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Phaedon John Kozyris

I. INTRODUCTION

Conflicts scholarship in the United States has been graced, laced (and burdened!) with lots of theory, reflecting the learned, cosmopolitan and utopian bend of its disciples. This preoccupation continues, as evidenced in the vocabulary about "rethinking," "myths," etc., despite ominous traces of fatigue. Unfortunately, it is not uncommon for those who express dissatisfaction with the repetition of what we all know all too well (historical evolution and a summary of most of the approaches, with reference to the key cases, every time), and who start with a promise to guide us out of the labyrinth, to feel obligated to restate what they purport to avoid with the result of more bulk and less float. Indeed, it is not too much of an exaggeration to label this continuing inundation of theory a "deluge," which makes it imperative for us not to add more water, but instead try to salvage something useful in the Ark to guide us for what is coming "après!"

I hope that this explanation lends support to my proposing here to be too succinct and practical, and thus address only certain central "facts" and "faults" which have dominated, and bedeviled, the conflicts scene. I consider such an approach suitable to a festschrift honoring Professor Symeonides, a uniquely distinguished conflicts expert who not only is a major scholar but has been active in the "real" conflicts world of legislative solutions and who also presents us every year with a fascinating and learned report and commentary on what is actually...
happening down there in the courts. Thus, I will concentrate on some simple points which should appear obvious but are often forgotten in the hustle—hence the title “conflicts theory for dummies”? I beg forgiveness from those who may find my style too imperious and self-righteous, and I want to assure them that it is not due to an attitude but to a concern, perhaps excessive, over hedging and inconclusiveness.

II. A SEARCH FOR MEANING

My first point is methodological and can be stated quite plainly. Conflicts law cannot and should not escape the simple requirement that applies to every law, to wit, that it have intelligible, readable, meaningful content and that its body of provisions (rules, principles, approaches, purposes and what not) lead to reasonably and consistently predictable results in most contexts. I may be revealing here my Napoleonic syndrome, but telling the courts in each conflicts case to make a choice and fashion the applicable law “ad hoc” and “anew” (i.e. without legislative or precedential direction) on the basis of what is right (just, proper, good, suitable, interested, etc.), as is often done under the prevailing conflicts theories, appears to me not only inconsistent with the basic principles of the separation of powers, not only burdensome and potentially arbitrary beyond reason, not only disorienting to the transacting persons, but essentially empty of meaning. I am not claiming that this, let us call it “requirement of predictability,” necessarily leads to just or totally certain results or that it places the particular choice rule beyond challenge. But unpredictable law is not law to begin with. I am afraid that the prevailing conflicts theories in the United States (the many variations of interest analysis, the most-significant-relationship test by itself, and the “better” or “modern” law approaches) pose a serious problem of indeterminacy. Except as they serve as incantations to cover up some other clandestine basis of choice (e.g., pro-forum, pro-plaintiff, pro-recovery-in-tort, pro-resident, which we will address in those contexts), they leave us stranded in ambiguity. As teachers, we find it difficult to teach a course where there are only questions and where every position is as justified—or as wrong—as any other, where the students can defend with equal poise the choice of any law and where the judges (who themselves are desperately seeking concrete guidance) are prompted to choose instead whatever they want, to do the “right thing” and hope for the best. Equally problematic is the reference to all possible connections and all imaginable bases of choice, leaving it to the decision maker to figure it all out in the case at hand. It is one thing to challenge, debate, and evaluate

particular rules, methods, approaches, outcomes, etc. and quite another to set sail rudderless on the sea of relativity!  

In this context, it seems that the "lex loci delicti" rule of the First Restatement of Conflicts was predictable enough, in the sense that it provided ex ante a choice (not necessarily always a good one) for most actual situations.  

Lest we forget that "hard cases do not the best law make," the very small number of cases where a traditional "escape clause" (renvoi, characterization, public policy, etc.) had in fact been used did not undermine the "requirement of predictability" of the rule. Indeed, these were not "cutting edge" paradigms and resulted often from the fact that the substantive law itself was unclear, e.g., on the contractual or tortious nature of the liability and on the cumulation thereof. The exaggeration of the "escape clause" problem in traditional conflicts, as if all rules do not or should not contain (reasonably predictable, narrow) exceptions, is the misbegotten offspring of the "realist jurisprudence" challenge to conflicts. 

4. The antiformalism that has dominated American legal theory in the last fifty years, while useful as an antidote, lends itself to utopian extremes when it takes over... The broader the reference to a universe of multiple, cumulative, potentially inconsistent factors, incorporating all conceivable personal and territorial links of parties, events, disputes and activities, the easier it becomes to argue in each case for both sides with equal plausibility, and the more arbitrary the eventual choice. Intuitive ad hoc solutions are not only logistically burdensome, requiring extensive original explanation and justification each time, but also succumb to arbitrariness, foment unpredictability, and risk producing too many camels and not enough horses! 

P. John Kozyris, Values and Methods in Choice of Law for Products Liability: A Comparative Comment on Statutory Solutions, 38 Am. J. Comp. L. 475, 484 (1990) ("Values and Methods"): "The conflicts revolution has been pregnant for too long. The conflicts misery index, which is the ratio of problems to solutions, or of verbiage to result, is now higher than ever." P. John Kozyris, Foreword and Symposium on Interest Analysis in Conflict of Laws: An Inquiry into Fundamentals with a Side Postscript: Glance at Products Liability, 46 Ohio St. L.J. 457, 458 (1985)("Side Glance"). Cf. P. John Kozyris, The Conflicts Provisions of the ALI's Complex Litigation Project: A Glass Half Full? 54 La. L. Rev. 953, 956 (1994) ("Half Full"): "Conflicts theorists... have been notoriously indifferent to the issue of efficiency, treating every case as a unique specimen calling for custom-made handling on the tacit assumption that litigational resources are infinite." It should be recognized that the American Law Institute's Complex Litigation Project: Statutory Recommendations and Analysis (1994), which has not been adopted yet by the U.S. Congress, makes a valiant attempt in Section 6 to provide sufficient guidance on how to choose the applicable law, closing the escape avenues and allowing for the possible division of the various classes of claimants into groups for conflicts purposes. For an excellent commentary on the Project, with reference also to conflicts theory, see Fred I. Williams, The Complex Litigation Project's Choice of Law Rules for Mass Torts and How to Escape Them, 1995 BYU L. Rev. 1081. 

5. Cf. William H. Allen & Erin A. O'Hara, Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond, 51 Stan. L. Rev. 1011 (1999) ("Allen-O'Hara"): "[P]rimary predictability is... the primary goal of... choice-of-law...[as recognized also by Professor Baxter]." Id. at 1041. "[T]he widespread rejection of the First Restatement rules was a classic illustration of the 'nirvana fallacy'... [A] modified First Restatement approach... is the preferred alternative [and produces sound results in most cases]." Id. at 1043. 

To be sure, law-in-action does not always reflect law-in-the-books, and surely, in choosing the applicable law, the judge is tempted, as also when he applies purely internal law, to do “justice in the individual case.” But this does not mean justice “imbroglio” in the slippery paths of good intentions. Likewise, the long-standing (endless?) debate about the relationship between positive and natural law has no special relevance to conflicts. The choice criteria and methods are as much natural or positive as for any other kind of law.

