

# ESSAY

## Governmental Interests and Multistate Justice: A Reply to Professor Sedler

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In the last issue of the *U.C. Davis Law Review* Professor Robert Sedler published an article that takes issue with my critique of the so-called “interest analysis” approach to choice of law.<sup>1</sup> It flatters me that he deems my contributions worthy of a response, and I am delighted not only about the nice things he said about me, but also about his taking the time to summarize, analyze, and criticize what I had to say. I am of course disappointed that Professor Sedler did not like what he read. But his reaction is understandable considering that, as he points out, we differ on several fundamental points. In the following, I shall attempt to list our differences and to say a few words in defense of the positions I have taken.

### I. THE FLAWS OF INTEREST ANALYSIS

#### A. *An Approach Devoid of Discernment*

Professor Sedler and I differ, first of all, on the question of whether there is any substance to those “governmental interests” which the late Brainerd Currie believed to be central to choice-of-

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<sup>1</sup> Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a Response*, 23 U.C. DAVIS L. REV. 865 (1990) [hereafter Sedler, *Appreciation*].

law analysis.<sup>2</sup> Now “interest” is a slippery term that covers a variety of different phenomena, and Professor Sedler does not deny the obvious, namely that not all interests are created equal. He concedes that there is a *spectrum* of governmental interests,<sup>3</sup> ranging, I suppose, from the strong to the weak and presumably approaching zero intensity at the lower end. Yet interest analysis fails to make any allowance for differences in strength of the interests allegedly at stake in conflicts cases, or of the policies in whose realization governments are supposedly interested.<sup>4</sup>

At one point Professor Sedler seems at least to draw a line between different kinds of policies. Thus he tells us that “[s]tate laws do . . . ‘wish to be applied’ in litigation between private parties when they reflect a *strong* policy.”<sup>5</sup> Yet he fails to mention why such wishes should be honored if the law in question reflects a weak, indefensible or perhaps nonexistent policy.<sup>6</sup> Also, from his discourse and the examples he gives one must deduce that the adjective “strong” is superfluous, and therefore misleading, and that any conceivable policy, however misguided or insipid it may be, is strong enough to support an interest.

The United States Supreme Court, of course, is more discerning than the analysts. Rather than treating all kinds of concerns and policies alike, the Court distinguishes situations that call for a “resolution of conflicting governmental interests”<sup>7</sup> at the highest judicial level from situations where the asserted interests are too ephemeral to provoke a dispute between states.<sup>8</sup> In other words, although the Court’s case law is responsible for the indiscriminating use of the term “interests,” the Justices are quite aware of the difference between those that are real and those that are spurious.<sup>9</sup> Currie also spotted this difference, but he failed to draw appropriate conclusions from it.<sup>10</sup>

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<sup>2</sup> See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS passim* (1963).

<sup>3</sup> Sedler, *Appreciation*, *supra* note 1, at 878 (emphasis in original).

<sup>4</sup> *See id.*

<sup>5</sup> *Id.* (emphasis added).

<sup>6</sup> See B. CURRIE, *supra* note 2, at 105-06, 175, 608-9.

<sup>7</sup> *Texas v. Florida*, 306 U.S. 398, 434 (1939) (Frankfurter, J., dissenting).

<sup>8</sup> *California v. Texas (I)*, 437 U.S. 601, 611 (1978) (Stewart, J., concurring).

<sup>9</sup> See Juenger, *Governmental Interests—Real and Spurious—in Multistate Disputes*, 21 U.C. DAVIS L. REV. 515, 520-28 (1988) [hereafter Juenger, *Governmental Interests*].

<sup>10</sup> *See id.* at 529-30.

Currie's approach, avowedly geared as it is to the analysis of conflicting interests, can therefore be faulted for lumping together trivial or nonexistent governmental concerns with those that touch upon the very *nervus rerum*. Similarly, his method is open to challenge for failing to accord any significance to the different strengths of competing policies. An approach so utterly wanting in discernment hardly deserves to be called "analysis." That the alleged governmental concerns at the lower end of the spectrum lack substance is apparent from the analysts' need to resort to fiction. Going beyond Currie, who resorted to anthropomorphizing states to impute interests to them,<sup>11</sup> Professor Sedler anthropomorphizes laws, attributing to them a "wish to be applied,"<sup>12</sup> as if rules of law were human (or at least animalic), with feelings and desires of their own. Such metaphysics strongly suggest that the interests of which the analysts speak are but figments of legal imagination.

B. "Functionally Sound and Fair Results"?

Sensing, I suppose, the inherent weakness of the approach's fundamental concept, Professor Sedler asserts that "the interest of the state in the application of its law to implement the policy reflected in that law is *not*, in my view, the underlying premise of the interest analysis approach."<sup>13</sup> Undisturbed by the potential for confusion inherent in the use of a nomenclature coined to express a rather different conflicts philosophy,<sup>14</sup> Professor Sedler defends interest analysis on the purely pragmatic ground that it enables a court to reach a "functionally sound and fair result in the case before it."<sup>15</sup>

On that proposition we do not disagree. In fact, interest analy-

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<sup>11</sup> See *id.* at 518.

<sup>12</sup> Sedler, *Appreciation*, *supra* note 1, at 878. Sedler is, of course, neither the only nor the first unilateralist to resort to this far-fetched fiction. See Juenger, *Governmental Interests*, *supra* note 9, at 531. Apparently, neither of the two orthodox conflicts approaches can make do without such imagery; the "*volonté d'application*" is but the counterpart of the unilateralists' "seat" of legal relationships. *Id.*; see also Juenger, *General Course on Private International Law*, in 193 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 119, 256 (1985-IV) [hereafter Juenger, *General Course*].

<sup>13</sup> Sedler, *Appreciation*, *supra* note 1, at 878 (emphasis in original); see also *id.* at 879 n.71 (noting Sedler's disagreement with Currie's "overemphasis . . . on the interest of the state").

<sup>14</sup> See B. CURRIE, *supra* note 2, at 178-80.

<sup>15</sup> Sedler, *Appreciation*, *supra* note 1, at 878-79.

sis allows judges to reach virtually any result they wish to reach.<sup>16</sup> The results they do reach are, however, hardly attributable to the ratiocinations in which they indulge; rather, like any nonrule approach, interest analysis simply leaves courts free to decide lawsuits as they wish. Left to their own devices, most judges — quite unsurprisingly — avail themselves of this freedom to reach decent results in interstate cases.<sup>17</sup> The chameleon-like adaptability of interest analysis is further enhanced by the fact that it covers a multitude of approaches, Currie's followers differing from one another in various and sundry ways.<sup>18</sup> Accordingly, if in an actual case Professor Sedler's version would produce an unwelcome decision, the judge may simply choose to rely on the teachings of some other analyst.

Some courts, however, do take interest analysis at face value. But when they do attempt earnestly to assess the conflicting claims of different sovereigns to regulating a particular set of facts, the outcomes often leave much to be desired. Lost in speculations about legislative policies and governmental interests, judges are apt to write convoluted opinions in support of decisions that offend one's sense of justice, as the New York Court of Appeals did in *Schultz v. Boy Scouts of America, Inc.*<sup>19</sup> That case callously denied a New Jersey couple and their son recovery from two foreign charities for the molestation of the boy and his brother and for the brother's resulting suicide. Sacrificing interstate justice on the altar of New Jersey's alleged interest in a statute that had resuscitated the moribund principle of charitable immunity, this New York Court of Appeals decision demonstrates how Currie's doctrine can produce mischief.<sup>20</sup>

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<sup>16</sup> Compare *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978) (applying law of Louisiana, situs of accident, to deny recovery to California plaintiff) with *Pfau v. Trent Aluminum Co.*, 55 N.J. 511, 263 A.2d 129 (1970) (refusing to apply law of Iowa, situs of accident, to bar recovery by Connecticut plaintiff against forum resident).

<sup>17</sup> See Juenger, *What Now?*, 46 OHIO ST. L.J. 509, 513-15, 524 (1985).

