowledged as territorially based because their purpose is to regulate occurrences within a certain area.\(^{36}\) Under the interest analysis, the state in which the occurrence transpires is recognized as having an interest that its law govern the case. For instance, if a state has adopted a tort law not only to compensate injured persons but also to deter hazardous conduct within the state, it has an interest in regulating such conduct whenever it occurs within the borders of the state. Even if both the tortfeasor and the victim are nonresidents, if the conduct giving rise to the tort occurred within the state, there is a state interest in having its law applied to the victim's claim against the tortfeasor. In such a case, the interest analysis acknowledges the territorial function of the law.\(^{37}\)

The interest analysis also can accommodate the legitimate expectations that persons have concerning a law's operation, even the

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36. "[The interest analysis] recognizes that the occurrence of an act within a state may give rise to a strong interest on the part of that state in implementing its admonitory and regulatory policies." Sedler, The Territorial Imperative: Automobile Accidents and the Significance of a State Line, 9 Duq. L. Rev. 394, 394 (1971). See also Gaither v. Myers, 404 F.2d 216, 224 (D.C. Cir. 1968); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581, 587 (D.C. Cir. 1965); Gordon v. Parker, 83 F. Supp. 40, 42 (D. Mass.), aff'd, 178 F.2d 888 (1st Cir. 1949); Schmidt v. Driscoll Hotel, 249 Minn. 376, --, 82 N.W.2d 365, 368 (1957).

37. See Sedler, supra note 36, at 394.
expectation of territorial operation of a law. For example, in *People v. One 1953 Ford Victoria*, the State of California sought to have a mortgagee’s lien on a Ford Victoria automobile, used by the mortgagor to transport marijuana illegally within California, forfeited in its favor. According to the laws of California the mortgagee’s lien on the car was forfeitable because the mortgagee had not made an investigation into the mortgagor’s character. However, the mortgage had been made in Texas, where the mortgagee’s lien was not forfeitable. When faced with this conflict of law, the California Supreme Court followed Texas law on the ground that, although California had an interest in having its forfeiture law applied to mortgaged automobiles used for illegal purposes within California, that interest did not extend to situations where the mortgage had been made outside of the state. To apply California law to out-of-state mortgages would take the mortgagee by surprise and defeat his legitimate expectations.

*Ford Victoria* demonstrates that the interest analysis is not blind to the parties’ legitimate expectations concerning the law. It should be remembered, however, that expectations are not always legitimate or present. Hoping to find the purposiveness needed in their approach, neoterritorialists overemphasize the parties’ expectations. They often see expectations where none exist. For example, no one has any expectations in tort cases, because accidents are unexpected. Nevertheless, interest analysis can accommodate readily those situations presenting genuine expectations that should be recognized.

**The Quest for Rationality**

*Territorialism*

As noted above, the premise of both the traditional and the neoterritorial approaches is that a state has authority to regulate only

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38. See R. Weintraub, *supra* note 6, at 204-06; Sedler, *supra* note 36, at 394-95.
40. Id. at __, 311 P.2d at 480-81.
41. Id. at __, 311 P.2d at 482. See also Bernkrant v. Fowler, 55 Cal. 2d 588, __, 360 P.2d 906, 909, 12 Cal. Rptr. 266, 269 (1961).
42. See notes 18-21 *supra* & accompanying text.
those events occurring within its own borders.\textsuperscript{43} Therefore, occurrences are to be governed by the law of the state in which they transpire. However, because legal transactions often transpire in more than one state, courts must struggle with the decision of which law should govern a tort action when, for example, negligence committed in state A causes injury in state B. Equally uncertain is the determination of the law to govern a contract when an offer is made in state A, a counteroffer in state B, and an acceptance in state C.

The traditional approach deals with such problems by designating certain occurrences as key events which demark the location of the vesting of a right.\textsuperscript{44} Hence, the traditional approach sometimes is referred to as the "vested rights theory" because only those rights which vest within a state are subject to regulation under its laws.\textsuperscript{45} For example, tort rights traditionally vest at the place of injury rather than the place of negligence.\textsuperscript{46} According to the majority rule, contract rights vest at the place the contract is made,\textsuperscript{47} while the minority rule asserts that they vest at the place the contract is to be performed.\textsuperscript{48} There is a certain beguiling logic to all of this, but it is a logic that is superficial at best. Moreover, the logic fails to define what determines a key event. Thus, the major philosophic deficiency of the vested rights theory is that rights vest whenever the courts say they do, and courts, without explanation, may designate one occurrence to be the magical key event that operates to vest a right. Lacking any rational basis, the traditional rules serve no purpose other than to have rules for the sake of having them.

Neoterritorialists admit the bankruptcy of the vested rights theory,\textsuperscript{49} but retain faith in the premise of territoriality.\textsuperscript{50} According to neoterritorialism, laws are territorially based, and therefore