It is quite ironic that the end result of the challenge to the “escape clauses” of the traditional conflicts system has been not their abolition but their replacement by, e.g., the “most significant relationship” black hole, defined under the free-for-all and conflicting “modern” criteria of Section 6 of the Restatement Second of Conflicts which go around in circles and place any concrete conflicts choice in jeopardy.7

III. THE TERRITORIAL AND PERSONAL IMPERATIVES

My second point is that, in its search for the millennium, conflicts theory has been dreaming (unsuccessfully) to escape again from another major inherent limiting factor, that the spatial application of law is determined basically only through territorial and personal connections.8 On this foundational issue, not much progress has been made since the time of the statutists. The name of the game is location, location, location: location of events, things, persons. Indeed, most conflicts approaches, old and new, in the end and however willy-nilly, require some “contact(s)” between the parties and events of the dispute and the state whose law is to be applied.9 Even the result-oriented scholars, e.g., F. Juenger (fashion a “modern” substantive rule) or R. Leflar (prefer the “best” substantive rule), require some prior contact with the state of the applicable law. We should also remember that even a pure “lex fori” approach is grounded on location, since the forum itself is predetermined by jurisdictional “contacts.” Of course, the weight given to the various territorial and personal contacts may differ and the methods of evaluating and using them may reflect diverse criteria, but this is another story which we will address later. However, accusing the First Restatement of Conflicts of “wooden territorialism” (would “personalism” be any less wooden?) both overstates the challenge and disorients the debate.

7. “[I]t is the agnostic conflicts theories themselves that give the green light to judges to engage in the grand escape of doing justice in the individual case, or choosing the better law or considering the social and economic factors, without any guidance.” Kozyris, Half Full, supra note 4, at 960. This criticism should not be taken to mean that no conflicts rule should contain an exception or a limitation. It addresses only the vague open-ended nature of particular trumps. For a thorough review and evaluation both of traditional and of “modern” types, see Symeon C. Symeonides, Exception Clauses in American Conflicts Law, 42 Am. J. Comp. L. 813 (Supp. 1994).

8. See Kozyris, Values and Methods, supra note 4, at 486-87.

At this point, I cannot resist the temptation of quoting Judge Posner’s language from a recent builder’s tort liability case, Spinozzi v. ITT Sheraton Corp. The plaintiff’s argument for Illinois law, because of defendant’s solicitation of plaintiff there together with plaintiff’s Illinois domicile, proved too much for Judge Posner. He saw it as tantamount to saying that “each guest be permitted to carry with him the tort law of his state or country, provided that he is staying in a hotel that had advertised there.” The plaintiff could not have thought that he was:

carrying his domiciliary law with him, like a turtle’s house, to every foreign country he visited . . . [nor could he, while] eating dinner with a Mexican in Acapulco, feel himself cocooned in Illinois law, like citizens of imperial states in the era of colonialism who were granted extraterritorial privileges in weak or dependent states. Law is largely territorial, and people have at least a vague intuition of this. They may feel safer in foreign hotels owned by American chains, but they do not feel that they are on American soil and governed by American law.

Acceptance of the plaintiff’s argument would subject a hotel operator like Sheraton “to a hundred different bodies of tort law,” each imposing potentially inconsistent duties of care. “A resort might have a system of firewalls that under the law of some states or nations might be considered essential to safety and in others might be considered a safety hazard.” These dangers are avoided by the application of the “lex loci delicti [which] is the only choice of law that won’t impose potentially debilitating legal uncertainties on businesses that cater to a multinational clientele while selecting the rule of decision most likely to optimize safety.” For, in the absence of unusual circumstances the place where the tort occurred is the place that has:

the greatest interest in striking a reasonable balance among safety, cost, and other factors pertinent to the design and administration of a system of tort law. Most people affected, whether as victims or as tortfeasors, by accidents and other injury-causing events are generally residents of the jurisdiction in which the event takes place. So if law can be assumed to be generally responsive to the values and preferences of the people who live in the community that formulated the law, the law of the place of the accident can be expected to reflect the values and preferences of the

10. 174 F.3d 842 (7th Cir. 1999). See also, his comments in Barron v. Ford Motor Co. of Canada Ltd., 965 F.2d 195 (7th Cir. 1992) and Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055, 1057 (7th Cir. 1987).
11. Spinozzi, 174 F.3d at 845.
12. Id.
13. Id. at 846.
14. Id. at 845.
15. Id.
16. Id. at 846.
people most likely to be involved in accidents—can be expected, in other words, to be responsive and responsible law, law that internalizes the costs and benefits of the people affected by it.\textsuperscript{17}

IV. CONFLICTS PERFECTIONISM VERSUS THE INHERENT DIFFICULTY IN APPLYING NATIONAL LAW WITHIN THE “GLOBAL VILLAGE”

Conflicts theory has been plagued by the implied assumption that it is possible to come up with the “best” answer to every choice dilemma and that if we fail, the problem is with us; somehow we have not been doing it right or trying hard enough. My third point, which needs reiteration every time, is that this is not true and that in many multistate contexts it is increasingly difficult to come up with any plausible choice. Indeed, we must recognize, and resign ourselves to the modern reality that, the greater the mobility of persons and events, the lesser the isolation of national spaces, and the fuller the integration and interpenetration of markets and societies, the less suitable is any local-national law to provide a satisfactory exclusive answer to a legal question. To the extent that the multistate or international regulation lags behind the related reality, and the transnational transaction is squeezed into the straightjacket of local law, we do have an inherent imperfection that is beyond the capability of conflicts to redress. Thus, not all of the “bizarre” results of conflicts analysis are due to its own shortcomings and we should not assume that we are always to blame.\textsuperscript{18} Consequently, Professor Juenger’s instinct to seek, for every diffuse multistate situation, a “modern” substantive rule, moves in the right direction. My major disagreement with him relates to the source of the rule, i.e., I question whether the national judge has the authority, the knowledge and the capability to develop such an ad hoc common-law type “jus gentium.”

Quite plainly, the reach of a substantive rule ideally should be co-extensive (as broad or narrow) as the scope of the activity that it regulates. For example, it is good that, finally, multistate sales are subject to a uniform law throughout the United States (UCC) and that international sales are basically governed under the multinational legal regime of the Vienna Convention on the International Sales of Goods, not the internal law of any of the states or nations of contact. In many other fields of law, however, including unfortunately many “modern” ones, the short rule does not match the long activity. Let us not mince our words. Is it not ridiculous for single-event transnational mass disasters, such as typical airplane accidents, to be subjected to the law of any one particular nation (the Warsaw Convention has limited application), let alone the law of any one state of the United States? With all due respect, any conflicts approach in that context will be equally ridiculous. How about producers liability for consumer goods? When typically each category of the many best-known and frequently-used products (and/or their components) are designed, made, promoted, distributed, and used in different locations at different times by mobile persons from different states, does it make any sense to

\textsuperscript{17} Id. at 844-45.  
\textsuperscript{18} Kozyris, Half Full, supra note 4, at 953-54.
try to identify one local law to govern the related rights and liabilities? Yet, the many attempts to federalize the law in the United States failed due largely to opposition by the self-interested trial bar; and, internationally, almost nothing has been done. So any conflicts approach in this field is bound to be imperfect. Turning to another burgeoning area, insurance coverage for environmental pollution, universal or at least broad standards would be preferable to the state-by-state regulation. But even in their absence, making sure that the insurance policy covers the damage at the local site under local law is not best approached through convoluted contract conflicts, by forcibly inserting such a clause into foreign contracts between foreign persons, but directly, e.g., by requiring the operator of any local site to obtain insurance that so covers the risk. Cyberspace poses another virtually insoluble conflicts problem. In the absence of universal regulation, the expedient of applying the law of the state of origination in many contexts makes simple, if not simplistic, sense. 19

V. THE QUESTIONABLE “LOCALISM” OF CONFLICTS

My fourth point is equally fundamental and relates to the overall philosophy of the conflictual method. The thrust of traditional conflicts was to seek the best choice-of-law system for multilateral or at least bilateral, national or international, application. Within the United States, this trend was reinforced by the constitutional limitations on state authority resulting from the Full Faith and Credit, the Due Process, the Privileges and Immunities and the Equal Protection Clauses. 20 Internationally, the spirit of cooperation, comity, and mutuality resulted in the crystallization of choice of law rules in the many Hague Conventions. Unilateral choice rules or parochial provisions on spatial application within substantive statutes were rare and frowned upon.