<sup>18</sup> See *id.* at 509-10; cf. Sedler, *Appreciation*, *supra* note 1, at 866 n.2 ("interest analysis . . . as developed by . . . Currie and refined by his followers"), 887 ("interest analysis . . . as I have reformulated it"). For examples of how courts split on "interests" see *id.* at 894 nn.124 & 126.

<sup>19</sup> 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985).

<sup>20</sup> Another New York illustration of interest analysis' propensity to invoke substandard laws is *Feldman v. Acapulco Princess Hotel*, 137 Misc. 878, 520 N.Y.S.2d 477 (Sup. Ct. 1987), in which the court limited the

But unsatisfactory results apparently do not disturb Professor Sedler,<sup>21</sup> who considers conflicts decisions “functionally sound and fair”<sup>22</sup> as long as they have been reached by means of interest analysis. Here, however, he begs the question. It is clearly circular first to commend an approach for its ability to produce a “functionally sound and fair result,”<sup>23</sup> and then to conclude that a particular result is “functionally sound and fair” because it is a product of that approach.

Elsewhere I have attempted to show that the traditional multilateralist approach to choice of law and the interest analysts’ unilateralist methodology share certain vices.<sup>24</sup> Since both of these conflicts orthodoxies proceed from the basic premise that solutions to multistate problems can be derived from an allocation of lawmaking power, both encounter similar difficulties and both are forced to rely on similar artifices.<sup>25</sup> Probably unwittingly, Professor Sedler furnishes yet another example for this propensity. Anointing results reached by applying interest analysis as “functionally sound and fair” is but the counterpart of the traditionalist’s contention that their methodology promotes “conflicts justice.”<sup>26</sup>

### C. A Rational Approach?

Professor Sedler believes that interest analysis, in addition to

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recovery of plaintiff, whose hospital and medical bills exceeded \$29,000, to \$5,256. The judge assumed that the ceiling on recovery established in a statute of the Mexican state of Guerrero reflected a Mexican interest in promoting tourism and a concern about the country’s sovereignty and resources, a dubious conclusion that is unsupported by evidence.

<sup>21</sup> Professor Sedler categorizes the New York conflicts approach to tort cases as “interest analysis/policy-based rules.” R. SEDLER, *ACROSS STATE LINES* 44 (1989). He cites *Schultz* as an example of this approach, without either criticizing or applauding it. Elsewhere, however, he does approve of similarly questionable decisions as *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964), which struck down an interstate contract because of a spurious Oregon “spendthrift” statute; he also approves of cases applying such outdated rules as interspousal immunity and statutory dollar limitations on wrongful death recovery. See Sedler, *Appreciation*, *supra* note 1, at 882 nn.81 & 82, 883, 891-92, 896 n.130.

<sup>22</sup> Sedler, *Appreciation*, *supra* note 1, at 893.

<sup>23</sup> See *supra* note 15 and accompanying text.

<sup>24</sup> Juenger, *General Course*, *supra* note 12, at 255-56.

<sup>25</sup> *Id.*

<sup>26</sup> See Kegel, *The Crisis of Conflict of Laws*, in 112 *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW*, 91, 183-85 (1964-II).

being “functionally sound,” is the most *rational* method of resolving choice-of-law issues.<sup>27</sup> But an approach premised on notions that require a leap of faith<sup>28</sup> can hardly claim to be rational. No one has succeeded in adducing any empirical evidence for the proposition that a government is interested in having its own rather than a foreign law applied to an ordinary tort or contract. As long as no one does, the existence of such interests must remain in doubt. In fact, Professor Sedler may be ready to concede as much.<sup>29</sup> Given the tenuous nature of its central assumption, governmental interests analysis appears hardly more rational than Beale’s approach, which hypothesized a mysterious vesting of rights.<sup>30</sup>

Perhaps it bears reiteration at this point that neither Currie nor any other interest analyst has ever been able to tell us who exactly is supposed to be interested in the outcome of the many lawsuits that are brought within a state.<sup>31</sup> Where states have interests, they usually appoint agencies, such as tax collectors and customs officials, to protect their prerogatives. Yet, to the best of my knowledge, no state or nation has ever designated a governmental agency to vindicate the kind of concerns Currie thought a state has in the application of its law. Nor has any state resorted to diplomacy or other means to safeguard these concerns against infringements by other states and foreign nations. Troubled, perhaps, by such considerations and critical of Currie’s “over-emphasis . . . of the interest of the state,”<sup>32</sup> Professor Sedler nonetheless maintains that “even if . . . a real interest were absent . . . the rationality justification still would remain.”<sup>33</sup> But how can an analysis that rests on nonexistent premises be rational? Surely, Weintraub is right when he calls “state interests” a “needlessly confusing term.”<sup>34</sup>

Not only does the approach lack rationality, it distorts the interest analysts’ perspective. Preoccupied with governmental con-

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<sup>27</sup> Sedler, *Appreciation*, *supra* note 1, at 879 (emphasis in original).

<sup>28</sup> See Juenger, *What Now?*, *supra* note 17, at 509.

<sup>29</sup> See *supra* note 13 and accompanying text.

<sup>30</sup> See 3 J. BEALE, *A TREATISE ON THE CONFLICT OF THE LAWS* 1968-69, 1974 (1935).

<sup>31</sup> See Juenger, *Governmental Interests*, *supra* note 9, at 518-19.

<sup>32</sup> Sedler, *Appreciation*, *supra* note 1, at 879 n.71.

<sup>33</sup> *Id.* at 880.

<sup>34</sup> Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493, 495 (1985).

cerns, Currie failed to grasp the implications of his own methodology. Thus, he could “find no place in conflict-of-laws analysis for a calculus of private interests.”<sup>35</sup> In reality, however, his method’s built-in forum bias invites forum shopping, and forum shopping allows litigants to frustrate whatever concerns a sovereign may have in the resolution of private disputes by staying out of that sovereign’s courts. In this fashion, a method that purports to vindicate state interests subverts its very *raison d’être*.

And how can interest analysis explain the power of individuals and corporations to defeat sister-state concerns by failing to raise the foreign law issue?<sup>36</sup> How can it explain their power to designate, by private contract, the applicable law<sup>37</sup> and the forum in which they wish to litigate their disputes?<sup>38</sup> The recognition of party autonomy is of course irreconcilable with the notion that governmental rather than private interests reign supreme in the conflict of laws.<sup>39</sup> If interest analysis is “rational,” is contract conflicts law irrational?

#### D. The Domiciliary Nexus

After taking issue with my critique of the key concept of interest analysis, Professor Sedler goes on to chide me for oversimplifying matters. Specifically, he takes issue with my statement that Currie’s version of interest analysis “amounts to little more than a

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<sup>35</sup> B. CURRIE, *supra* note 2, at 610.

<sup>36</sup> *See id.* at 75-76, 665-66.

<sup>37</sup> *See* U.C.C. § 1-105(1) (1987); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

<sup>38</sup> *See, e.g.,* Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 551 P.2d 1206, 131 Cal. Rptr. 374 (1976).

<sup>39</sup> Although Professor Sedler discusses choice-of-law and forum-selection clauses, R. SEDLER, *supra* note 21, at 70-75, he makes no attempt to reconcile the phenomenon of party autonomy with the tenets of interest analysis except to note that choice-of-law clauses will not be recognized to displace an otherwise applicable law that expresses a *strong policy*. *Id.* at 73-74 (emphasis in original). The qualifier “strong” seems incongruous because, as noted earlier, interest analysis makes no allowance for differences in the strength of policies. *See supra* text accompanying notes 6-10. In a cognate field, the Supreme Court has recognized the incompatibility of notions of sovereignty with a party’s power to affect jurisdiction. *See* Insurance Corp. v. Companie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982).

complicated way of saying that the law of the domicile governs.”<sup>40</sup> Should I have confused anyone beyond the measure of confusion that inheres in the doctrine I attacked, I offer my apologies. But I unabashedly confess distaste for the excessive refinements that this doctrine (if not as set forth by Currie, then at least as modified by his disciples) forces upon courts and scholars. If I am guilty of over-simplification, I still have the excuse that I tried hard to clarify what may look to others as murky as it looks to me.