\begin{itemize}
\item \textsuperscript{43} See text accompanying notes 9, 23-29 supra.
\item \textsuperscript{44} R. Leflar, American Conflicts Law 205-06 (2d ed. 1968).
\item \textsuperscript{45} See A. Ehrenzweig, A Treatise on the Conflict of Laws 10 (2d ed. 1962).
\item \textsuperscript{46} H. Goodrich, Handbook of the Conflict of Laws 165-66 (4th ed. 1964).
\item \textsuperscript{47} Id. at 201, 212.
\item \textsuperscript{48} Id. at 201, 213.
\item \textsuperscript{49} See, e.g., D. Cavers, supra note 24, at 65-66; Twerski, Enlightened Territorialism, supra note 7, at 377.
\item \textsuperscript{50} D. Cavers, supra note 24, at 134-35, 139-40; Twerski, Enlightened Territorialism, supra note 7, at 390.
\end{itemize}
choice of law decisions should be dictated by the principle that events are governed by the law of the state in which they occurred. This poses for neoterritorialism the same problem that plagues the traditional approach: when the relevant events have occurred in more than one state, which state’s law should govern the case is uncertain. The neoterritorialist response to this problem is an attempt to find “enlightened” or rational criteria to aid in selecting the law of one of the states with a territorial connection to the controversy. However, the rational criteria proposed by neoterritorialists are few and far between and of questionable rationality. Professor Cavers, who later in his career became one of the leading advocates of neoterritorialism, advanced seven “principles of preference,” which read more like rules than principles, in an attempt to invest territorialism with rationality. The principles’ coverage of only a small fraction of choice of law problems demonstrates the futility of searching for rational standards by which to evaluate territorial contacts. Moreover, the purported rationality of the few principles advanced by Cavers is highly arguable. Professor Baade does not find them to be particularly rational, and even Professor Twerski, a neoterritorialist himself, has taken exception to some of them.

The irrationality of Cavers’ territorial principles is manifest in his first principle, wherein he asserts that when the laws of the state where an injury occurs set a higher standard of conduct or standard of financial protection against injury than do the laws of the state where the person causing the injury acts or has his home, the laws of the state where the injury occurs should govern. Cavers asserts this principle to be rational because the state where the injury occurs has established standards of safety to protect

51. See D. Cavers, supra note 24, at 135, 139.
52. See generally Twerski, Enlightened Territorialism, supra note 7, at 373-74.
53. See note 24 supra.
54. D. Cavers, supra note 24, at 139, 146, 159, 166, 177, 181, 194.
55. See notes 69-70 infra & accompanying text.
56. Baade, supra note 6, at 179.
57. Twerski, Enlightened Territorialism, supra note 7, at 375, 377.
58. D. Cavers, supra note 24, at 139. The principle excepts cases in which the injured party has such a strong relationship with the person causing the injury and the state in which the parties reside that the legal relationship should be governed by the laws of that state. Id. at 144-45.
persons within its borders, and these standards of safety will be impaired if persons who cause injury within the state are not subject to them. This reasoning ignores the salient point that the state where the person causing the injury has acted or resided also has established standards, according to which the person's behavior is not culpable and may even be considered worthy of encouragement. Cavers fails to answer why the standards of one state should take precedence over another. Thus, he focuses unjustifiably upon the standards of only one of the concerned states, ignoring the other.

Cavers' shortsightedness is demonstrated in one of his own examples, which he implies is exemplary of the soundness of his first principle. The example, a variation of an actual case, involves a Californian who is injured in an accident in California and files a personal injury action in the California courts against the administrator of the deceased tortfeasor's estate. The action is filed after the death of the tortfeasor, a citizen of Arizona. Contrary to California law, under Arizona law personal injury actions do not survive the death of the tortfeasor. According to Cavers' first principle, California law, as the law of the place where the injury occurred, should govern the case. Cavers believes the application of California law to be rational because it enforces the standards of safety established by the state where the injury occurred. Cavers states further that he would hope that even an Arizona court would follow the California rule and thereby refuse to shelter the estate of an Arizona citizen from "the injuries he had done in California and for which California's financial protection plan would hold a decedent's estate liable."

There is no rebuttal to Professor Cavers' assertion that California's policy will be impaired if its rule of law is not applied to the case. Nevertheless, Cavers overlooks entirely the impairment of Arizona's policy. In disregarding Arizona's policy, Cavers fails to address why it is rational to favor California's policy over Arizona's. Actually, Cavers' selection of this hypothetical to prove his

59. Id. at 139-40.
60. Id. at 141-42.
61. See Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953). See also B. Currie, supra note 5, at 128.
62. D. Cavers, supra note 24, at 142.
point is a disingenuous way of masking his indifference to Arizona policy, because the Arizona rule against survival of causes of action is a rule unlikely to command such sympathy. As Professor Currie observed, it is an archaic rule that probably is a holdover from the outdated notion that tort law is penal rather than compensatory. Founded upon an outmoded theory, the rule seems to serve little, if any, valid purpose today. Thus, we are likely to believe subconsciously that the Arizona rule fosters no worthwhile policy at all, and therefore California's efficacious policy should prevail. However, if some sympathy can be evoked for the Arizona rule, the flaw in Cavers' first principle becomes more apparent. The modern policy underlying the Arizona rule is that it is unfair for the beneficiaries of a decedent's estate to be held accountable for the torts committed by the decedent. While disputed, this policy nonetheless represents the legitimate policy of the State of Arizona. As such, it is entitled to as much deference as the California policy. By elevating California's policy and ignoring Arizona's, Cavers' first principle offers the pretense of rationality but not the reality of it.

The fallacy of Cavers' principle is even more flagrant in a second hypothetical, which he denotes as "a harder case." This hypothetical concerns a political speech in state Y that libels a public official of state X. Under the law of state X, the speaker is entitled to only a qualified privilege for the libel, while the law of state Y provides an absolute privilege. Here, the clash between the policies of the two states is dramatic. State X, where the injury occurred, has a policy of compensating persons for such injuries; state Y where the conduct occurred, has a different, but equally worthy, policy of allowing such speech so as to foster the fullest possible debate on issues of public concern. In this situation, application of Cavers' first principle amounts to the selection of the law of state X, where the injury occurred, to the exclusion of the policy of state Y. To do so is no more rational than not.