During the first half of the twentieth century, the only serious challenge to this multilateral, internationalist approach came from the so-called “local


law" theories, which made the rather arcane (and largely inconsequential) point that the judge "domesticated" the foreign substantive rule before applying it. A related, and more important, debate is whether at some point the "lex fori" should be given some extra weight. Again, we ended up with a pragmatic consensus that, while the law of the forum as such is not to be preferred, the judge surely is influenced by it and that, unless another choice is indicated, in the end he does and should (except in the most extreme circumstances) apply it residually.

In recent times, however, the multilateral, internationalist, forum-neutral trend has been decisively reversed, especially within the United States. It is quite remarkable that this happened almost entirely in and through conflicts theory, in the absence of any legislative direction or concern and against the desperate demand of the courts for more manageable and less state-centered criteria. It is no secret that it was Professor Brainerd Currie, through his "interests analysis," who charmed and browbeat many conflicts scholars into conceiving of the state first, as a parochial power giant who, second, in every case of potential choice of law, would chase after its own selfish "interests." As to the first point, Currie was right, as a matter of separation of powers, to argue that the judge should not depart from his own law in the absence of a legislative mandate. But as surely, he was wrong in suggesting that the legislatures were in fact giving some consideration to the spatial application of the substantive rules that they were adopting (remember the statutists?) and, even more so, that in the dark chambers of their mind, they would "wish" to abandon the prevailing multilateral and state-and-party neutral conflicts system in the private law sphere (reinventing a point earlier made in Germany by Waechter without much appeal).

We will address Currie's second point about "interests" in the next section. In the meantime, I must confess that I find it puzzling—and disheartening—that a serious and persistent critic of interest analysis, Professor Lea Brilmayer, has focused her challenge on the "fictitiousness" of the purported "legislative intention" suggested by Currie, 21 neglecting the trap of parochialism, and keeps repeating that she is not trying to tell the states what to do in this field and that choice of law may be addressed from a purely "internal perspective." 22 While it may be true that neither international law nor the U.S. constitutional mandates impose strict limitations, it seems to me that it is quite appropriate and desirable for the conflicts scholar not to glorify state arbitrariness, but to provide the much-needed and demanded guidance on the best ways to achieve justice through choice of law in multistate contexts. Indeed, rare if not non-existent are the cases where we detect a judicial jubilation with a newly-found freedom to decide cases unshackled by choice rules; and there is no indication whatsoever that legislatures have a parochial perspective.

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22. Brilmayer, *Directions*, supra note 9, at 173-74, 194-96. Also, her fairness concern if directed toward individuals, not states in terms of their power and authority. *Id.* at 239.
VI. THE PERVERSE “SELFISHNESS” OF INTEREST ANALYSIS

The fifth point is that I disagree with Currie’s main thesis that the states do, or should, play the game of conflicts in order to get some selfish advantage out of it; that, in the private law sphere where conflicts operates, the states do not merely adopt rules which they consider substantively proper and just but also wish to exercise the power over their application in a manner that will bring revenues to them or will benefit their “people” at the expense of the outsiders or will govern the world. The Currie thesis not only lacks support world-wide and U.S.-wide in the legislative texts and histories, both substantive and conflictual, as well as in the judicial attitudes toward choice of law, but is questionable on its merits and on its “beggar-thy-neighbor,” discriminatory, “imperialist” implications. 3

In retrospect, and despite all the dithyrambs that have been piled up on them, a simple-minded person like me cannot help but wonder by what logic the opinions of Judge Fuld in Babcock v. Jackson, 24 and Judge Traynor in Bernkrant v. Fowler, 25 were supposed to usher a “conflicts revolution” in favor of parochial state interests rather than merely explore the limitations of territorialism already in place in favor of the personal contacts in the (exceptional) situations where the latter were concentrated in another state. These cases extended an invitation to refine and particularize the rules (e.g. as happened later the Neumeier

23. [Interest analysis reduces choice of law] mostly to a process of finding justifications for the imposition of local law whenever there are minimal reasons to support it, with particular emphasis on fiscal benefits to the forum. This parochialism and selfishness, cultivated, in the interests of a supposed modernity, mostly by academics and not having been activated by legislative or judicial signals, sets back the common conflicts enterprise in many ways. Kozyris, Values and Methods, supra note 4, at 485-86.

Indeed, interest analysis is becoming as diverse as Marxism or Christianity. It has been subdivided into at least three major groupings. At the right we find the Orthodox, whose prophet remains Brainerd Currie. The middle is occupied by Reformists, who modify the formula but stick with the recipe. At the other end stand the Unitarians, who want to conduct policy analysis their own way and whose left wing appears reconciled to neutral conflicts rules, but differs from traditional conflicts principally in preferring personal over territorial contacts.

Kozyris, Side Glance, supra note 4, at 457-58. “[I]nterest analysis has done a disservice to federalism and internationalism by relentlessly pushing a viewpoint which inevitably leads to conflicts chauvinism or, more accurately, tribalism in view of the emphasis on the nation being a group of people.” Id. at 577. “Conflicts has become a tale of a thousand-and-one cases. When a new case comes down, interest analysts rush to co-opt it, not by arguing that it is the best or the most acceptable, but by rejoicing that it is supportable and not totally wrong.” Id. at 578. See also, Kozyris, Half Full, supra note 4, at 963-64. For a thorough challenge to this theory, see Friedrich K. Juenger, Conflict of Laws: A Critique of Interest Analysis, 32 Am. J. Comp. L. 1 (1984). Professor Sedler remains the last of the interest analysis purists. See, e.g., Robert A. Sedler, A Real World Perspective on Choice of Law, 48 Mercer L. Rev. 781 (1997).

v. Kuehner\textsuperscript{26} way), not to overthrow the conflictual method and especially not to introduce the concept of the State as a Conflicts Leviathan, bent on manipulating choice-of-law to enrich itself or to prefer its own citizens against the foreigners, or even to impose its own sense of justice on the world.

It seems to me that legislatures and courts overwhelmingly used to and still continue to create and apply substantive rules on their internal merits and are content to leave the spatial scope to conflicts rules-approaches that are reasonable, bilateral and neutral in terms of their impact on the equal sovereignty of other states and on the fair treatment of people. In this spirit, we should support a broad reading and an effective application of the above-mentioned U.S. constitutional limitations on the excessive outreach of state power and extend this logic through comity to the international community. The encouragement of a parochial, selfish attitude by conflicts theory has been perverse and wrong.

Professor Brilmayer should be praised for being the one not only to talk emptily about but really to try to "modernize" conflicts through game theory, prisoner's dilemmas, stag hunts and the law-and-economics perspective,\textsuperscript{27} and for focusing on the key connections between choice-of-law and jurisdiction and choice-of-law and regulation. However, the assumption that a state should approach choice of law with the idea that it will derive some (selfish) gain out of it gives a wrong signal.