Yet, I wonder how far off the mark I was. According to Professor Sedler, the law of the parties’ common domicile does control recovery in tort cases.<sup>41</sup> What difference does it make whether one attributes this result to a common-domicile rule, or requires the judge first to jump through the hoops of analyzing policies and interests? Elegance, concision, and comprehensibility, not to mention predictability, are better served by a simple rule than an amorphous “process.” Attempting to show that the law of the common domicile does not invariably control, Professor Sedler, apparently at a loss for real cases, contrives a hypothetical: A couple from a state that has retained interspousal immunity quarrels in a state that has abolished the immunity, and one spouse inflicts severe<sup>42</sup> personal injuries upon the other. He concludes that a court of the altercation state should apply its own law because the forum has a “real interest.”<sup>43</sup>

Quite apart from Professor Sedler’s failure to tell us which states, if any, still retain interspousal immunity for intentional torts, the distinction he draws between domestic altercations and traffic accidents is quite dubious. Should the applicable law depend upon whether the wife hits her husband with a wrench or, in her anger, drives the family car into a ditch? Do state interests vary depending on whether a particular jury characterizes her conduct as negligent, willful or intentional? Such subtleties and refinements, which rarely crop up in the so-called “real world,” may interest the analysts and give them something about which to disagree. To the skeptical outsider, however, they merely demonstrate the needless complexities of Currie’s approach.

At the very least, it seems misleading to say that “domicile does

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<sup>40</sup> Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 39 (1984) [hereafter Juenger, *Critique*].

<sup>41</sup> Sedler, *Appreciation*, *supra* note 1, at 883.

<sup>42</sup> *Id.* at 883. Professor Sedler fails to tell us whether the result would differ if the injuries were not severe.

<sup>43</sup> *Id.* at 883-84.



not have overriding analytical or functional significance in interest analysis."<sup>44</sup> As perceptive judges have noted, the switch from the First Conflicts Restatement to interest analysis entailed abandoning the common law's traditional emphasis on territoriality for the personal law principle.<sup>45</sup> The shift to the domiciliary nexus<sup>46</sup> explains why the results reached by applying interest analysis differ so dramatically from those following from the First Restatement rules. Moreover, domicile, the nexus that turns individuals into taxpayers and voters, is, of course, the magic ingredient that supposedly converts private interests into governmental interests. Currie's fixation with the personal as opposed to the territorial nexus is obvious. That predilection prompted him to explain the accident state's interests in terms of protecting resident medical creditors.<sup>47</sup> It also creates the strange and wondrous conundrums of "true conflicts" and "unprovided-for cases," which manifest themselves when litigants lack a common domicile. Should I have overstated my case, I have at least emphasized what must be emphasized to understand the implications of Currie's methodology.

#### E. *The Forum Law Bias*

That interest analysis is a handy pretext for applying forum law should be obvious from the reported decisions. In the large majority of cases, courts that adopt this approach end up applying the *lex fori*.<sup>48</sup> I do not, of course, maintain that each and every case follows that pattern. Interest analysis is, after all, a methodology so vague and nebulous that it can support almost any result, including the application of sister-state law either to grant or to deny recovery to a resident tort plaintiff.<sup>49</sup> But exceptions

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<sup>44</sup> *Id.* at 884.

<sup>45</sup> See, e.g., *Tooker v. Lopez*, 24 N.Y.2d 569, 597, 249 N.E.2d 394, 411-12, 301 N.Y.S.2d 519, 543 (1969) (Breitel, J., dissenting); *Babcock v. Jackson*, 12 N.Y.2d 473, 486, 191 N.E.2d 279, 286, 240 N.Y.S.2d 743, 753 (1963) (Van Voorhis, J., dissenting).

<sup>46</sup> If I speak of the "domiciliary" nexus, I may once again be faulted for simplifying. Interest analysts thrive on complexity, and complexity is the enemy of definition. They have therefore been unable, to this day, to define the required nexus. See Juenger, *Critique*, *supra* note 40, at 39.

<sup>47</sup> See B. CURRIE, *supra* note 2, at 366, 701-02.

<sup>48</sup> See, e.g., *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

<sup>49</sup> Compare *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157,

that result from the approach's open-ended nature do not eradicate its intrinsic forum bias.

Taking issue with my contention that "non-rule approaches . . . serve as a thinly disguised pretext for applying forum law,"<sup>50</sup> Professor Sedler serves up some hypothetical cases in which the forum happens to be a "disinterested state."<sup>51</sup> But at least before Justice Scalia miraculously resuscitated the *Pennoyer*<sup>52</sup> doctrine in *Burnham v. Superior Court*,<sup>53</sup> a state had to have certain "minimum contacts" to be able to claim jurisdiction.<sup>54</sup> Since, according to *Allstate Insurance Co. v. Hague*,<sup>55</sup> contacts spawn interests,<sup>56</sup> how could there be such a thing as a disinterested forum? Regrettably, Professor Sedler fails to tell us what specific situations he has in mind.

In the same context, Professor Sedler also discusses "unprovided-for cases,"<sup>57</sup> another curious phenomenon resulting from the analysts' preference for the domiciliary nexus.<sup>58</sup> I leave it to them to cope with their self-inflicted difficulties, which have

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583 P.2d 721, 148 Cal. Rptr. 867 (1978) (applying sister-state law to deny recovery) and *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985) (applying sister-state law that arguably violates New York public policy to deny recovery) with *Standal v. Armstrong Cork Co.*, 356 N.W.2d 380 (Minn. Ct. App. 1984) (applying sister-state law to award recovery).

<sup>50</sup> Juenger, *What Now?*, *supra* note 17, at 516.

<sup>51</sup> Sedler, *Appreciation*, *supra* note 1, at 880.

<sup>52</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1877).

<sup>53</sup> 110 S. Ct. 2105 (1990).

<sup>54</sup> See *Shaffer v. Heitner*, 433 U.S. 186 (1977). Justice Scalia's opinion announcing the Court's judgment in *Burnham* limits Justice Marshall's statement in *Shaffer* that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny" to quasi in rem actions. *Shaffer*, 433 U.S. at 212; *Burnham*, 110 S. Ct. at 2115-16. Only the Chief Justice and Justice Kennedy, however, joined Scalia's opinion in full. Justice Brennan's concurrence, in which three other Justices joined, assumes the continued validity of the principle Justice Marshall announced in *Shaffer*. *Id.* at 2121-22 (Brennan, J., concurring). Thus, it remains unclear whether service within a state is sufficient, in and of itself, to confer jurisdiction on a "disinterested forum." For a critique of *Burnham* and a discussion of its implications see Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: from Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990).

<sup>55</sup> 449 U.S. 302 (1981).

<sup>56</sup> See *id.* at 308.

<sup>57</sup> Sedler, *Appreciation*, *supra* note 1, at 886-87.

<sup>58</sup> See Juenger, *What Now?*, *supra* note 17, at 510.

already generated a literature as esoteric and abstruse as anything ever written about the classical puzzles of *renvoi* and characterization.<sup>59</sup> I do, however, find Professor Sedler's manner of dealing with this oddity exceptionally congenial. Unlike Currie (who, as usual, favored applying the *lex fori*<sup>60</sup>), Professor Sedler prefers to let the law more favorable to the tort plaintiff prevail. While I find his fiction of a "common policy"<sup>61</sup> to be both implausible and dispensable, it does make good sense to use the *favor laesi* as a tie-breaker.<sup>62</sup> I am happy to note our agreement on the proposition that, at least in this respect, teleology is preferable to chauvinism.