Professor Cavers himself is ambivalent about the validity of his

64. B. Currie, supra note 5, at 144.
65. D. Cavers, supra note 24, at 142.
66. Id.
first principle. For instance, he attaches an exception to it and offers several qualifications to its application. Cavers' ambivalence carries over to all seven of his principles, each of which is qualified in one way or another. Moreover, when he originally set forth the seven principles, Professor Cavers advanced them as a means for dealing with only "the hard cases . . . in which legislative purposes are unclear or conflicting." He reiterated that a "prerequisite" for the application of the principles is "the absence of any ascertainable legislative purpose in the forum's law." Cavers' doubt regarding the merit of the principles ostensibly has carried over to the courts. Although one of the principles was adopted expressly by the Supreme Court of Pennsylvania in Cipolla v. Shaposka, they have not received general acceptance in the courts.

As discussed above, Professor Cavers' principles do not possess the rationality that he claims for them. Cavers' failure to find rational standards by which to select among territorial contacts is a flaw endemic to the territorial approach. By seeking to evaluate occurrences according to their territorial significance, when in fact one event has no more territorial importance than another, neoterritorialists, like their traditional predecessors, err in searching for rationality in a place where it does not reside. Under a territorial approach, there can be no satisfactory resolution of cases composed of multistate events. If one accepts the premise of territoriality, each state in which an event occurred has a claim for its law to be applied in a multistate case, and there are no rational territorial principles by which to select one state's law over another's.

The Interest Analysis

One of the primary advantages of the interest analysis is that

67. See note 58 supra.
68. See D. Cavers, supra note 24, at 144-45.
69. Id. at 122. Nevertheless, later in his career, Cavers took the position that his seven principles of preference should have a much broader application. Cavers, supra note 24, at 153.
70. D. Cavers, supra note 24, at 215.
72. "[I]t is difficult to find subsequently decided cases that expressly follow any of Cavers' illustrative 'principles.'" R. Leflar, American Conflicts Law 192 (3d ed. 1977).
some conflicts of law are revealed to be "false conflicts." When only one state has an interest in having its law govern a case, the conflict is false and resolves itself in favor of following the law of the interested state.\textsuperscript{73} To use an example described earlier, when two parties from state $A$ execute a contract in state $B$, only state $A$ has an interest in regulating the capacity of the parties to enter into the contract. This false conflict results in application of the law of state $A$.\textsuperscript{74}

Many cases which seem to present conflicts of law under a territorial approach are shown by the interest analysis to be false conflicts which resolve themselves rationally. Nevertheless, true conflicts can exist under the interest analysis. For example, in \textit{Lilienthal v. Kaufman},\textsuperscript{75} an Oregon spendthrift contracted a debt with a Californian. Oregon, but not California, recognized the spendthrift defense. Because Oregon had an interest in protecting the Oregon spendthrift, and California had an interest in protecting the California creditor, the case presented a true conflict.\textsuperscript{76}

A variety of methods has been proposed by choice of law scholars and adopted by the courts for resolving true conflicts under the interest analysis. Professor Currie, the "father" of the interest analysis, believed that true conflicts should be decided by applying the law of the forum.\textsuperscript{77} Although admitting that courts balance competing state interests in other circumstances, Currie concluded that the weighing of the competing state interests is outside the judicial function of the courts when two or more interested states have contradictory policies.\textsuperscript{78} Therefore, when confronted with a true conflict, a court should apply its own law\textsuperscript{79} so that it at least can advance the policy of its own state.\textsuperscript{80}

Only a few courts have adopted Currie's proposal for resolving true conflicts in favor of forum law.\textsuperscript{81} Most advocates of the inter-

\textsuperscript{73} R. Cramton & D. Currie, \textit{supra} note 17, at 220; Sedler, \textit{supra} note 6, at 186-87.
\textsuperscript{74} See Sedler, \textit{supra} note 6, at 186-87. See also text accompanying note 16 \textit{supra}.
\textsuperscript{75} 239 Or. 1, 395 P.2d 543 (1964).
\textsuperscript{76} \textit{Id.} at \_, 395 P.2d at 549.
\textsuperscript{77} B. Currie, \textit{supra} note 5, at 119, 183-84.
\textsuperscript{78} \textit{Id.} at 182-83.
\textsuperscript{79} \textit{Id.} at 182.
\textsuperscript{80} \textit{Id.} at 119.
\textsuperscript{81} See, e.g., \textit{Lilienthal v. Kaufman}, 239 Or. 1, \_, 395 P.2d 543, 549 (1964) (applying forum law).
est analysis also have rejected this approach to true conflicts, some condemning it as an irrational way of deciding conflicts of law. Professor Baxter notes that Currie's position is subject to the same fault that Currie himself once ascribed to the traditional approach: it will "casually defeat now the one and now the other policy, depending upon a purely fortuitous circumstance," only now the fortuitous circumstance is the plaintiff's choice of forum. Other scholars add that, contrary to Currie's belief, balancing and evaluating state interests is an entirely appropriate function for the judiciary; indeed such balancing is something that it does all the time. Still others assert that true conflicts can be resolved by more satisfactory techniques, to be discussed below, which do not involve the courts in weighing competing state interests.

Better Rule of Law Approach

Several courts have resolved a true conflict by choosing what they believe to be the better rule of law. Among choice of law scholars, Professor Leflar has been the foremost advocate of the better rule of law approach, which has received mixed reviews from his colleagues. Courts using this approach most commonly