Currie's interest analysis was also burdened with two fundamental ambiguities that neither he nor his successors addressed adequately: (a) How far should the federal (central) authority limit, through constitutional provisions, the state pursuit of selfish local interests and a race to the bottom where eventually all lose? Of course, the same issue arises under international comity. Currie's "enlightened and restrained" interpretation of interests was only a beginning and remains without a satisfactory follow-up; and (b) How important is the domiciliary connection as such? Indeed, after all is said and done analyzing purported interests, does not the Currie theory boil down to preferring personalism over territorialism? What is the justification for this bias? What evidence is there that states do (or should) focus on the affiliation of "peoples" rather than on the location of "events and things," especially in an era of increasing personal and material mobility?

Finally, the indeterminacy and multiplicity of the purported local state "interests" in choice of law contexts, coupled with the need to take some notice of those of other states, makes the process too complex and arduous and may often lead to the simple expedient of either applying the law of the forum, as discussed above, or, despite the disclaimers, choose a substantive result, e.g. pro-domestic-plaintiff, to be addressed in the next section.\textsuperscript{28}

\begin{footnotesize}
\begin{enumerate}
\item 26. 31 N.Y.2d 121, 335 N.Y.S.2d 64 (1972).
\item 27. Brilmayer, Directions, supra note 9, at 170-81. See also generally, Kramer, Rethinking, supra note 1.
\end{enumerate}
\end{footnotesize}
VII. YES, VIRGINIA, THERE IS "CONFLICTS JUSTICE" (HEREIN OF THE CONUNDRUM WITH "MODERN," "JUST" OR "BEST" RESULTS)!

My sixth point is that the question of whether a state has the power and a good reason to apply its own or another law in a particular context is entirely different from the question of whether the chosen law is substantively just. In other words, I believe that the task of conflicts is to select the jurisdiction whose law is to apply and that such selection should be just in an allocation sense as well as content-neutral, with the public policy exception for outrageous rules beyond the pale. I must confess here that I am so dumb as not even to understand how it could be otherwise! Perhaps my wrong-headedness comes from my tendency to distinguish between the judicial and the legislative functions. Starting with the courts, it seems to me that no one disputes the conflicts-justice proposition that if all territorial and personal connections of a transaction are with the forum state, its law should apply, period, even if the courts do not consider it right. Likewise, if all connections are with only one other state, its law should be chosen subject only to the narrow public policy exception for outrageous rules. It seems equally obvious to me that in a multistate transaction, where there are also some “reasonable” contacts with the forum state, the choice of whether to apply forum or another law may not be made on the basis of whether the court considers that the forum law leads to “just,” “best,” “modern,” or what not results through a process of particularistic judicial intuitionism. By definition, the court must consider the law adopted by its own legislature or through precedent as just, best or modern. Thus, the determination of what is a “reasonable” contact for choice of law purposes, and where does it lead, must be made on other, jurisdiction-selecting criteria. It is only when the multistate transaction has no contact whatsoever with the forum state,

29. "It is a truism to say that all law aims in the end at justice in the individual case. But, what is justice and how can we find it? Certainly not by pulling an outcome out of some hat. This approach is dangerous because it implies that just results can be perceived directly, through some form of impressionist intuition, rather than reasoned out and explained publicly in reliance on existing norms." Kozyris, Half Full, supra note 4, at 956. "Adding [to the conflicts quest] an intention to seek justice in the individual case not only introduces an even more impressionistic and preferential, if not quixotic, dimension but tends to confuse issues of legitimate authority with subjective perceptions about the merits of particular substantive rules. Mixing up 'who decides' with 'what should be decided' is likely to add neither clarity nor rational justifications beyond personal preferences for the proposed choices." Kozyris, Values and Methods, supra note 4, at 484. "[J]ust results and better laws [are] labels often placed on pro-plaintiff, pro-recovery solutions without identification of the applicable sources of justice and goodness and without regard for actuarial soundness and for cost-benefit considerations." Id. at 486. "A cenotaph is also needed for such words as ‘fair’, ‘reasonable’, ‘functional’, and ‘workable’ when used to justify a conflicts answer. These notorious question beggers and good-intention signalers should be unmasked and recognized for what they are. In a normative text, they merely invite the decision makers to fill the empty vessel by drawing from some value system. However, they fail to provide the system itself." Kozyris, Side Glance, supra note 4, at 570. "Collapsing the conflicts inquiry into the quest for substantive justice, thus confusing questions of power . . . with those of substantive results, and pursuing the holy grail through a self-centered policy analysis compounds the mess." Id. at 578.
hopefully a rare situation for jurisdictional reasons, that a judge need not consider the spatial (territorial and personal) applicability of forum law. But if he decides to make the choice between the other potentially applicable rules on the basis of their content, again the jurisdiction-selecting criterion of similarity with the law of the forum should inescapably prevail. Thus, doing "justice in the individual (multistate) case" for me means selecting and properly applying the law that is justly applicable on the basis of the appropriate connections and, residually, the law of the forum. Does this not mean that there is such a thing as "conflicts justice"?

When it comes to the legislature, it certainly may guide the courts, through separate choice rules or through directions incorporated in the substantive statutes themselves, on how far to apply forum or foreign law. Where it remains silent and delphic, the judge may construct a common choice of law system along the lines described in the previous paragraph. It should be pointed out that even where the judge is totally parochial, ignores choice of law, and always applies the law of the forum, he is doing "conflicts justice" in that he chooses such law jurisdictionally and regardless of its content.

VIII. CONNECTING CONFLICTS TO JURISDICTION

While the jurisdictional issue is simpler, because the only (one-sided) question is whether the forum will entertain the action, and while the justice considerations are not identical, since here the state public concern about overburdening its courts comes into play but also there is a presumption that the plaintiff's choice should not be lightly disturbed, yet the decision is often made on the basis of the presence and evaluation of contacts that resembles conflicts analysis, and the Ehrenzweig quest for a "proper law at the proper forum" points in the right direction. In addition, for all the reasons explained above, the choice of forum affects significantly the (subsequent) choice of law and, thus, there is a strong incentive for the plaintiff (and the defendant in declaratory actions) to engage in forum shopping.

My seventh point is that there should be concern about forum shopping but only in proper measure. I would not propose limiting the parties to a single forum. On the other hand, certain general jurisdictional bases, such as personal-presence, doing-substantial-business, plaintiff's-nationality and presence-of-property, are potentially excessive and burdensome and distortive of choice of law. Thus, either they should be eliminated or they should be avoided through a generous application of the forum non conveniens doctrine.

30. For a recent challenge to the "better law" syndrome, see Gary J. Simson, Resisting the Allure of Better Rule of Law, 52 Ark. L. Rev. 141 (1999). See also, Kramer, Rethinking, supra note 1, at 339-40. It is worth noting, with some sense of wonder, that Professor Brilmayer has been unwilling or unable to take a clear-cut position on the relationship between choice of law policies and substantive policies. See Lea Brilmayer, The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules, 252 Collected Courses of the Hague Academy of International Law 19-111 (1995). Professor Sterk argues persuasively that Brilmayer's positions on this dichotomy are contradictory. Sterk, Marginal Relevance, supra note 1, at 1025-30.
IX. THE SYMEONIDES THEORY: ON THE RIGHT TRACK!

My eighth point will give Professor Symeonides his theoretical due. First, he should be praised for being open-minded and meticulously fair in assessing the impact of the various theories on the living case law in his annual review in the American Journal of Comparative Law. While the courts often are perplexed and unsure about the new conflicts and offer us results elliptically supported by a smorgasbord of theory, in his role as the modern glossator of conflicts, Symeonides does his best to organize and explicate for the benefit not only of scholars and lawyers but also of judges in the future.