## II. THE ROLE OF TELEOLOGY

### A. Judicial Instincts

Let me now turn to the crux of my disagreement with Professor Sedler. In my view the conflict of laws ought to serve the function of producing, in interstate cases, substantive solutions that are responsive to the exigencies of multistate transactions. To that end I advocate a choice-of-law approach that takes into account the quality of the rules of decision among which the court is asked to choose.<sup>63</sup> In contrast, Professor Sedler professes to believe that the quality of the substantive rules that are applied to a multistate transaction is irrelevant, as long as courts engage in a calculus of governmental interests and policies.<sup>64</sup>

Yet, when courts actually decide conflicts cases, they can hardly be oblivious to the difference in result that follows from applying one rule of decision rather than another. As Cavers once put it, "only a judge in whom the legal mind . . . has hypertrophied could exclude from consideration the consequences of the application of the proffered law to the facts of a given case."<sup>65</sup> Interest analysis compels courts to look at the policies behind the laws

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<sup>59</sup> Interest analysts are not even sure that unprovided-for cases do "exist." See Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045 (1989).

<sup>60</sup> See B. CURRIE, *supra* note 2, at 152-56.

<sup>61</sup> Sedler, *Appreciation*, *supra* note 1, at 887.

<sup>62</sup> See Juenger, *General Course*, *supra* note 12, at 275, 290-91.

<sup>63</sup> See, e.g., *id.* at 269-99, 319-22; Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105, 121-27 [hereafter Juenger, *Mass Disasters*].

<sup>64</sup> Sedler, *Appreciation*, *supra* note 1, at 890-91.

<sup>65</sup> Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 181 (1933).

proffered for application. At this point, qualitative differences become painfully apparent. The degree of hypertrophy required to distract a judge who has been probing these policies from comparing their merits and efficacy should suffice to disqualify him from holding office.

Actual practice certainly does not bear out Professor Sedler's assumption that judges are blind to the merits of competing rules and policies. Even when conflicts rules were hard and fast, courts manipulated them by resorting to escape devices to reach palatable results.<sup>66</sup> The esoteric vocabulary and fluffy concepts of interest analysis have considerably enhanced the freedom of judges to follow their sense of justice. A large number of the cases that have prompted courts to "go modern" involve, like *Babcock v. Jackson*,<sup>67</sup> foreign guest statutes.<sup>68</sup> A glance at a standard treatise<sup>69</sup> should make it obvious why courts were willing to scuttle the *lex loci delicti* rule which compelled the application of such monstrosities. Some other early cases dealt with intrafamily immunity,<sup>70</sup> the functional equivalent of a guest statute, and yet others with limitations on wrongful death recovery.<sup>71</sup> Judicial aversion to such "drags on the coattails of justice,"<sup>72</sup> rather than the intrinsic worth of modern conflicts approaches, may well explain the American "conflicts revolution." That, at least, is what they seem to think in West Virginia.<sup>73</sup>

There are of course cases in which federal judges, the lower

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<sup>66</sup> See B. CURRIE, *supra* note 2, at 132-33, 181; R. LEFLAR, L. MCDUGAL & R. FELIX, *AMERICAN CONFLICTS LAW* 257-61, 299-300 (4th ed. 1986) [hereafter *AMERICAN CONFLICTS LAW*] (with further references); see, e.g., *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953) (characterizing survival statute as "procedural" in order to apply superior *lex fori*); *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961) (same as to limitation on wrongful death recovery).

<sup>67</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

<sup>68</sup> See, e.g., *First Nat'l Bank v. Rostek*, 182 Colo. 437, 514 P.2d 314 (1973); *Kopp v. Rechtzigel*, 273 Minn. 441, 141 N.W.2d 526 (1966).

<sup>69</sup> See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 34, at 215-17 (5th ed. 1984 & Supp. 1988) [hereafter *PROSSER AND KEETON*].

<sup>70</sup> See, e.g., *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968); *Jagers v. Royal Indem. Co.*, 276 So. 2d 309 (La. 1973).

<sup>71</sup> See, e.g., *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *Griffith v. United Air Lines*, 416 Pa. 1, 203 A.2d 796 (1964).

<sup>72</sup> *Clark v. Clark*, 107 N.H. 351, 355-56, 222 A.2d 205, 209 (1966) (Kenison, C.J., deprecating Vermont guest statute).

<sup>73</sup> See *Paul v. National Life*, 352 S.E.2d 550, 551-52 (W. Va. 1986).

rungs of the state judiciary, and sometimes even state supreme courts, become sufficiently confused by newfangled conflicts theories to take them at face value and to end up favoring capricious rules of decision.<sup>74</sup> Professor Sedler cites such a case, *Maguire v. Exeter & Hampton Electric Co.*,<sup>75</sup> in which the New Hampshire Supreme Court applied the forum's \$50,000 wrongful death limitation rather than Maine's admittedly better rule of unlimited recovery. Professor Sedler calls the decision in *Maguire* "functional" and "fair,"<sup>76</sup> even though the New York Court of Appeals characterized arbitrary caps on wrongful death recovery as "unfair and anachronistic."<sup>77</sup> Looking at *Maguire* from a policy point of view, one wonders what is functional or fair about the New Hampshire Supreme Court's decision to punish sister-state residents for their failure to forum shop.<sup>78</sup>

As this example demonstrates, one of the hazards of interest analysis is its tendency to distract attention from the obvious, namely the preference of judges for qualitatively better law in conflicts as well in purely domestic cases.<sup>79</sup> While some judges will own up to this preference,<sup>80</sup> most are apt to retreat behind the smokescreen of the conflicts *nouvelle vague*. Recourse to open-ended formulae and free-form "analysis" allows them to reach results compatible with common sense and justice, just as they formerly paid lip service to the First Restatement only to subvert its rules by resorting to gimmickry.<sup>81</sup> The reason for the smoke screen is not a judicial disdain for substantive values; many judges simply value caution higher than candor. But, as Judge Posner

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<sup>74</sup> See, e.g., *supra* notes 19-20 and accompanying text; *Tower v. Schwabe*, 284 Or. 105, 585 P.2d 662 (1978) (applying Oregon's guest statute to bar recovery for British Columbia accident).

<sup>75</sup> 114 N.H. 589, 325 A.2d 778 (1974). There are quite a few decisions of this kind. See, e.g., *Peters v. Peters*, 63 Haw. 653, 634 P.2d 586 (1981) (applying interest analysis to deny recovery to New York wife pursuant to forum's interspousal immunity); *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968) (applying Iowa guest statute to bar recovery by Iowa guest against Iowa host for Wisconsin accident); *supra* notes 19-20 and accompanying text (discussing *Schultz*).

<sup>76</sup> Sedler, *Appreciation*, *supra* note 1, at 892.

<sup>77</sup> *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 39, 172 N.E.2d 526, 528, 211 N.Y.S.2d 133, 135 (1961).

<sup>78</sup> See R. SEDLER, *supra* note 21, at 54-55 (evading nonrecovery rules by obtaining jurisdiction in plaintiff's home state).

<sup>79</sup> See AMERICAN CONFLICTS LAW, *supra* note 66, at 297-300.

<sup>80</sup> See *infra* notes 118-29 and accompanying text.

<sup>81</sup> See *supra* note 66 and accompanying text.

has noted, it "is a considerable paradox to suggest that the false reasons which uncandid judges give for their actions are the only legitimate grounds for judicial action."<sup>82</sup> Interest analysis is attractive precisely because it furnishes such false reasons for result-conscious manipulation, and even Professor Sedler concedes that judges are apt to conjure up interests to reach results.<sup>83</sup>

### B. Does Lex Fori Equal Better Law?

I fully agree with Professor Sedler that judges who follow the better-law rule usually end up applying the law of the forum.<sup>84</sup> Although he accuses me of conveniently ignoring this point,<sup>85</sup> I have in fact addressed it more than once.<sup>86</sup> The reason for this homing trend should be obvious. In tort cases, plaintiffs' counsel can be expected to refrain from suing in states with substandard rules that unreasonably bar or diminish recovery. As a matter of habit, in evaluating cases they take into account, first and foremost, the law of the state in which they practice. If that state has a guest statute, counsel may decide not to waste their time on guest passenger suits. Or they may avail themselves of permissive long-arm statutes to litigate such cases in a more favorable forum, for forum shopping may be easier than marshalling the sophisticated arguments that persuade a court to apply a more favorable foreign law. Hence, tort cases are channeled into states whose law favors recovery; they are rarely litigated in a forum that must apply foreign law to compensate the victim's injuries.