82. "[A]s far as I can see, all courts and writers who have professed acceptance of Currie's interest language have transformed it by indulging in that very weighing and balancing of interests from which Currie refrained." Ehrenzweig, A Counter-Revolution in Conflicts Law? From Beale to Cavers, 80 HARV. L. REV. 377, 389 (1966).
83. See, e.g., R. WEINTRAUB, supra note 6, at 203; McDougal, supra note 6, at 450.
84. B. CURRIE, supra note 5, at 120.
85. Baxter, supra note 6, at 19.
86. See McDougal, supra note 6, at 452; Sedler, supra note 6, at 217-18; von Mehren, Book Review, 17 J. LEGAL EDUC. 91, 94-96 (1964).
87. A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS—CASES AND MATERIALS ON CONFLICT OF LAWS 94-95 (1965); R. WEINTRAUB, supra note 6, at 203-04; Baxter, supra note 6, at 20.
90. For favorable discussions of the better rule of law approach, see R. WEINTRAUB, supra note 6, at 244-45; Ehrenzweig, "False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law, 83 VA. L. REV. 847, 853-55 (1967); Juenger, Choice of Law in Interstate Torts, 118 U. PA. L. REV. 202, 235 (1969); for opposition to the better rule of law approach, see B. CURRIE, supra note 5, at 154 n.82; Cavers, The Value of Principled Prefer-
regard one rule to be better than another because it is progressive and represents the majority trend. Either the rule of law of the forum or a rule of law that favors compensation for injured plaintiffs usually prevails as the more progressive standard. The serious drawback to the better rule of law approach is its failure to acknowledge that the state whose law is not chosen also has deemed, through its official processes, that its rule of law is the better rule. Judges who use the better rule of law approach can decide true conflicts only by closing their eyes to this fact. Thus, this method ostensibly is less a resolution of true conflicts than a sidestepping of them.

The Most Significant Relationship Test

The most significant relationship test is yet another means of solving true conflicts which has been used by a few courts. Adopted in the second Restatement as a general approach to tort and contract choice of law problems, the most significant relationship test operates by choosing the law of the state that has the most significant relationship to a case. Application of the test often devolves into nothing more than contact counting that provides no standard for determining which contacts are significant. As Professor Ehrenzweig astutely observes, the most significant relationship test is circular in reasoning because the significance of the relationship is the very question to be answered. Moreover, experience has shown it to be a test that is manipulated easily "to support virtually any result." Strongly discredited by most com-

ences, 49 Tex. L. Rev. 211, 212-15 (1971); Kanowitz, supra note 6, at 286-93.
92. See Kanowitz, supra note 6, at 290-93.
96. A. Ehrenzweig, supra note 45, at 351.
mentators\textsuperscript{98} and increasingly passed over by the courts, the most significant relationship test has proven a failure.

\textit{The Comparative Impairment Test}

One of the more substantial proposals for dealing with the problem of deciding true conflicts is the comparative impairment concept. This concept builds upon the interest analysis, adding a means of resolving true conflicts in a rational or purposive manner. The comparative impairment concept was first articulated by Professor Baxter,\textsuperscript{99} later championed by Professor Horowitz,\textsuperscript{100} and still later adopted and utilized by the California courts.\textsuperscript{101} Under the comparative impairment concept, conflicting state policies are not weighed to determine which is better or more important.\textsuperscript{102} Rather, the concept assumes that each state's policy is of equal weight and seeks to evaluate the comparative impairment to each state's policy if its law is not applied.\textsuperscript{103} Accordingly, a true conflict will be resolved by following the law of the state whose policy would suffer greater impairment by the subordination of its law.\textsuperscript{104}

To illustrate how the comparative impairment concept operates, Professor Baxter presents a hypothetical in which a citizen of state Y, driving in excess of the speed limit in state X, injures another citizen of state Y. According to the law of state X, but not state Y, driving in excess of the speed limit constitutes negligence per se. As the policy underlying the state Y rule concerns loss-distribution rights for injuries, state Y certainly has an interest in having its

\begin{itemize}
\item 99. Baxter, supra note 6, at 18-22.
\item 100. Horowitz, supra note 6, at 747-58.
\item 102. Bernhard v. Harrah's Club, 16 Cal. 3d 313, —, 546 P.2d 719, 723, 128 Cal. Rptr. 215, 219, cert. denied, 429 U.S. 859 (1976); Horowitz, supra note 6, at 753.
\item 103. Baxter, supra note 6, at 17-18.
\item 104. See id. at 18; see Horowitz, supra note 6, at 748-49.
\end{itemize}
law applied. The policy behind the state X rule is the deterrence of dangerous conduct and the protection of X residents. The case thus presents a true conflict in that both states have an interest in having their law regulate the controversy. Nevertheless, Professor Baxter explains that the interest of state X will be the less impaired if its law is not applied to the case, because conduct on X highways will not be affected by the knowledge that the X rule will be subordinated in those rare instances involving two nonresidents. The deterrent effect of state X's law will not be decreased appreciably by choosing not to apply X law to cases in which all parties are nonresidents. On the other hand, if Y law is not followed in a suit between two Y citizens, the Y loss-distribution policy will be defeated completely in all such cases. Therefore, state Y's interest in having its law prevail is stronger than that of state X. According to the phraseology employed by Professors von Mehren and Trautman, state Y is the "predominantly concerned jurisdiction."

In the abstract, the comparative impairment concept appears to be a workable method of introducing rationality into the resolution of true conflicts. However, application of the concept in actual cases has been questioned. Professor Martin makes the cogent observation that although the comparative impairment concept is a good idea when it works, it does not always work because there are many situations in which the impairment to each state's policy is roughly equal. Baxter's hypothetical concerning a negligence-per-se rule illustrates how the comparative impairment concept operates, but gives an overly optimistic impression of the concept's viability by ascribing an incorrect purpose to the negligence-per-se rule. Only by investing the rule with a policy of deterrence does the state where the accident occurred have the less predominant interest in having its law govern the controversy. Yet, the policy

105. Baxter, supra note 6, at 12. State X has an interest only if one agrees that the purpose of its per se negligence rule is the deterrence of dangerous conduct. If one believes the only purpose of the X rule is to compensate accident victims, state X has no interest because the victim is a resident of state Y. See text accompanying notes 142-53 infra for a discussion of this issue in relation to guest-host statutes.