Second, the two main thrusts of the Symeonides theory point in the right direction. His espousal of the "comparative impairment" general approach, despite its "interests" genealogy, by its own terms rejects the parochial, pro-forum, local-interests-first, content-affected biases which we condemned above. Further, his emphasis on (almost infatuation with?!) the distinction in torts between conduct-regulating rules, where territoriality should reign, and loss-distributing standards, where the personal contacts should carry the day, provides a reasonable contact-based and sovereignty-respecting starting point for making the right choices. My main concern with the Symeonides theory lies not in its direction but in manageability of those distinctions: recognizing and weighing "impairments" of uncertain-elusive interests, sorting out "regulation of conduct" from "loss distribution" etc., when most rules do both. My other concern relates to the manner in which Symeonides particularizes his choices in fields such as, e.g., producers liability, as will be explained below.

X. FROM THEORY TO SPECIFICS: A "MODERN" CHOICE OF LAW FOR PRODUCERS LIABILITY

The time now has come to test the above points in the chosen concrete field, producers liability. To begin with, a few simple (perhaps oversimplified) facts about the world of producers liability need to be summarized. First, let us keep in mind the (conflicting) substantive policies behind the related laws: on the one hand, there is a trend to favor recovery in tort from the manufacturer, regardless of fault, by the persons harmed, assuming that he (and the investors) can better bear the risk and/or spread it among all users; on the other hand, it is rather clear that generous pro-recovery rules are likely to lead to some products disappearing from the market as well as to increases in the cost of products resulting in fewer choices and higher prices to the detriment of all consumers. The outcome of discrete litigation is bound to have pervasive effects on the safety standards and costs of production of entire industries, intersecting with government regulation, as well as on prices, thus affecting consumers as a whole. Also, the question of how acceptable risk will eventually be handled extends beyond mere compensation into insurance, first or third party, and even touches on general considerations of public welfare. Less directly, the impact is likely to be felt by laborers, investors, lenders, and other
of most typical products is certainly national (not local) in the broadest sense in the United States and is becoming increasingly global. Two additional things complicate matters: (a) while most states in the world do recognize some liability in tort for harm resulting from the use of products, compensation plans differ (and this is going to increase) on how far injuries are better covered through social insurance systems (and even private insurance, first-party policies) rather than tort recoveries; and (b) the relationship between the potential contractual rights and the tort claims of a victim who was the immediate purchaser of the product has been unstable. Other issues also have some relevance: how to deal with the contributory-comparative negligence of the victim; whether conduct-regulation objectives should be better addressed through criminal sanctions; how much weight should be given for reasons of fairness and predictability to the planning of activities, including waivers of liability?

Recognizing that this is a very important field and that we need to propose, if at all possible, some intelligent but also intelligible conflicts guidelines, based on some form of consensus as to the indicated choices, we should not recoil from articulating a set of specific rules, on the Neumeier v. Kuehner model, to cover the typical situations. All the same, we should not forget that what we are trying to do will be by definition imperfect and questionable, not so much because of our own weaknesses but for the simple and plain reason that we are trying to straightjacket into local, provincial, substantive rules activities that are multistate and multinational par excellence: The obviously better overall approach here would have been to develop common substantive rules for "interstate" or "international" producers liability for situations with contacts with many states, in the manner, e.g., of the Vienna Convention on the International Sale of Goods.

Many scholars, including Professor Symeonides and the present author, have attempted in the recent past to move to the specifics of a regime for producers liability. The idea was to transcend the vague, delphic "approaches," which provide high-sounding pronouncements that can support almost anything, and move to concrete choice rules which would lead to predictable yet reasonable outcomes, and this a good time and place for a brief revisitation. The emphasis will be placed on consumer products. Other kinds of products such as capital goods, including machinery, public means of transport—airplanes, trains, electricity, etc., especially single-event transnational mass disasters move in different patterns and require participants in the production process, as well as taxpayers.

Kozyris, Half Full, supra note 4, at 969-70.

Drawing and maintaining the optimal safety line requires a cost-benefit analysis which considers the socioeconomic and technological conditions and the prevailing ethic in the particular society. . . . Because the line cannot be drawn at perfect safety, the liability rules determine what incentives to create and where to place the losses. . . . Obviously, the decision of whether and what to shift is motivated not only by compensatory and ethical considerations, but also by concerns about deterrence (punitive damages), practicability, administrative efficiency, and, last but not least, the effects of insurance on the distribution.

Kozyris, Side Glance, supra note 4, at 581-82.
more specialized analysis, especially since typically the victim harmed has no transactional link with the manufacturer.

With these reservations in mind, let me start with a few general conflicts propositions which should guide us in our search. Proposition One: it is unfair for a person to be subjected to the burdens of the law of a state with which he has no deliberate and meaningful "affiliating circumstances" (we used to call them contacts or connections). Proposition Two: it is not just for a person to receive the benefits of the law of a state with which he also has no such affiliations. It follows from these two propositions that the affiliating circumstances should be normally mutual, i.e., connecting both (all) parties to the applicable law.33 Proposition Three: given the presence of significant countervailing considerations as to the availability and cost of products, there should be no substantive bias in favor of recovery, except in the most residual no-other-choice sense. Optional safety standards and levels, sources and types of compensation involve delicate balancing judgments which should not be second-guesses in the conflicts process, especially on a ex post sympathy basis.34 Proposition Four: since there are significant variations on how far product-related injuries are compensated through tort recoveries or social-private insurance plans, and a delicate balance is often pursued, an effort should be made to apply the chosen law as a whole, avoiding dépecage. Proposition Five: in view of the typical presence of a deliberate transaction, directly or indirectly, between the manufacturer and the injured or damaged consumer, at the market where the product was delivered and received, and of the fact that the issues do not relate to "status," the territorial connections should predominate over the personal.

The conflicts rules which I will attempt to articulate below seek to cover the greatest number of the typical factual contexts for consumer-type producers liability. After I describe and explain them, I will add some observations on

33. These propositions are eloquently explained and defended in Brilmayer, Directions, supra note 9, at 253-59. See also, Lea Brilmayer, Rights, Fairness and Choice of Law, 98 Yale L. J. 1277 (1989). In a letter dated March 23, 1990, Professor Larry Kramer, Professor of Law at the University of Chicago, has expressed the view that these propositions (as well as the desirability of holding dépecage to a tolerable level) are not self-evident and need to be defended on their merits. To be sure, a general philosophical text on conflicts, such as the Brilmayer article above, should include such a defense; however, I responded in a letter dated April 12, 1990, that in my judgment these propositions are so overwhelmingly accepted that they need not be belabored upon when referred to in other particularized contexts.

34. Where product liability is at stake, the ultimate effects of providing compensation are not confined to the transfer of wealth from an actor to a victim merely to redress individual harm. Decisions of whether there is liability, and for how much, are bound to transcend the interests of the particular litigants and affect the practices of entire industries, with repercussions for the economy in general. Another reason why the principle of compensation is questionable is that it addresses the loss situation ex post (after the event), rather than ex ante, as it should be. In many situations, it is quite possible that the plaintiff had been already compensated ex ante for assuming the risk, for example, by paying a lower price for the product. Favoring recoveries in the form of tort damages undermines other options of handling losses—social or first-party insurance—and reduces opportunities to use resources in the marketplace to satisfy other preferences.

Kozyris, Half Full, supra note 4, at 961.
comparable schemes and then test them against the case law from the perspective of results. I hope to be able to show that they are consistent with the outcomes of a large number of cases and that, therefore, from the perspective of practical utility, they are preferable to the often convoluted and contradictory theoretical justifications which burden the courts when struggling with these situations. My basic style of presentation will focus on combinations of the significant affiliations (places of acquisition-delivery, of availability through commercial channels, of domicile of victim and of harm, i.e. injury or damage) from the perspective of what both the manufacturer and the victim are entitled to expect and cannot complain against. Needless to say, what I will propose here does not significantly differ from what I have advocated in earlier writings, but it does constitute a refinement.