In tort cases, therefore, judges are seldom asked to apply a sister state's better rule of decision. Moreover, once a state supreme court does reach the conclusion that a foreign law is better, it has the opportunity to change the *lex fori* by overruling precedent, or by reinterpreting a forum statute or holding it unconstitutional. Nevertheless, some reported decisions have applied superior sister-state law. Indeed, Professor Sedler cites such cases, if only to explain them away. He characterizes *Bigelow*

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<sup>82</sup> Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1373 (1990).

<sup>83</sup> See Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 203-04 (1977).

<sup>84</sup> Sedler, *Appreciation*, *supra* note 1, at 894.

<sup>85</sup> *Id.*

<sup>86</sup> See Juenger, *What Now?*, *supra* note 17, at 514; Juenger, *General Course*, *supra* note 12, at 294.

*v. Halloran*<sup>87</sup> and *Offshore Rental Co. v. Continental Oil Co.*<sup>88</sup> as “no-conflict” cases, because the state supreme courts that decided them *subsequently* adopted the better foreign rule of decision as their own.<sup>89</sup> Inverting cause and effect, he refuses to acknowledge that in both cases the forum first displaced its own inferior law, and only later changed the *lex fori*.

Of course, litigants can often avoid imposing on courts the burden of applying the more favorable foreign law. Permissive jurisdictional rules allow plaintiffs to forum shop, and the forum non conveniens doctrine allows defendants to engage in reverse forum shopping. Contrary to what Professor Sedler says,<sup>90</sup> I do not deplore these practices.<sup>91</sup> As long as interest analysis — with its powerful homing trend — prevails, counsel must forum shop to protect their clients’ interests. What I have said is that “[o]nly to the extent that we can design choice-of-law rules that are attuned to the exigencies of interstate and international justice can forum shopping ever become obsolete.”<sup>92</sup>

If judges use as the criterion for choice the quality of competing laws, it should not matter whether the superior rule of decision is found in forum law or elsewhere. Yet, evidence to the contrary notwithstanding,<sup>93</sup> Professor Sedler assumes that judges are unable or unwilling to use this criterion.<sup>94</sup> He maintains that the homing trend rather than the quest for quality explains the choice, for “whenever the forum applies the ‘better law,’ that law not coincidentally, is its own.”<sup>95</sup> Equating the *lex fori* with the better law, he then attributes to the teleological approach a major weakness of interest analysis, *i.e.*, its incentive for forum shopping.<sup>96</sup> Rarely have I seen a more astonishing argument.

### C. The Judiciary’s Role

Professor Sedler’s central contention, however, is not that

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<sup>87</sup> 313 N.W.2d 10 (Minn. 1981).

<sup>88</sup> 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

<sup>89</sup> See Sedler, *Appreciation*, *supra* note 1, at 894 n.128.

<sup>90</sup> *Id.* at 895.

<sup>91</sup> See Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 570-72 (1989).

<sup>92</sup> *Id.* at 574.

<sup>93</sup> See *infra* notes 111-29 and accompanying text.

<sup>94</sup> Sedler, *Appreciation*, *supra* note 1, at 891, 893, 895, 899-901.

<sup>95</sup> *Id.* at 891; see also *id.* at 872 n.39.

<sup>96</sup> *Id.* at 895.

courts *cannot* do interstate justice, but rather that they *should not*. He reasons, first of all, that no objective standards exist by which to assess the merits of rules of decision.<sup>97</sup> Secondly, he maintains that courts should not disregard legislative policies with which they disagree.<sup>98</sup> In support of these propositions Professor Sedler uses a quote from *Lilienthal v. Kaufman*,<sup>99</sup> a 1964 case in which the Oregon Supreme Court refused to permit a California seller to collect on promissory notes issued by an Oregon buyer on the ground that the buyer was a spendthrift. After discussing various conflicts approaches, all of which would have led to the application of California law, the majority reached the conclusion that the Oregon spendthrift statute controlled because “[c]ourts are instruments of state policy.”<sup>100</sup>

Few other state supreme courts have viewed their role in deciding multistate controversies as that of implementing the beggar-thy-neighbor principle. Rather, most judges are acutely aware of the fact that such an ethnocentric stance would, as the dissent in *Lilienthal* put it, lead to the “balkanization”<sup>101</sup> of law in interstate cases. As an interest analyst has noted, Currie’s approach “has been unsuccessful in persuading even its most faithful followers to apply forum law without further inquiry in true conflict cases.”<sup>102</sup> In an effort to make the parochial attitude he advocates more palatable, Professor Sedler suggests that multistate cases are the same as intrastate cases, with but a marginal difference.<sup>103</sup> That suggestion not only begs the question, it defies reality. In a purely intrastate case, the parties’ forum shopping possibilities are limited, and there is no reason to apply any law other than that of the forum. In contrast, multistate cases pose the very question for which the law of conflicts has been invented, namely “what law applies?”

This question prompts, as one possible reply, a further question: why not apply the law best adapted to the exigencies of those transactions with which the law of conflicts is concerned? Professor Sedler evades that question by assuming that there are

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 895-96.

<sup>99</sup> 239 Or. 1, 395 P.2d 543 (1964).

<sup>100</sup> *Id.* at 16, 395 P.2d at 549.

<sup>101</sup> *Id.* at 25, 395 P.2d at 553 (Goodwin, J., dissenting).

<sup>102</sup> Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 586 (1983)

<sup>103</sup> Sedler, *Appreciation*, *supra* note 1, at 892.



no “objective standards — or for that matter, any standards whatsoever”<sup>104</sup> to make such a determination. That assumption, however, disregards the fact that the bulk of state law is judge-made. This is true, especially, of tort law, which, as an authoritative treatise notes, “is overwhelmingly common law, developed in case-by-case decisionmaking by courts.”<sup>105</sup> To develop such a body of precepts, judges must have been guided by some standards. Even professed conservatives encounter no difficulty in finding them. As Judge Posner says, when “the precedents are not decisive, we turn to principles.”<sup>106</sup>

While I fully agree with Professor Sedler’s statement that we can “learn something from the behavior of courts in actual cases,”<sup>107</sup> I disagree with his assertion that courts lack objective standards to determine which among competing rules of decision is the most suitable.<sup>108</sup> In fact, this assertion contradicts the case law of the state in which Professor Sedler teaches. Twenty years ago I wrote a brief amicus curiae in support of comparative negligence, which the Negligence Section of the State Bar submitted in response to an invitation by the Michigan Supreme Court.<sup>109</sup> Urging the court to scuttle contributory negligence, the common law’s “cruellest and most indefensible doctrine,”<sup>110</sup> I pointed out that Michigan courts did not regard *stare decisis* as an obstacle to progress.

I was able to document this contention with citations to a fair number of cases and with revealing quotations from judicial opinions that clearly showed the supreme court’s awareness of its pre-torian powers.<sup>111</sup> The Michigan Supreme Court’s contributions to American tort law include, *inter alia*, two landmarks that have been widely followed in other states. *Spence v. Three Rivers Builders*

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<sup>104</sup> *Id.* at 897.

<sup>105</sup> PROSSER AND KEETON, *supra* note 69, § 3, at 19.

<sup>106</sup> Justice v. CSX Transp., Inc., 908 F.2d 119, 123 (7th Cir. 1990).

<sup>107</sup> Sedler, *Appreciation*, *supra* note 1, at 891.

<sup>108</sup> *Id.* at 897.

<sup>109</sup> See Brief of Amicus Curiae, *Parsonson v. Construction Equip. Co.*, 386 Mich. 61, 191 N.W.2d 465 (1971) (No. 52,572) reprinted in Juenger, *Brief for Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae*, *Parsonson v. Construction Equipment Company*, 18 WAYNE L. REV. 3 (1972) [hereafter Juenger, *Brief*].

