The Last Treatise: Review of Weintraub, Commentary on the Conflict of Laws

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THE LAST TREATISE


Reviewed by Robert Allen Sedler*

Some years ago Professor Charles Alan Wright observed that "[o]n a generous estimate one litigated case out of every hundred may involve a question of the conflict of laws. Yet the subject of the conflict of laws has attracted the best thinking and the most diligent research of a host of capable scholars. Magnificent treatises explore its every intricacy; fruitful theories abound by which it may be explained and understood and reshaped. . . ."† Russell J. Weintraub's Commentary on the Conflict of Laws, the latest treatise worthy of Professor Wright's

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description, will take its place among the works of the other leading conflicts theorists.2

The book is a remarkable piece of scholarship. In an extremely well-organized and very readable manner Professor Weintraub shows how courts have dealt with conflicts problems in actual cases, sets forth existing law, and analyzes present and proposed solutions to a variety of conflicts problems, all the while developing with precision and clarity his own functional analysis. He blends all of this together, shifting from one objective to another almost imperceptibly and presenting somehow the picture of an integrated whole.

At the base of functional analysis is a consideration of the policies and interests of the concerned states, and Professor Weintraub here draws on the governmental interest approach developed by the late Brainerd Currie.3 Professor Weintraub further develops governmental interest by applying it to all areas of conflicts law. Differing from Professor Currie, he tries to come up with a “rational solution to the true conflict, focusing on policies and trends in the development of the law that the jurisdictions share” (p. 39).

Significantly, because through outstanding research and thinking capable theorists have now established a basic framework of scholarship upon which future commentators can build, this may be the last complete treatise on the conflict of laws for some time. In addition, because our present emphasis on law as an instrument of social change has lessened the importance of the traditional subjects in the law school curriculum, particularly those related to private dispute settlement, many of the younger (which for obviously personal reasons I define as under 40) academicians may be unwilling to make the kind of intellectual and personal commitment it takes to produce a treatise such as Commentary on the Conflict of Laws.

The emphasis now should turn to variations on the differing themes and upon the development of sound solutions to particular conflicts problems. Perhaps then, with the publication of Weintraub’s Commentary, we are at the end of one era of conflicts scholarship and at the beginning of a new one. If so, a somewhat different kind of review may be appropriate for what I would call the “last great treatise.” I will indicate my personal reaction to a number of Professor Weintraub’s ideas, and more importantly, will use the book as a vehicle for developing my

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3 See generally B. Currie, supra note 2.
own ideas as to the proper solution of conflicts problems, particularly in Torts and Contracts.

I. OBSERVATIONS AND RESPONSES

Professor Weintraub's use of functional analysis in the property area was particularly impressive. He demonstrates very cogently what I had always felt—that interest analysis could be employed effectively consistent with the need for certainty that purportedly exists in fields such as property. He shows the irrelevancy of domicile as such by indicating that, under functional analysis, each of the classic domicile cases points to only one state whose law should be applied. In Chapter 8 he deftly works a series of examples showing that the situs qua situs often has no interest in applying its law to determine questions of succession or transfer of land. Particularly in the succession area he employs functional analysis to point out false conflicts, resolve true ones, and show that sometimes there is no conflict at all.

Little attention is given to the substance-procedure problem except in the discussion of statutes of limitations. The omission is significant. Analytically the substance-procedure problem, or what I would prefer to call "extent of incorporation," arises only after the forum has decided to displace its own law. Since the forum cannot for all purposes become a court of the other state, it must draw the line at some point in deciding how much of the other state's law it will incorporate as a model for the rule of decision. The line has traditionally been drawn by reference to the substance-procedure dichotomy. Under the traditional rules, of course, the forum was often forced to displace its own law even in cases where it had a strong interest in applying it. This meant not only that substance-procedure questions would arise with some frequency, but

4 Estate of Jones, 192 Iowa 78, 182 N.W. 227 (1921); White v. Tennant, 31 W. Va. 790, 8 S.E. 596 (1888); In re Annesley, [1926] Ch. 692.
5 In each of these cases the law of that state was not applied.
6 Once false constitutional dogmas concerning jurisdiction of subject matter are swept aside, a functional analysis reveals that the situs qua situs, with rare exceptions, has an interest in applying its own law to affect the interest of persons in property only when choice of law will affect the use of the land. Even when land use is affected as between states of the United States, the situs rule should probably yield to the conflicting rule of another state that has a genuine interest in validating a transaction that the situs would invalidate (p. 338).
7 For example, according to Professor Weintraub, the situs should not apply its rule against perpetuities to invalidate a transfer that satisfies the perpetuities rule of the state where the claimants are resident because, "The differences between the perpetuities rules of the various states are differences in detail rather than of basic policy" (p. 321).
8 RESTATEMENT OF THE CONFLICT OF LAWS § 585 (1934).
that the forum would be tempted to characterize an obviously "substantive" issue as "procedural" in order to apply its own law. Thus procedural characterization quickly became a favorite manipulative technique. At various times spousal immunity, survival of actions, and limitations on wrongful death recovery all came to be characterized as matters of "procedure." A functional approach will relegate these mutants to obscurity, since the forum will displace its own law only when it considers such a result desirable. Some years ago I argued that the *Erie* "outcome-determinative" test should be employed in conflicts cases to deal with the problem of "extent of incorporation." This accords with Professor Weintraub's functional definition of "procedure" (pp. 46-48), and with the approach the courts appear to be taking. Functional analysis clearly goes a long way toward solving the "pervasive problem" of substance and procedure.