I propose first that the tort claim against the manufacturer of a victim harmed by a commercially distributed consumer product that was acquired by him or on his behalf or for use by him (i.e., some privity broadly defined) should be governed by the law of the state chosen in the following lexical order: Rule (a) his home state at the time of such acquisition there or such acquisition in another state if also at that time the same kind of product of the same manufacturer was also so available at his home state. Incidentally, since we are dealing with liability in tort, not contract, I mean by "acquisition" the place where the product was delivered pursuant to agreement, not where the agreement itself was made. It is there that the product will likely rest and cause harm. This clarification is specially important for instances of remote sales. Rule (a) should not be controversial. The victim is entitled to have the benefit of the law of his home where he acquires-receives the product, and the manufacturer is entitled to the protection of the law of the place where he markets and delivers the product to a local person. It follows that the victim should be limited to such law because of the entitlement of the manufacturer and vice versa. The victim should also have the benefit of his own law when such product was then commercially available there even if he so acquired it in another state, on the theory that it is not unfair to the manufacturer as the place of actual acquisition is not important in these circumstances in terms of calculating his exposure.

I propose next, especially for the benefit of third parties or the so-called bystanders who did not themselves acquire the product or it was not acquired for use by them, but not limited to them, as Rule (b), that the victim in all situations should be entitled to opt for the law of the place of harm if it coincides with his then home, provided that when the product was originally acquired the same kind of the same manufacturer was also available there through commercial channels. This option reflects the perception that a person injured at home should be entitled to that law; and protects the manufacturer from unfairness through the requirement that such product at the time of the transaction of acquisition was also available there through commercial channels.

Finally, for all hopelessly non-local situations, where the significant affiliations are so dispersed as not to come within these concentrations, I would propose as a

residual (lesser evil) Rule (c), a pure and simple application of the law of the state of the consensual acquisition-delivery at the initial transaction on a theory of ease of application, of more likely fairness as party-mutual and of greater consistency with the basic assumption of state authority.

This scheme reflects my earlier Propositions One and Two that the chosen law must be connected to both parties and the basic thought that the key "affiliating" circumstance in this kind of liability is the transaction whereby the product is acquired (deliberately delivered and received for use) in the market. It is there that the manufacturer has deliberately put in circulation the "defective" product capable of causing injury and it is there that the person who acquired the product went deliberately for that purpose. The choice becomes overwhelming when that state is also the victim's domicile, as under Rule (a). While that latter contact, standing by itself, should not suffice, when it is coupled with commercial availability there, the balance shifts in that direction. It should be noted that Rule (a) focuses on the protection of the person who had a transactional connection with the manufacturer at the place of acquisition-distribution-delivery. By contrast, Rule (b) is intended to cover mostly third parties who were harmed in their home state and had done nothing to affiliate themselves with another state. We generally take into account the fact that the manufacturer should foresee the possibility of the product leaving the state of transaction and causing harm to a domiciliary of another state of his commercial distribution or to a domiciliary of the state of harm. This concentration of contacts in another state justifies the subjection of the manufacturer to its laws in these circumstances. Rule (c) covers the situation where no other state has any significant mutual contacts.

The centrality of the transaction of acquisition also manifests itself in two intertemporal contexts. First, commercial availability should be determined as of the time of acquisition, not of harm. A manufacturer should not be able to avoid the law of a state by discontinuing to serve its market after the acquisition but, by the same token, he should be free to start serving a market and not be subjected to its law for products which had been sold elsewhere at an earlier time. Second, I would assume that any change in the chosen law subsequent to the time of acquisition, either expanding or limiting the rights of the victim, should be disregarded.

It is obvious that I deliberately left out two contacts that often are mentioned as at least relevant, if not significant, in the texts, the literature and in some cases: (a) the place where the product was designed and/or made, and (b) the "domicile" or principal place of business of the manufacturer. I have explained elsewhere in greater detail why I consider the place of designing-making irrelevant either by itself or even when combined with other factors. Since we are dealing here not

36. See Kozyris, Side-Glance, supra note 4, at 583, and Kozyris, Values and Methods, supra note 4, at 491-501. Professor Weintraub has suggested that my opposition to the place of manufacture reflects a "last-event" analysis reminiscent of Section 377 of the First Restatement of Conflicts. Russell J. Weintraub, The Contributions of Symeonides and Kozyris to Making Choice of Law Predictable and Just: An Appreciation and Critique, 38 Am. J. Comp. L. 511, 519 (1990) ("Appreciation"). While I do not belong to those who wish to exorcise the First Restatement, I would like to point out that the
with criminal activity, and not with activity that can cause any harm by itself, but only with the civil compensation of persons harmed by products, it seems to me that the state where the preparatory acts of merely designing and making (and storing) the product are taking place has no reason to concern itself with its specifications and with the potential recoveries for harm caused. The product cannot cause any harm until it is delivered to a user, until it is placed in the market. It is the state where those transactions take place that has the major reason to address these issues, and balance the considerations, both for preventive and for corrective purposes.\(^{37}\) The fact that a product is often placed in the market where it was made, can be dealt with directly through the last connector. An additional problem here is multiplicity, since often the related contacts are dispersed through the many places of operation of multistate or multinational enterprises. Next, the "domicile" of the manufacturer, unlike that of the victim, by itself has no connection with the acquisition, use and harm of the product.\(^{38}\) The fact that unilateral decisions may be made there about the design, manufacture and even marketing of the product should not be enough, for purposes of simple civil liability, to trigger the application of its law. Another major problem is the indefinite nature of a manufacturer's "home" state: place of incorporation, situs of the headquarters, principal place of business, place where the related decisions were made (but then we get back to place of designing, making, etc.) or what? This latter position reflects also my belief that the mere fact that a person "knows" (or is deemed to know) a certain law, e.g., that of its domicile, should not count on the issue of the "unfairness" of being subjected to it. The pertinent question is whether to be subjected to such law in these circumstances, and where the connections exist, it is not the knowledge that makes it fair and, by the same token, neither does lack of knowledge provide an excuse.\(^{39}\) It is heartening to report that the recent case law increasingly recognizes the validity of the above analysis and places the emphasis on the place where the product is "placed in the stream of commerce."\(^{40}\)

\(^{37}\) Professor Fawcett has criticized my approach on this issue, suggesting that it would encourage "reprehensible behaviour" by manufacturers who can thus "dump goods in a low liability state." J.J. Fawcett, \textit{Products Liability in Private International Law: A European Perspective}, 238 Collected Courses of the Hague Academy 11, 187 (1993-I) ("Fawcett"). But this is exactly the point, that it is the state where products are marketed, delivered and used which should have the primary authority to decide where to draw the cost-benefit line and how to regulate the relationship among actors and claimants fairly connected there.

\(^{38}\) Kozyris, \textit{Side-Glance}, supra note 4, at 585.

\(^{39}\) The inappropriateness of these two connectors is beautifully illustrated in the recent case of \textit{Kelly v. Ford Motor Co.}, 933 F. Supp. 465 (E.D. Pa. 1996), discussed infra at Appendix B, where the law of the place of making and principal place of business were relied upon to shield the manufacturer from liability even though the product had been placed in the stream of commerce and had injured a foreign domiciliary elsewhere. This result should be just plainly unacceptable under any reasonable approach.