106. See Baxter, supra note 6, at 13.


108. J. Martin, supra note 63, at 259.
underlying the negligence-per-se rule is a current issue of debate. According to the modern view of torts, similar negligence rules are intended to serve compensatory purposes, not admonitory or deterrent purposes.\textsuperscript{109} If so, Professor Baxter's hypothetical presents a false conflict which can be resolved easily, without using the comparative impairment concept. Consequently, one wonders if the comparative impairment concept is useful in cases that actually do present true conflicts. Perhaps, as Martin suggests, there are few, if any, instances of true conflict that can be solved satisfactorily by the concept of comparative impairment. The comparative impairment concept may be nothing more than another way of describing what Professor Currie referred to as an apparent conflict, that is, a seemingly true conflict which further analysis of state interests reveals to be a false conflict.\textsuperscript{110} If so, the comparative impairment concept will be of limited utility.

Professor Kanowitz is highly critical of the comparative impairment concept.\textsuperscript{111} He argues that the concept leads to unconscious or conscious manipulation of data by the court in comparing the impairment of each state's interest. An even more serious defect asserted by Kanowitz is the inevitable implication of the kind of weighing or value judgment that determines which policy is better or worthier.\textsuperscript{112}

These reprisals are unduly harsh, as every concept, principle, rule, or approach is subject to manipulation. Professor Kanowitz in no way demonstrates that the comparative impairment concept is prone to an excessive amount of manipulation or even a relatively undue amount of manipulation. If it is a helpful concept, the possibility of misuse by some judges should not deter its adoption by the courts. A similar response might also be made to Kanowitz' second point. Although courts may use the comparative impairment concept as little more than a guise for the weighing of state interests generally ascribed to the better rule of law approach,\textsuperscript{113} as did the court in \textit{Offshore Rental Co. v. Continental Oil Co.},\textsuperscript{114} the

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\item \textsuperscript{109} See B. Currie, supra note 5, at 144.
\item \textsuperscript{110} R. Weintraub, supra note 6, at 39.
\item \textsuperscript{111} Kanowitz, supra note 6, at 260-64, 277-86.
\item \textsuperscript{112} Id. at 261.
\item \textsuperscript{113} Id. at 294.
\item \textsuperscript{114} 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).
\end{itemize}
concept’s misuse should not be reason for its abandonment. If it is a beneficial concept, it should be retained, and steps should be taken to prevent its misuse. Nevertheless, whether the comparative impairment concept can be a valuable tool for dealing with true conflicts remains to be seen. While the concept offers a rational means for deciding true conflicts in the abstract, there may be few actual cases where the concept can be of any real use.

Reformulated Interest Analysis

Professor Sedler recently proposed a “reformulation” of Currie’s interest analysis which includes a slight revision of Currie’s approach to the true conflict. Sedler suggests that once a forum determines it has a “real interest” in applying its own law to effectuate the policy reflected by that law, the forum should apply that law without considering the real interests of any other state involved. Thus, as Currie advocated, the courts would always apply forum law in true conflict cases. Underlying Sedler’s position is the thought that as long as a state has an interest in a case, the function of its courts should be to advance its own state policies, not the policies of other states.

If courts functioned in this manner, parochialism would be a justifiable accusation. Professor Sedler’s suggestion would result in the selection of forum law even when the forum state was not the predominantly concerned jurisdiction. Sedler nevertheless defends the rationality of his reformulated approach on the ground that whenever courts have purported to apply “objective criteria” to de-

In Offshore Rental, a California corporation brought a negligence action against a Louisiana corporation for the loss of services of a key employee. In contrast to California case law, Louisiana law did not recognize a cause of action by a corporate plaintiff for the loss of services of an officer. Although the court in Offshore Rental asserted that the comparative impairment concept does not entail the weighing of the respective state interests or the determination of the “worthier” social policy, the court then proceeded to engage in the admonished balancing process: “We therefore conclude that the trial judge in the present case correctly applied Louisiana, rather than California, law, since California’s interest in the application of its unusual and outmoded statute is comparatively less strong than Louisiana’s corollary interest, so lately expressed, in its ‘prevalent and progressive’ law.” 22 Cal. 3d at ___, 583 P.2d at 728, 148 Cal. Rptr. at 874.

115. Sedler, supra note 6, at 181.
116. Id. at 221-22, 227.
117. Id. at 227.
118. See id. at 221.
cide true conflicts, "they have skewed the criteria in favor of the application of their own law."\textsuperscript{119} If so, some courts simply have mishandled the criteria; such misuse does not necessarily mean that the criteria are not worthy or should be abandoned. Moreover, I do not believe that courts "skew" criteria in favor of the application of their own law as often as Professor Sedler implies. While skewing does occur at times, a substantial number of true conflict cases in which courts have applied the law of some other state demonstrate that skewing is not the norm.\textsuperscript{120} Although Professor Sedler is one of the leading contemporary scholars of choice of law and has made many fine contributions to the field, his reformulated method of resolving true conflicts has not proven meritorious. His approach, which follows forum law rigidly in all true conflicts, serves no rational purpose.

Perhaps there never will be a satisfactory method for resolving most true conflicts. If not, this should not be taken as a defeat of the interest analysis. True conflicts exist because the world is not politically unified, but composed of separate states with varying laws. No choice of law methodology can change that situation or provide perfect solutions to every choice of law problem. Under territorialism, there is no rationality whatsoever to choice of law decision making. The interest analysis at least provides rationality to most choice of law decisions, particularly those involving false conflicts. Perhaps that is the most that can be hoped for.

\textbf{RULES VERSUS PROCESS}

Territorialists assert that their approach has the advantage of being more rule-oriented than the functionalism of the interest analysis.\textsuperscript{121} They characterize the interest analysis as an ad hoc decisional process that does not produce rules as does territorial-

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\item \textsuperscript{119} Id. at 232.
\item \textsuperscript{120} See, \textit{e.g.}, Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480 (1957); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); Casey v. Manson Constr. & Eng'r Co., 247 Or. 274, 428 P.2d 898 (1967); Hunker v. Royal Indem. Co., 57 Wis.2d 588, 204 N.W.2d 897 (1973).
\end{itemize}
ism. Rules, of course, are said to be desirable because they invest
the law with stability, certainty, and uniformity.