<sup>110</sup> Green, *The Individual’s Protection under Negligence Law: Risk Sharing*, 47 NW. U.L. REV. 751, 757 (1953).

<sup>111</sup> See Juenger, *Brief*, *supra* note 109, at 34-41.

*Et Masonry Supply, Inc.*,<sup>112</sup> which dealt with the collapse of a home constructed with defective cinder blocks, was the first case to grant recovery, without privity and negligence, on a warranty theory for products other than food or drugs. *Piercefield v. Remington Arms Co.*<sup>113</sup> broke new ground by permitting a bystander to recover for injuries he suffered when a shotgun exploded. Even a cursory reading of the opinions in these cases and the others I cited suffices to show the judges' acute awareness of their role in shaping the law of torts.<sup>114</sup> It therefore comes as no surprise that the Michigan Supreme Court has also consistently refused to apply substandard foreign law in conflicts cases.<sup>115</sup>

Nor is Michigan's experience unique. According to the leading torts treatise, "more progress has been made in the tort field in the last three decades than in a century or two preceding."<sup>116</sup> How can one argue then that courts are incapable of sorting the wheat from the chaff? If they are expected to handle ephemeral governmental interests that are so fine-spun that they defy detection, why should judges be disqualified from dealing with the very real interests of victims, tortfeasors and insurers — the only par-

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<sup>112</sup> 353 Mich. 120, 90 N.W.2d 873 (1958).

<sup>113</sup> 375 Mich. 85, 133 N.W.2d 129 (1965).

<sup>114</sup> Regrettably, I never found out whether my brief persuaded any of the judges. The Michigan Supreme Court's per curiam opinion in *Parsonson v. Construction Equip. Co.*, 386 Mich. 61, 191 N.W.2d 465 (1971), affirmed the decisions below, according to which defendants were not liable for the plaintiff's injuries, mooting the issue of comparative versus contributory negligence. Judge Black, in his concurring opinion, was the only judge to address the moot issue: he indicated that he was not persuaded. *See id.* at 79-83, 191 N.W.2d at 473-74. In *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979), the court did adopt pure comparative negligence without, however, citing my brief or the opposing brief submitted by Cholette, Perkins & Buchanan.

<sup>115</sup> Even the author of the opinion in *Abendschein v. Farrell*, 382 Mich. 510, 170 N.W.2d 137 (1969), which applied the *lex loci delicti* rule to bar the guest passenger's recovery for injuries suffered in Ontario, had second thoughts about the result. *See id.* at 517-22, 170 N.W.2d at 139-42. In *Sweeney v. Sweeney*, 402 Mich. 234, 262 N.W.2d 625 (1978), the court invoked the public policy reservation to justify its refusal to apply Ohio's intrafamily immunity doctrine. It scuttled the *lex loci delicti* rule in *Sexton v. Ryder Trade Rental, Inc.*, 413 Mich. 406, 320 N.W.2d 843 (1982), to avoid application of the accident state's rule that failed to impose owner liability on truck rental agencies. Finally, in *Olmstead v. Anderson*, 428 Mich. 1, 400 N.W.2d 292 (1987), the court declined to honor Wisconsin's former limit on wrongful death recovery.

<sup>116</sup> PROSSER AND KEETON, *supra* note 69, § 3, at 17.

ties truly concerned about the outcome of tort cases — that come to the fore in accident litigation? At least one state supreme court is on record as saying that it is easier to dishonor a guest statute than to cope with “a cumbersome and unyielding body of conflicts law that creates confusion, uncertainty and inconsistency, as well as complication of the judicial task.”<sup>117</sup>

In reality, of course, there are quite a few conflicts cases in which judges have made value judgments, at times quite scathingly, about foreign and domestic tort rules. The *Kilberg* court, for instance, denounced the former Massachusetts cap on wrongful death recovery as “absurd and unjust.”<sup>118</sup> With greater reserve, but equal disdain, Judge Fuld in *Babcock* characterized the Ontario guest statute as “unique.”<sup>119</sup> In *Schlemmer v. Fireman's Fund Insurance Co.*<sup>120</sup> the Arkansas Supreme Court deprecated the forum's former guest act as “archaic and unfair.”<sup>121</sup> More poetically, in *Clark v. Clark*<sup>122</sup> Judge Kenison called the Vermont guest statute a “drag on the coattails of civilization.”<sup>123</sup> In the *Off-Shore Rental* case<sup>124</sup> Judge Tobriner contrasted Louisiana's “prevalent and progressive” law with California's “unusual and outmoded” civil code provision.<sup>125</sup> In *Bigelow v. Halloran*<sup>126</sup> the Minnesota Supreme Court dismissed the forum's bar against the survival of actions as a “remnant of the early common law.”<sup>127</sup> Although the New Hampshire Supreme Court, in *Maguire v. Exeter & Hampton Electric Co.*,<sup>128</sup> decided to apply the forum's statutory \$20,000 limit on wrongful death recovery, the judges realized that this enactment “lies in the backwater of the modern stream.”<sup>129</sup>

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<sup>117</sup> *Paul v. National Life*, 352 S.E.2d 550, 553 (W. Va. 1986).

<sup>118</sup> 9 N.Y.2d 34, 40, 172 N.E.2d 526, 528, 211 N.Y.S.2d 133, 136 (1961) (quoting *Medinger v. Brooklyn Heights Ry.*, 6 A.D. 42, 39 N.Y.S. 613 (1896)).

<sup>119</sup> 12 N.Y.2d at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 751.

<sup>120</sup> 292 Ark. 344, 730 S.W.2d 217 (1987).

<sup>121</sup> *Id.* at 347, 730 S.W.2d at 219.

<sup>122</sup> 107 N.H. 351, 222 A.2d 205 (1966).

<sup>123</sup> *Id.* at 355, 222 A.2d at 209.

<sup>124</sup> 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

<sup>125</sup> *Id.* at 168, 583 P.2d at 728, 148 Cal. Rptr. at 874.

<sup>126</sup> 313 N.W.2d 10 (Minn. 1981).

<sup>127</sup> *Id.* at 12.

<sup>128</sup> 114 N.H. 589, 325 A.2d 778 (1974).

<sup>129</sup> *Id.* at 592, 325 A.2d at 780.

## D. "Tort Reform"

A certain uneasiness about accusing judges of lacking discernment with respect to a body of rules of their own creation may explain Professor Sedler's emphasis on the importance of recent statutory developments in the law of torts. I am pleased to note that he puts the expression "tort law reform" in quotes.<sup>130</sup> So do Prosser and Keeton,<sup>131</sup> for the word "reform" is surely a misnomer. While there is much to criticize about American accident tort litigation,<sup>132</sup> the root causes of the malaise are surely not the substantive rules. What makes our tort law so inefficient and expensive is well known: jury trials, contingent fees, punitive damages and court congestion.

None of the motley array of statutes parading under the misleading banner of tort reform attacks the problem at its roots;<sup>133</sup> these pitiful attempts to avoid inundation by putting fingers into dikes merely balkanize the American law of torts. Enacted in response to the efforts of powerful lobbies, they hardly set appropriate standards for interstate justice. On the contrary, the checkered provisions that arbitrarily bar or limit recovery create interstate conflicts problems where none existed before and wrench American tort law out of line with that of other civilized nations. If anything, the need to protect interstate and international tort victims from such *statuta odiosa* furnishes a strong argument in favor of the better-law approach.

The two hypothetical cases Professor Sedler constructs to prove the judiciary's inability to make value judgments<sup>134</sup> do not support his thesis, for they would hardly tax judicial discernment. One revolves around a Colorado statute that imposes a \$250,000 ceiling on recovery for noneconomic loss. In this hypothetical,

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<sup>130</sup> Sedler, *Appreciation*, *supra* note 1, at 897.

<sup>131</sup> PROSSER AND KEATON, *supra* note 69, Introduction, at 1 (Supp. 1988).