It should be recognized here that mine are not the only proposals for choice of law in producers tort liability which are sufficiently concrete as to lead to predictable outcomes. At least five other sets meet that requirement. There is not much space here to comment on them at length so I will make only a couple of brief comparative points about them. First, the major Hague Convention on the Law Applicable to Products Liability, is already in effect in eight European states. The Convention has many virtues: it is forum and party neutral, not giving either party major options, it eschews parochialism, it is comprehensive and multilateral and admits almost no déjá vu. In addition, the following connectors quite appropriately play a major role, although not in the combinations which I have proposed: the victim’s habitual residence, the place of the product acquisition by the victim, the place of harm and the places of the commercial availability of the product. However, the Convention also relies heavily on the principal place of business of the defendant. Second, the “proper law” proposal of Professor Cavers: it is slanted in favor of the victim, giving him options among the law of the states where the product was designed or approved, or of his habitual residence where it was acquired or caused harm, or of the place where it was acquired and caused harm. The producer is only given a commercial-availability veto. Third, Article 135 of the Swiss Federal Statute on Private International Law of 1987 adopts a simple rule to the effect that the victim may choose either the law of the defendant’s place of business or habitual residence or the law of the state of acquisition unless the product was marketed there without consent. The damages awarded, however, may not exceed those available under Swiss law. My objections would focus on the first leg of the choices, on the elimination of the victim’s home and the place of harm, as well as on the limitation of damages. Next, Professor Weintraub has been refining an approach which has a lot of merit. His principal choice for the main issues is the law of the victim’s habitual residence if the product was commercially available there or if the defendant so chooses. If that is not applicable, however, he gives first the victim and then the defendant a choice of one of the following three contacts: (a) defendant’s principal place of business, (b) where the product was acquired or caused harm, subject to the commercial availability proviso or (c) the


41. For an excellent description and evaluation of these as well as other approaches, including my earlier positions, see Fawcett, supra note 37, at 136-94. For other contributions to the discussion, see, e.g., Bruce L. Hay, Conflicts of Law and State Competition in the Product Liability System, 80 Geo. L.J. 617 (1992).

42. 11 I.L.M. 1283 (1972).

place of design, manufacturing or maintenance of the product or any of its components. My main disagreements relate to these latter items: the use of the defendant's home state in (a) and the acceptance of a smorgasbord of contacts on the manufacturer's side under (c).

I would like now to address the Symeonides approach for producers liability, as reflected in the Louisiana codification, but also as more fully elaborated in a recent article. Article 3545 of the Louisiana Civil Code contains a special unilateral rule for products liability in favor of Louisiana law in certain contexts and relegates all other choices to the general conflicts regime. Basically, local law applies to the claim of a domiciliary (resident) of Louisiana injured there or injured in another state by a product manufactured or acquired in Louisiana, and to the injury in Louisiana to any person if the product was manufactured or acquired in Louisiana; provided that the product (or of the same kind of the same manufacturer) was commercially available in Louisiana. My general comment is favorable on four of the five contacts used: domicile of victim, place of injury, place of acquisition, place of commercial availability, and the combinations that I have proposed above are quite similar although not identical. The only particular objection aims at the place of manufacture. I am also concerned about the pro-forum effect of a unilateral rule and to residual reference to the all-too-general tort conflicts criteria.

44. Russell J. Weintraub, Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation, 1989 U. Ill. L. Rev. 129, 148. See also Russell J. Weintraub, The Contributions of Symeonides and Kozyris to Making Choice of Law Predictable and Just: An Appreciation and Critique, 38 Am. J. Comp. L. 511 (1990), and Russell J. Weintraub, A Proposed Choice-of-Law Standard for International Product Liability Disputes, 16 Brook. J. Int'l L. 225, 238 (1990). An earlier tendency to opt for the law favoring compensation has been moderated in pieces such as his An Approach to Choice of Law that Focuses on Consequences, 56 Alb. L. Rev. 701, 719-20 (1993). In his most recent piece, Russell J. Weintraub, Conflict of Laws for Products Liability: Demagnetizing the United States Forum, 52 Ark. L. Rev. 157 (1999) ("Demagnetizing"), he places the emphasis on the law of the home of the victim and at the same time, quite appropriately, objects strenuously to the practice of many lower courts to cling to the notion that the standards and calculation of damages is a "procedural" issue subject to the law of the forum, with the result that U.S. producers, amenable to suit at home, are subjected to the generous compensation rules of the United States even in situations where the dispute has no connection whatsoever with this country. To prevent this abuse of jurisdictional rules, federal draft legislation had required the application of the lex loci delicti to product liability actions brought by foreign plaintiffs against U.S. citizens for harm that occurred abroad. S.1996, Cong. Rec. S.18805-6 (daily ed. Dec. 21, 1987).


47. See Kozyris, Values and Methods, supra note 4, at 509. Professor Symeonides has responded and pointed out that the total package is not unilateral and that, for the situations left out, probably not too many, the proper conflicts approach is still controversial. Symeon C. Symeonides, Problems and Dilemmas in Codifying Choice of Law for Torts: The Louisiana Experience in Comparative Perspective, 38 Am. J. Comp. L. 431, 464-69 (1990).
The new Symeonides proposal is multilateral and contains a major option feature, originating with Professor Cavers and also employed by Professor Weintraub, giving the parties certain reasonable choices. Under the Symeonides plan, the plaintiff may choose the law of any state where at least two of the following significant named contacts are concentrated: (a) injury (b) domicile of victim (c) home of defendant (d) place of manufacture and (e) place of acquisition (by anyone); provided, again, that the requirement of commercial availability is met. If he is entitled but fails to exercise it, then the defendant may choose only the law of state of (a) and (b). The above comments about the Louisiana codification also apply here with the added, and serious, objection against the introduction of the home of the manufacturer as a significant contact, as explained above. As to the option feature, I do support its use, but in more limited circumstances. My more generalized concern relates to the residual choice and the escape clause of the Symeonides plan. Not only is he calling for a return to the vagaries and uncertainties generated by Sections 6 and 145 of the Second Restatement, amplified by an additional and only potential escape clause under the “principles” of the Restatement, but also adds the burden of classifying substantive rules as either conduct regulating or loss distributing, which complicates matters considerably in this mixed field. Thankfully, given the extensive coverage of the Symeonides particular producers liability conflicts regime, only marginal situations will call for resorting to all this guesswork.

The time has come finally to assess how my proposed Rules would have decided the recent cases of producers liability to consumers, where issues of substantive choice of law were involved, as reported and analyzed by none other than Professor Symeonides in his contributions to the American Journal of Comparative Law for the last six years in chronological order. I have made this assessment in Appendices A and B at the end of this article, starting with the cases where the results appear consistent with the Rules. I should note here three things. First, for informational purposes, I do list the forum, even though in most cases no explicit reference is made or weight is given to it. Second, in no case was there doubt about commercial availability, so this factor played no role in the outcomes. Third, I sometimes cite both my Rules (a) and (c), the reason being that the facts do not reveal clearly the extent and nature of the relationship between the original acquirer and the victim.

XI. CONCLUSION

Après le deluge, then what? Preoccupied with chasing rainbows, “modern” conflicts theory has neglected to preserve in the Ark the hard-core concepts and methods that would inform the new era. Interest analysis may have charmed and

48. See supra note 44.
49. See Symeonides, supra note 46; Third Restatement, supra note 46, at 16.
50. See Symeonides, supra note 46; Third Restatement, supra note 46, §§1-6 at 15-16.
browbeat us into admiration but, on further reflection, it has revealed its serious shortcomings: mythical legislative intent, parochialism, selfishness, self-righteousness, one-sidedness, manipulability. “Most significant relationship,” “grouping of contacts,” “proper law” and the like moved in the right direction but, by being all things to all people, by referring to all possible contacts and considerations, however incompatible, opened the door to chaos. Nevertheless, their supplementation with presumptions provided some needed guidance. “Best,” “modern,” etc. law sounds good, but it is impressionistic and incompatible with the judicial function; furthermore, it calls for making ad hoc judgments in the rushed and restricted conditions of adjudication where a more reflective and comprehensive approach is needed.