There are several rebuttals to these arguments. First, certainty
and uniformity should not be sought at the expense of incorrect
decision making. As previously discussed, territorial rules operate
in ignorance of the policies for which the laws were enacted and
thus often frustrate those policies. Put another way, territorial
rules often lead to injustice. It is more important that choice of law
decisions serve justice than certainty and uniformity. No matter
how certain and uniform territorial rules are, they should not be
adopted when to do so derogates the very policies for which laws
were promulgated.

Moreover, it is questionable whether the interest analysis is, as
its critics maintain, an ad hoc process incapable of producing rules.
The interest analysis is by no means ad hoc; to describe it as such
demonstrates a misunderstanding of how the interest analysis op-
erates. On the other hand, the interest analysis is a less rule-orien-
ted system than the territorial approach. As their names state,
the latter is an approach, while the former is a mode of analysis.
Approaches place greater emphasis on rule production than do
modes of analysis. Under an approach, the emphasis is upon rules,
while under a mode of analysis the emphasis is on policy. Ap-
proaches stress formalistic logic; analyses stress in depth un-
derstanding. Nevertheless, this difference should not be exaggerated
unduly; the production of rules under modes of analysis, including
the interest analysis, is not impossible or even difficult. Whether or
not rules are forthcoming is also a function of how legal systems
are wielded by the judges who are in charge of them. Exhibiting
more concern with policy and justice, most modern judges are less
devoted than their predecessors to constructing elaborate bodies of
hard and fast rules. Nevertheless, the interest analysis is capable of
producing rules when the judges who use it care to do so.

122. Reese, Chief Judge Fuld and Choice of Law, supra note 121, at 552, 566; Rosenberg,
supra note 121, at 464.
123. Reese, Choice of Law: Rules or Approach, supra note 121, at 316; Reese, Chief
Judge Fuld and the Choice of Law, supra note 121, at 562.
124. See notes 13-22 supra & accompanying text.
125. But see Sedler, supra note 6, at 209 (contrasting interest analysis and territorialism
by referring to the former as an “approach” and to the latter as a system of “rules”).
Under the common law system, rules are developed from cases. Since the interest analysis is not an aberration of the common law method, rules of choice of law can be developed from court decisions. To prove this point, Sedler, after reviewing conflicts torts cases in jurisdictions that have adopted the interest analysis, was able to identify no less than nine conflicts torts rules that have emerged clearly from the cases. These rules are relatively easy to discern and are no less distinct than territorial rules. The interest analysis thus seems amenable to the production of rules.

Rules, however, may not be as desirable as traditionalists assume. Another point of controversy between legal traditionalists and realists concerns the value of rules. Legal realists maintain that the traditional devotion to—some would say obsession with—rules is misguided. It exalts certainty and uniformity over correct decision making and justice. In addition, too much stability restrains the legal process and makes needed change difficult to accomplish. But perhaps the most telling criticism that realists

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126. See Sedler, supra note 8, at 979-81.
127. Sedler’s analysis of the conflicts torts cases produced nine rules: (1) forum law applies when two residents of the forum are involved in an accident in another state; (2) recovery is allowed when the parties to an accident are residents of a state with a recovery statute, but are involved in the accident in a nonrecovery state; (3) forum law should apply when two residents of a nonrecovery state are involved in an accident in a recovery state and institute the cause of action in the recovery state; (4) forum law should apply when a resident of the forum is injured in the forum as a result of an act committed therein or in a location with the foreseeable risk of harm resulting in the forum state; (5) absent unfairness to the defendant, forum law should apply when a plaintiff, resident of a recovery state, is injured by the defendant in his state of residence, a nonrecovery state; (6) the defendant’s state of residence will apply its own law denying recovery when a plaintiff from a recovery state is injured by defendant, and sues in the nonrecovery state; (7) the commission or omission of an act by the defendant in a state whose laws are grounded in a deterrence policy will result in liability for the defendant when the resultant harm occurs in another state; (8) recovery will usually be awarded to a plaintiff from a nonrecovery state, irrespective of the place of the accident’s occurrence, when the defendant is a resident of a recovery state; (9) an employer’s tort liability to an employee covered by workmen’s compensation is governed by the law of the state in which the employer obtained coverage for the particular employee. Id. at 1033-39.
128. For a discussion of the substantive differences between legal realists and traditionalists, see the text accompanying notes 18-22 supra.
129. J. FRANK, LAW AND THE MODERN MIND 6-7 (1930). Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions; although changes cannot be made lightly, yet law must be more or less impermanent,
level at rules is that the certainty and uniformity ostensibly produced is, at best, superficial. 130 True certainty and uniformity cannot be achieved by rules because rules suffer necessarily from one of two flaws; they are either too general or too specific. When too general, laws provide little, if any, guidance. As Jerome Frank argues, "[a] generalization is empty so far as it is general." 131 When empty and providing a minimum of guidance, general rules fail to evince certainty or uniformity. On the other hand, when rules are specific, they become rigid and incapable of dealing with the multitudinous factual permutations that arise in cases. Inevitably, an exception must be grafted upon the rule and then another and another, with exceptions to the exceptions soon to follow. Each exception required decreases the amount of certainty and uniformity of the original rule. Rule specificity, then, leads to little more stability than does its antithesis, generality.