<sup>132</sup> For a perceptive description and critique see J. FLEMING, *THE AMERICAN TORT PROCESS* (1988).

<sup>133</sup> Fleming notes that:

Tort reform statutes in thirty-nine states have effected modest changes of substantive and remedial law since the mid-70s . . . . Although promoted by the insurance industry, they have not resulted in any noticeable reduction of premiums, thereby fuelling the accusation that the reform campaign was just a disingenuous attack on the deserved gains of tort victims.

*Id.* at 24.

<sup>134</sup> Sedler, *Appreciation*, *supra* note 1, at 898-90.

the negligence of the driver of a Colorado bus owned by a Colorado company causes an accident in Arizona. Professor Sedler contends that it is "functionally sound and fair"<sup>135</sup> to award Arizona passengers full recovery, while punishing Colorado passengers for their home state's "law reform" efforts (for which they are hardly responsible and of which they may have been blissfully unaware) by reducing any verdict exceeding this amount to the statutory limit.

Contrary to what Professor Sedler seems to assume, a court should have no difficulty whatsoever in selecting the most suitable rule of decision from Colorado and Arizona law. One may of course question whether the amounts awarded by American juries for pain and suffering are, as a general matter, fair or excessive. Indeed, one may question why laypersons should be in the position to play fairy godmother to accident victims by reaching into deep corporate pockets. One might even question, more broadly, whether it makes sense to award damages for pain and suffering. Assuming, however, that it is possible and proper to attribute a monetary value to noneconomic losses, it is clearly capricious to grant full recovery to anyone incurring damages in the amount of \$250,000 or less, but to curtail the compensation of those who, like the boy burned in a Pinto,<sup>136</sup> experience such excruciating pain and suffering as to warrant a verdict for \$2.5 million. In fact, some courts have struck down arbitrary ceilings on nonpecuniary damages, even if the cap exceeded \$250,000, for being so objectionable as to violate constitutional provisions.<sup>137</sup>

Thus, it is quite easy to make the value judgments that the better-law rule requires and to reach commonsensical results in multistate cases. In contrast, the solution Professor Sedler proposes strikes me as far from "functionally sound and fair." A slight change of his hypothetical reveals the absurd consequences of the approach he favors. Assume that, instead of a bus, an airplane owned by a Colorado company (incorporated in that state because of its legislature's accommodating attitude towards tortfeasors) makes an unscheduled emergency landing in Arizona,

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<sup>135</sup> *Id.* at 900.

<sup>136</sup> *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

<sup>137</sup> *See, e.g.*, *Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987) (\$450,000 ceiling on noneconomic damages); *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711, *modified*, 112 Wash. 2d 636, 780 P.2d 260 (1989) (statutory variable formula for limiting noneconomic damages).

injuring passengers from Colorado, Arizona, fourteen other states and twenty foreign nations. Interest analysis requires the court to research the home-state law of each victim as to each issue presented. This burden, however, is not counterbalanced by the ultimate emergence of a superior rule of decision, nor may the court apply a single rule of decision to each issue. Rather, it must engage, as to each case, in a complex calculus of interests to find out which of thirty-six laws applies to which particular issue in which particular case.

How can it be fair and sound to treat differently victims who, sitting side by side, suffered the same burns in what is a truly multistate accident? In air crash cases, even courts that purport to analyze interests strain to avoid such discrimination.<sup>138</sup> Also, why should the defendant's domiciliary nexus matter? Should the liability of interstate and international carriers vary depending on the state in which they choose to incorporate or to locate their corporate headquarters? Should the law of conflicts encourage states to become haven jurisdictions? As this hypothetical illustrates, there is much to be said for Judge Weinstein's conclusion in the spectacular *Agent Orange* litigation<sup>139</sup> that interest analysis makes little sense in mass disaster cases and that only a substantive law approach will achieve a fair measure of interstate justice. Courts are, after all, in the business of making choices between competing substantive rules. Requiring them to do so in multistate cases hardly puts them in an unfamiliar role.

#### E. How Hard Cases Can Make Good Law

Let us now look at the other hypothetical Professor Sedler adduces to buttress his argument that courts are unequipped to make value judgments about the merits of competing laws. He concludes, quite correctly, that a California plaintiff who is injured by a product she bought in California, which was defectively designed by a New York manufacturer, would be well advised to sue at home if California, unlike New York, imposes the burden of proving nondefectiveness on the defendant.<sup>140</sup> If

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<sup>138</sup> See *In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979*, 644 F.2d 594 (7th Cir.), cert. denied, 454 U.S. 878 (1981); *In re Paris Air Crash of March 3, 1974*, 399 F.Supp. 732 (C.D. Cal. 1975).

<sup>139</sup> *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984).

<sup>140</sup> See Sedler, *Appreciation*, *supra* note 1, at 898-99 & n.138.

so far we are in agreement, I cannot but take issue with Professor Sedler's assertion that the better-law approach could not resolve the choice between the New York and California rules of decision because neither of them is clearly "substandard."<sup>141</sup> I have never maintained that the role of teleology in conflicts law must be limited to cases dealing with such heinous laws as guest statutes, intrafamily immunity, arbitrary ceilings on recovery and similar oddities on which interest analysts have lavished so much of their attention. Rather, as I have said on more than one occasion,<sup>142</sup> the better-law approach performs an especially valuable service when neither of the potentially applicable rules of decision is obviously inferior.

A judge assessing the merits of the various approaches courts have devised to deal with design defects would, of course, consult *Barker v. Lull Engineering Co.*<sup>143</sup> The author of the opinion, Judge Tobriner, was an eminent jurist and his opinion was endorsed by a unanimous California Supreme Court. Moreover, the leading treatise on torts devotes several pages to design defects and to the various tests courts have developed to determine when a design is defective.<sup>144</sup> In addition, there are encyclopedic works on products liability with ample references to a rich and variegated case law.<sup>145</sup> While there is obviously room for debate, and the problems posed are quite thorny, one should expect that judges are able to draw their own conclusions from this wealth of materials. Indeed, assisted by able law clerks, they do just that each and every day.

Whichever way the court chooses to deal with the burden of proof, its well-reasoned conclusion stating why one approach to design defects makes more sense in interstate cases than the other will render a welcome contribution to an important debate. Such an opinion is bound to be of infinitely greater value than yet another one of the many heavily footnoted, lengthy, learned, and

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<sup>141</sup> *Id.* at 899.

<sup>142</sup> See Juenger, *What Now?*, *supra* note 17, at 523; Juenger, *General Course*, *supra* note 12, at 287-88.

<sup>143</sup> 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

<sup>144</sup> PROSSER AND KEETON, *supra* note 69, § 99, at 698-702 (1984 & Supp. 1988).

<sup>145</sup> See, e.g., 1A L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 3.03[4][f][iv.] (1988 & Supp. 1990); 2 AMERICAN LAW OF PRODUCT LIABILITY 3d § 28 (R. Davis, W. Foster, J. Smith & D. Ytreberg eds. 1987 & Supp. 1990).

tedious discourses on the respective governmental interests of New York and California. Difficult as it may be to write a substantive opinion on design defects, the labor that goes into it represents a far better allocation of judicial resources than indulging in the glass-bead games required by modern conflicts dogmas. Of course, a New York judge's conclusion may differ from that a California judge would reach. But that should not shock Professor Sedler, who has no difficulty whatsoever in evaluating the inconsistent results reached by different courts in the same case as equally "functionally sound and fair."<sup>146</sup>

#### F. *What Courts Have Been Doing*

A word now about actual practice. As I suggested earlier,<sup>147</sup> the conflicts revolution mirrored the movement in the substantive law of torts, which during the past decades expanded the rights of accident victims. Both were driven by the judiciary's penchant for just results in domestic as well as in multistate cases. Judges throughout the United States recognized that a number of defenses that unreasonably limited or barred recovery were out of tune with the times. These defenses, *i.e.*, guest statutes, interspousal immunity and limitations on wrongful death recovery, have since become history in most states.<sup>148</sup> Their demise may, in part, be due to the conflicts cases that highlighted their vicious nature. Once one state's courts refused to apply such blemished law, others followed suit.