In my judgment, our “rethinking” should be resigned to the simple reality that choice of law in the private sphere involves delineating the authority of a state to impose its own sense of justice on events and persons that fairly come within its power. Since the considerations both of public power and of private fairness revolve around contacts, with emphasis on purposeful and mutual affiliations, we are reduced to choosing which territorial and personal contacts of the litigants, and in what concentrations, point to the choice of which law. Of course, conflicts theory only studies and proposes: it is for the states to enact or adopt particular conflicts regimes.

Professor Symeonides is on the right track when he responds to the “comparative impairment” philosophy of treating all states as equal; and, even better, when he seeks to resolve the personal-territorial dilemma through the “conduct regulation” versus “loss distribution” distinction. The problem, however, of translating these preferences to concrete choices still looms large. Professor Symeonides has gone further and has given us, in an important and controversial field such as producers liability, the concrete (albeit unilateral and partial) Louisiana Rule as well as a proposal for a narrowly drafted section of a new Conflicts Restatement. While my own ideas and proposals are not identical, there is considerable common ground and room for accommodation. My preferences revolve around more particularized and narrow rules as building blocks for a Third Restatement. I am mindful of the danger of transforming the current state of a thousand cases to that of a thousand rules and hope that we could accommodate a large number of typical situations within a relatively short universe of rules. In the field of products liability, I propose rules only for consumer products (there is little reason why airplane single-event mass disasters should be treated in a similar conflicts fashion as discreet discomforts from bottles of Coke) and I place the emphasis on the place of marketing—distribution, use, commercial availability—and on the home of the victim, rejecting both the place of making and the home of the defendant. I also consider it crucial to avoid open-ended—“unless”-type escape clauses, which undermine the rules and invite ex post improvisations. I tried to show that most of the cases would have been decided the same way under my proposals and that in virtually all the cases my proposals would have produced better, or at least as defensible, choices.
My last admonition is not to forget the inherent limitations of the current choice-of-law process. All too often, we are trying to choose which local law to apply to non-local transactions and relationships; and this straight-jacketing comes at a point where the procedure has already been burdened with the jurisdictional phase and where the main task is to interpret and apply some law rather than choose it. In those contexts, the guidance that we provide should be as concrete as possible, intelligible even to “dummies”; and those who challenge us with the siren song of perfectionism should be ignored unless they can come up with a better and at least equally workable alternative.
APPENDIX A


16. *Alexander v. General Motors Corp.*, 478 S.E. 2d 123 (Ga. 1996). Car seat. Law of Georgia (forum, place of acquisition by victim, local domiciliary;—not Virginia, place of harm); strict liability; for plaintiff; Rule (a).


19. *Nesladek v. Ford Motor Co.*, 46 F.3d 734 (8th Cir. 1995). Transmission gear. Law of Nebraska (place of acquisition of car at home by plaintiff, death of child— not Minnesota, forum, doing business by defendant, place of installation, current domicile of plaintiff); statute of repose, for defendant; Rules (a) and (c).

20. *Bonti v. Ford Motor Co.*, 898 F. Supp. 391 (S.D. Miss. 1995). Car. Law of North Carolina (place of acquisition at home by plaintiff, death of husband, also North Carolina domiciliary; not: South Carolina, place of accident;—not: Mississippi, forum, doing business by defendant;—not: Michigan, place of design;—not Kentucky, place of assembly); statute of repose, for defendant; Rules (a) and (c).


25. *Rice v. Dow Chem.*, 875 P.2d 1213 (Wash. 1994). Herbicide. Law of Oregon (place of delivery at purchase to local employer, then domicile of plaintiff, exposure—not Washington: forum, manifestation of symptoms, current domicile of victim); statute of repose, for defendant; Rules (a) and (c). Excellent opinion.


The cases that do not fit the above system are considerably fewer and are listed in Appendix B. Their reasoning, where revealed, deserves special comment.
1. *Denman v. Snapper Div.*, 131 F.3d 546 (5th Cir. 1998). Lawnmower. Manufactured in Georgia by Georgian company, acquired in Mississippi (forum) by local domiciliary. Later loaned to relative domiciliary of North Carolina, injury there. North Carolina substantive statute of repose was applied, principally on a lex loci basis, to bar the action. Does it make sense to shield the manufacturer in that type of situation? It was justly criticized by Symeonides. Rule (c) would have called for the law of Mississippi.

2. *Davis v. Shiley*, 64 Cal. App. 4th 1257, 75 Cal. Rptr. 2d 826 (Cal. App. 4th 1998), designated as “not for publication” by the Supreme Court. Heart valve, acquired and implanted in Oregon on Oregon domiciliary. Product made by Californian in California (forum). Oregon’s shorter statute of repose was not applied on the ground that California has a policy of applying its own limitation periods “to protect California residents and courts from stale claims” (at 830). The nonsequitur of such reasoning was noted by Symeonides. Rule (a) would have called for the law of Oregon.


5. *MacDonald v. General Motors Corp.*, 110 F.3d 337 (6th Cir. 1997). Van made by defendant in Michigan, sold in Kansas to local university, death of North Dakotan student passenger in Tennessee accident (forum). Choice of law of North Dakota, no-ceiling on damages, for the benefit of the there-domiciled parents, since the defendant also does business there and the other plaintiffs had already been subjected to law of Kansas. Any conflicts sense? Rules (a) and (c) would have called for the law of Kansas.

6. *Kelly v. Ford Motor Co.*, 933 F. Supp. 465 (E.D. Pa. 1996). Car sold in Pennsylvania to local domiciliary who was killed in the state. But law of Michigan applied to shield the manufacturer from punitive damages because the car had been manufactured in Michigan at the home of the company on the theory that, at least on that kind of issue, Pennsylvania’s interest analysis

52. *Id.* at 374-75.

53. *Id.* at 378.
focuses on the place of defendant's conduct and on his principal place of business! No comment!

7. *LaPlante v. American Honda Motor Co., Inc.*, 27 F.3d 731 (1st Cir. 1994). All-terrain vehicle, designed and made in Japan by Japanese company, acquisition in Colorado and injury there to Rhode Island (forum) domiciliary soldier. Law of Rhode Island with no damage limits applied on a theory that Honda's insurance rates are not likely to be affected, since it does business in all states. Logical, sound?! Rules (a) and (c) would have called for the law of Colorado.

8. *Ness v. Ford Motor Co.*, No. 89 C 689, 1993 U. S. Dist. LEXIS 9938 (N.D. Ill. July 20, 1993). Car, made by Ford in Michigan, garaged and registered and apparently acquired in Illinois by local driver. Other Illinois domiciliary injured as a passenger in Iowa accident. What law to apply? The court made some very enlightening comments why the law of neither the plaintiff's nor the defendant's domicile ought to control. In the first situation, such a rule "would permit a state with little manufacturing to endow its citizens with generous protection wherever they choose to travel without picking up any part of the cost" (at *5). Likewise, in the second situation, the law of the state of manufacture "would tend to leave victims uncompensated as states wishing to attract and hold manufacturing companies would raise the threshold of liability and reduce compensation." Since there is no alternative that will produce a rational and fair result, let us go with the lex loci delicti. Rule (c) would have called for the law of Illinois.