Reaching a compromise between specificity and generality is impossible for all but the rarest of rules. The law must deal with problems as vast and complex as life itself and therefore cannot be reduced to neat formulae that are capable of treating those problems with certainty and uniformity. 132 A court opinion, like a novel, play, or poem, cannot be reduced to a shorthand statement of its meaning without losing much of that meaning. Holdings of cases stated as rules tell us something about the cases but also omit important details. Were it not so, students, teachers, lawyers, and judges would never have to read judicial opinions to understand the law. To the contrary, we are all cognizant of the fact that experimental, and therefore not nicely calculable. Much of the uncertainty of law is not an unfortunate accident: it is of immense social value.

Id.

The art of free society consists first in the maintenance of the symbolic code; and secondly in fearlessness of revision, to secure that the code serves those purposes which satisfy an enlightened reason. Those societies which cannot combine reverence to their symbols with freedom of revision, must ultimately decay either from anarchy, or from the slow atrophy of a life stifled by useless shadows.


132. "The law deals with human relations in their most complicated aspects. The whole confused, shifting helter-skelter of life parades before it—more confused than ever, in our kaleidoscopic age." Id. at 6.
the sine qua non of legal understanding is reading the opinions. Rules can never be anything other than shorthand abbreviations for complex legal concepts, doctrines, and ways of thinking. As such, rules cannot be relied upon for certainty or uniformity.

In fact, to the extent that certainty and uniformity can be effectuated, they probably are attained more readily through a process than through a rule-oriented approach. Unlike rules, processes allow one to deal with the complexities of law, and therefore lead to a deeper understanding of the law. The formalism of rules results in the production of shallow certainty and uniformity, while the analytical nature of processes leads to a more genuine certainty and uniformity.

The specious certainty and uniformity that rules seem to provide is often accomplished by manipulating rules so as to achieve what Jerome Frank called "verbal stability." Verbal stability entails the retention of an old rule in its verbal form and the association of the old rule with new meanings, so as in effect to produce a new rule. Thus, a rule seems consistent on its face, when in fact it operates inconsistently. There is a stability of words, but not of content. This phenomenon is no stranger to conflict of law cases under the territorial approach. In fact, it occurs often enough in territorial cases to be treated in choice of law textbooks under its own heading: "characterization." The term "characterization" refers to the practice of manipulating choice of law rules by characterizing or labelling the legal issues presented by a case. If, for instance, an issue is characterized as a tort issue, it will call for a particular territorial rule that selects a certain state's law. On the other hand, if it is characterized as a contract issue, it will call for a different territorial rule that may select a different state's law. Since many issues combine elements of two or more legal categories, a great deal of leeway, and thus a great deal of manipulation, are possible in characterizing issues.

134. Id.
Characterization is an instance of verbal stability that gives the territorial approach a facade of stability but not the reality of it. Characterization is not an uncommon occurrence under the territorial approach; to the contrary, it is pervasive. It is not the only device that causes spurious stability, as other manipulative devices abound in the territorial approach. Among those are the renvoi doctrine, the dichotomy between substance and procedure, the exceptions for public policy, and the exceptions for penal and fiscal laws. Each device decreases the amount of certainty and uniformity that territorial rules purportedly carry. Thus, territorial rules are not nearly as stable as their adherents claim. Indeed, true stability is more probable with a process such as the interest analysis than with a rule-oriented approach such as territorialism. By emphasizing depth of reasoning, the interest analysis produces


137. R. CRAMTON & D. CURRIE, supra note 17, at 68-69.
138. Renvoi refers to the occurrence wherein a court in state A chooses the law of B to govern a case before it, but the choice-of-law rules of state B concerning the conflicts case turn to the law of state A to govern the case. Since forums are not consistent in their acceptance or rejection of the renvoi (reference back to their own law), legal stability is decreased. See Cormack, Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws, 14 S. Cal. L. Rev. 221, 249-51 (1941). For further discussion of the renvoi doctrine, see Falconbridge, Renvoi and the Law of the Domicile, 19 CAN. B. Rav. 311 (1941); Griswold, Renvoi Revisited, 51 HARV. L. REV. 1165 (1938).
139. W. REESE & M. ROSENBERG, supra note 7, at 435. Under the territorial approach, even though another state's substantive law is selected to govern a case, the forum is free to follow its own procedural law. Horowitz, supra note 6, at 741-42. This leads to a great deal of uncertainty.
140. W. REESE & M. ROSENBERG, supra note 7, at 509. The territorial approach allows a court to refuse to apply another state's law (that otherwise would govern the case) if that law is thought to violate the public policy of the forum, thus fostering uncertainty in the application of a forum's law. See id.
141. Penal and revenue laws constitute exceptions to the traditional rule mandating the enforcement of foreign causes of action. These exceptions necessarily derogate the objectives of certainty and uniformity. Under the territorial approach to conflicts problems, a forum may refuse to enforce foreign penal and revenue claims contrary to the public policy of the forum. R. CRAMTON & D. CURRIE, supra note 17, at 131-37.
more genuine stability than does the superficial logic of territorial rules.

**FOCUS OF THE CONTROVERSY: THE GUEST STATUTE CASES**

A sharp difference of opinion exists between territorialists and interest analysts concerning multistate tort cases in which one state has a guest statute that would prohibit recovery and another state does not. Teritorialists believe that such cases should be governed by the law of the place where the accident occurred, while most adherents of the interest analysis regard the place of occurrence as an irrelevant factor for choosing which law to follow.

Territorialists maintain that tort laws, including the rules governing guest-host relationships, do not serve the mere purpose of compensating injured persons, but also serve the purpose of deterring wrongful conduct. Tort laws are purported to be admonitory because they are meant to prevent harmful conduct within the territory of a state. From this premise, territorialists argue that the guest-host rules prove the soundness of territorialism. Territorialists extrapolate from guest-host rules, which they believe to be territorially based, to assert that all laws are territorially based. Surely this argument is excessive. The basis of one law in territorial principles does not extend to all other laws. As explained previously, some laws are meant to govern events within a territory and some are not. Under the interest analysis, those laws that are territorially based can be recognized as such, and a state's territorial interest in them can be afforded the application it merits. The interest analysis demonstrates, however, that some laws are meant to operate territorially and others are not.