Thus, after the New Hampshire Supreme Court declined to apply the Vermont guest act, condemning it as a "drag on the coattails of civilization,"<sup>149</sup> the Vermont legislature, stung by this criticism, repealed the statute.<sup>150</sup> Similarly, the refusal of New York and other American courts to apply the Ontario guest act — then "the most frequently litigated piece of Canadian legislation

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<sup>146</sup> Sedler, *Appreciation*, *supra* note 1, at 900.

<sup>147</sup> See *supra* notes 66-73 and accompanying text.

<sup>148</sup> See PROSSER AND KEETON, *supra* note 69, § 34, at 216-17 (guest statutes), § 122, at 902-04, 906-07 (1984 & Supp. 1988) (intrafamily immunity); S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 7:2 (2d ed. 1975 & Supp. 1989) (statutory caps on wrongful death recovery).

<sup>149</sup> *Clark v. Clark*, 107 N.H. 351, 355, 222 A.2d 205, 209 (1966).

<sup>150</sup> See Juenger, *Letter to the Editors*, 118 U. PA. L. REV. 1141 (1970). Vermont's repeal broke the ice, "and a number of other state legislatures thereafter tumbled along behind." PROSSER AND KEETON, *supra* note 69, at 216.



in the United States”<sup>151</sup> — may have helped induce the Canadian province first to amend the statute so as to permit recovery for gross negligence,<sup>152</sup> and then to abolish the bar to guest-passenger recovery altogether.<sup>153</sup> In Paul Freund’s words, the conflict of laws served as the “growing pains”<sup>154</sup> of state law reform.

The judiciary’s preference for sound substantive rules, which offers a convincing explanation for the “conflicts revolution,” is hardly a novel phenomenon. Noted scholars have commented on it. As the great Ernst Rabel said:

We well know that courts will try many direct or devious ways to satisfy this sense of justice. They will use the faculty to reject a foreign rule on the ground of a public policy of the forum. They will classify an unwelcome foreign rule as inapplicable foreign procedure. They will, with a desired end in view, affirm or deny a person’s domicile. And we may trust the courts always to select, of two accessible ways, that which leads to the result to them appearing preferable. These expedients of judicial wisdom cannot be closed entirely, and should not be, while conflicts rules remain crude and vague.<sup>155</sup>

Even Currie, who strongly objected to the teleological approach,<sup>156</sup> realized that judges can and do decide multistate disputes in a result-selective manner. Commenting on a series of survival cases, he concluded that several courts “deplored the archaism of their own laws and sought the just result in the progressive foreign law.”<sup>157</sup> Much as Currie disliked it, he knew that judges “may sometimes disregard or manipulate the system for the sake of reaching a ‘just’ or ‘progressive’ result.”<sup>158</sup> And, unlike Professor Sedler, Currie had little doubt that *he* could tell which of two conflicting rules is preferable. Commenting on

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<sup>151</sup> Baade, *The Case of the Disinterested Two States: Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 150, 151 (1973).

<sup>152</sup> Ont. Stat. 1966, ch. 64 § 20. As originally enacted, § 105(2) of the Highway Traffic Act, Ont. Rev. Stat. 1960, ch. 172, barred the guest passenger’s recovery even if the driver acted recklessly. This provision had been called one of the “most vicious pieces of legislation which an active insurance lobby was able to foist on an unsuspecting public.” Comment, *Motor Cars and Gratuitous Passengers*, 23 CAN. B. REV. 344, 347 (1945).

<sup>153</sup> Ont. Stat. 1977, ch. 54 § 16(1).

<sup>154</sup> Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1216 (1946).

<sup>155</sup> I E. RABEL, *THE CONFLICT OF LAWS* 98 (2d ed. 1958).

<sup>156</sup> See B. CURRIE, *supra* note 2, at 104-05, 133, 153-54, 705.

<sup>157</sup> *Id.* at 175.

<sup>158</sup> *Id.* at 384.

*Kilberg v. Northeast Airlines, Inc.*,<sup>159</sup> he noted that “you and I know, of course, which is the better law, which is the sounder policy, which is the more deserving interest.”<sup>160</sup>

#### IN CONCLUSION

For these reasons, Professor Sedler’s arguments leave me unpersuaded. I also find them unappealing, premised as they are on a legal positivism and notions of sovereignty that are strangely out of tune with the realities of the late twentieth century United States. I believe that Justice Story, the greatest American conflicts lawyer, had it right when he said that our discipline “is chiefly seen and felt in its application to the common business of private persons, and rarely rises to the dignity of national negotiations, or of national controversies.”<sup>161</sup> To deny judges a creative role in shaping the law dealing with that common business is to disavow our common law heritage.

Although I disagree with him, I am grateful to Professor Sedler for having offered me an opportunity to reiterate my views. If nothing else, by highlighting the weaknesses of our respective positions, such exchanges keep us honest. Also, we find out that we do agree on some propositions and that there may be areas of further *rapprochement*. For instance, we do agree that rights do not vest and contacts, as such, count for little. We also agree that in the large majority of cases the better law is that of the forum<sup>162</sup> and that courts do manufacture interests to reach results they like.<sup>163</sup> In addition, Professor Sedler is prepared to recognize at least a minimum of teleology.<sup>164</sup> Moreover, he apparently no longer believes that “*relatively few* [conflicts] *cases* arise in practice.”<sup>165</sup>

But following Currie, who characterized such cases as “margi-

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<sup>159</sup> 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

<sup>160</sup> B. Currie, *supra* note 2, at 705.

<sup>161</sup> J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 11-12 (2d ed. 1841).

<sup>162</sup> See *supra* notes 84-86 and accompanying text.

<sup>163</sup> See *supra* notes 16-17, 49, 81, 83 and accompanying text.

<sup>164</sup> See *supra* notes 61-62 and accompanying text.

<sup>165</sup> Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the ‘New Critics’*, 34 MERCER L. REV. 593, 597 (1983) (emphasis in original). See Juenger, *Mass Disasters*, *supra* note 63, at 106-07. In *Appreciation*, *supra* note 1, Professor Sedler does not repeat this statement.

nal,"<sup>166</sup> Professor Sedler still looks upon interstate and international transactions as domestic ones with a foreign wrinkle.<sup>167</sup> This point of view distracts attention from the uniqueness of multistate cases and the role of conflicts law as a facilitator of interstate and transnational transactions. Such a myopic perspective conveys a warped impression and trivializes our discipline. Perhaps Professor Sedler's next contribution could focus on aerial disasters or the Agent Orange litigation, cases that are far from "marginal" in any sense of the term.

As to our fundamental disagreement, I suppose it will not go away. Professor Sedler pays me the compliment of calling my views on the conflict of laws "grandiose."<sup>168</sup> So, indeed, they must appear from his perspective, which is that of a "True Believer"<sup>169</sup> in Currie's approach. Like religious dogmas, doctrinal preconceptions and their imagery — be it vesting rights or governmental interests — tend to blur reality and to suspend the True Believer's critical faculties. Professor Sedler's article, premised — as all of interest analysis — on the "Handmaiden Axiom,"<sup>170</sup> once again demonstrates the pernicious influence of Currie's doctrine and the strength of the metaphysical irons<sup>171</sup> he forged.

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<sup>166</sup> B. CURRIE, *supra* note 2, at 82.

<sup>167</sup> Sedler, *Appreciation*, *supra* note 1, at 892.

<sup>168</sup> *Id.* at 890.

<sup>169</sup> Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEX. L. REV. 141, 151 (1967); see Juenger, *What Now?*, *supra* note 17, at 509.

<sup>170</sup> See Peterson, *Weighing Contacts in Conflicts Cases: The Handmaiden Axiom*, 9 DUQ. L. REV. 436 (1971) (debunking Currie's notion that courts in conflicts cases are but the legislature's servants).

<sup>171</sup> B. CURRIE, *supra* note 2, at 132 (denouncing Joseph Beale).