The question that remains is whether the territorialists are correct in stating that guest-host rules are territorially based because they are meant to deter or admonish conduct within a state. The existence of criminal laws which penalize wrongful conduct that

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142. Similarly, the dispute thrives in situations in which one state has an intrafamily immunity law barring recovery and another state does not.
143. See D. Cavers, supra note 24, at 139-40.
144. See id. at 140-41.
145. See pp. 233-34 supra.
146. See notes 36-37 supra & accompanying text.
also constitutes a tort is one indication that tort laws are compensatory and not admonitory. This argument is consistent with the modern view of tort law, which rejects the penal or admonitory purpose. Nevertheless, Professor Cavers maintains that tort laws also constitute an admonitory "second line of defense" against harmful conduct. While some advocates of the interest analysis agree that tort laws serve an admonitory function, most maintain that tort laws are purely compensatory. The courts also are divided on this issue.

The significant difference between the presence and the absence of a guest statute is generally overlooked in this debate. When one state does not have a guest statute or similar rule, its interest, if any, is in the application of its laws making negligence an actionable tort. Those laws may or may not be admonitory; the issue is highly debatable. When the other state does have a guest statute, it can hardly be said that the state’s interest is admonitory. In the first place, guest statutes do not admonish conduct; to the contrary, they immunize conduct from liability. Second, the conduct that is immunized by guest statutes certainly is not conduct that any state encourages. It is, after all, tortious conduct causing harm. Thus, it can be concluded that guest statutes are not in any way admonitory. While a state’s tort laws in the absence of a guest statute may or may not be admonitory, guest statutes clearly are not.

When an accident occurs in a state having a guest statute that would bar recovery, and the guest and the host are nonresidents,

148. D. CAVERS, supra note 24, at 140.
150. See generally Sedler, supra note 8, at 1035; Sedler, Judicial Method is “Alive and Well”: The Kentucky Approach to Choice of Law in Interstate Automobile Accidents, 61 KY. L.J. 378, 382-83 (1973).
152. See Twerski, supra note 7, at 378.
the state where the injury occurred has no interest in having its law govern the controversy between the guest and the host. It has no interest in protecting the host from liability, because the host, being a nonresident, is not within the governmental responsibility of the state. Nor does the state have an interest in encouraging or even allowing the guest's conduct within its borders, because no state favors harmful conduct. In these circumstances, the fact that an injury occurs in a guest statute state is irrelevant, and that state's law should not be chosen to govern the case.

When an accident occurs in a state that does not have a guest statute, and the guest and host are nonresidents, the state where the accident occurred has an interest in having its law govern the controversy between the guest and host only if one believes that tort laws serve an admonitory purpose. If so, and if the plaintiff is from a guest statute state, but the defendant is from a non-guest statute state, the case presents a false conflict calling for the application of the law of the state where the accident occurred. If, however, the defendant is from a guest statute state, the case presents a true conflict that is not resolved so easily. Of course, if one believes that tort laws are purely compensatory, then the place of injury is entirely irrelevant, and its laws should never govern.

Guest statute cases have proven to be more problematic for choice of law decision making than most other kinds of cases. This is attested by the large amount of guest statute choice of law cases that arise in the courts. guests These cases are complicated by the sharp difference of opinion concerning whether tort rules are purely compensatory or also serve an admonitory purpose. Regardless of the purpose underlying other tort rules, guest statutes do not have an admonitory purpose and thus ostensibly enable an easier resolution of the choice of law dilemma in such cases.

CONCLUSION

The territorial approach to choice of law operates in the traditional mode of legal thinking referred to by Karl Llewellyn as the

153. See, e.g., Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973); Griggs v. Riley, 489 S.W.2d 469 (Mo. Ct. App. 1972); Gagne v. Berry, 112 N.H. 125, 290 A.2d 624 (1972); Conklin v. Horner, 38 Wis.2d 468, 157 N.W.2d 579 (1968).
Formal Style. In the traditional mode, the territorial approach emphasizes formalistic rules and logic that often are devoid of policy or purposes. Territorial rules present a facade of stability, but fail to produce real certainty and uniformity. Underneath their formal logic, they are irrational in the choice of law decisions that they dictate. Nevertheless, the greatest failure of territorialism is its lack of functionalism, its blindness to the purposes of laws.

The interest analysis, which has its roots in the works of Cook, Lorenzen, and Cavers, was conceived in reaction to the inadequacy of territorialism. By the early 1960's, the basic structure of the interest analysis had been outlined by Brainerd Currie. Additions to and remodelling of that structure were provided by such scholars as von Mehren, Trautman, Baxter, Horowitz, and Sedler. The interest analysis has had a profound and extensive effect upon the choice of law process, as evidenced by the rejection of the traditional approach in conflicts torts cases in twenty-seven jurisdictions. Indeed, it is not an exaggeration to state that the interest analysis has revolutionized choice of law decision making. The interest analysis now exemplifies a comprehensive methodology for choice of law decision making that has proven itself in actual practice in the courts. It operates in the Grand Style, thereby bringing rationality and purpose to the choice of law process. It is thoroughly capable of producing the degree of certainty and uniformity that may be desirable in the legal process. Above all, the interest analysis is functional; choice of law decisions are made with the intent of accomplishing the policies for which laws are enacted.

154. See notes 18-21 supra & accompanying text.
155. Sedler, supra note 8, at 976 n.2.
156. Id. at 975-76.
157. See text accompanying notes 21-22 supra.