Professor Weintraub makes a very interesting point in suggesting that the forum state look to the choice of law decisions of other involved states. The "pervasive problem" of the renvoi can arise as such only when the forum is operating under rigid choice of law rules—the forum's choice of law rule refers it to a state whose own choice of law rule looks back to the forum. Traditionally courts solved the problem by rejecting the renvoi; the forum looked only to the other state's substantive law indicated by the forum state's choice of law rule and ignored the other state's choice of law rule. The long practice of "rejecting the renvoi" appears to have created a judicial mind set against looking to another state's choice of law decisions. Professor Weintraub contends that those decisions may assist a functional analysis by underlining the real policy behind the other state's law. Thus in *Haumschild v. Continental Casualty Co.*, for example, the Wisconsin court, by looking to the California court's decision in *Emery v. Emery*, could have determined that the policy behind California's spousal immunity rule was really a community property policy applicable only to

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11 Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953). See the frank admission of what was done in *Traynor, Is This Conflict Really Necessary*, 37 Texas L. Rev. 657, 670 n.35 (1959).


14 RESTATEMENT OF THE CONFLICT OF LAWS § 7(b) (1934).

15 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

California spouses. California would thus have no interest in applying its immunity rule to Wisconsin spouses involved in an accident in California. The case clearly presented a false conflict.

Professor Weintraub notes, however, that it is impossible to obtain functional information from the foreign choice-of-law rule when it is cast in a "rigid territorial mold":

Such a territorially-oriented conflicts rule, by its nature, selects a geographical location as the source of the applicable law without first requiring inquiry into either the content of that law or that law's underlying policies. For example, if the marital domicile permits spouses to sue one another for negligence, but determines this question in conflicts cases by the law of the place of the wrong, this choice of law rule cannot reasonably be read as a functional decision to defer to the superior interests of the place of the wrong (p. 57).

Under functional analysis this case presents an obviously false conflict; this being so, the forum state should apply its own law and allow recovery. Professor Weintraub's position seems to be that it should do so even though the other state, if suit were brought there, would decide the issue in accordance with the substantive law of the forum. Here, I cannot agree. I would contend that where the state whose law is to be used as a model would follow the substantive law of the forum, for whatever reason, the forum should not displace its own law because there is simply no conflict of laws. I see the law of the forum as the basic law, which should not be displaced in the absence of a determination by the forum court that a conflict of laws exists and that there are valid reasons for displacement. In the above example there is an apparent conflict of laws when the "domestic" rules of the states are considered, but this conflict dissolves in light of the choice of law decisions of the

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17 At that time California held that recovery of damages for personal injuries by a spouse was community property, so that the negligent spouse would be in effect "profiting from his own wrong." See Bruton v. Villoria, 138 Cal. App. 2d 642, 292 P.2d 638 (1956).

18 By looking to the choice of law decisions it was possible to "end armchair speculation about the California policies" (p. 55).

19 The marital domicile has an interest in allowing its resident to recover, and the state of injury has no interest in protecting the "family harmony" of nonresident spouses, or more accurately, the interest of the nonresident insurer. See Sedler, Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method, 2 Rutgers-Camden L. Rev. 8, 52-54 (1970).

20 He does say that when the forum is "neutral, having no policy of its own to advance," and "all of the states that have contacts with the parties and with the transaction would reach the same solution to the choice-of-law problem," then, "[t]he neutral forum should mirror this result although it believes it foolishly dysfunctional, provided, of course, that the result is not so outrageous as to be unconstitutional" (p. 57). While the forum here has no policy of its own to advance, it does have contacts with the transaction, since the accident occurred there, and it is not the "disinterested third state." I doubt that Professor Weintraub intended the exception to apply here.
other state. My emphasis on the law of the forum as the basic law, and my view that the function of a court is to adjudicate the dispute before it, dealing only with conflicts questions when absolutely necessary, leads me to the position that the forum should not displace its own law when the only other concerned state would decide the issue in accordance with the substantive law of the forum.

Professor Weintraub has devoted most of his chapter on constitutional limitations on choice of law to a discussion of due process and full faith and credit. He points out that the due process clause does not prohibit the application of the law of a state having no interest in applying its law, when that law is chosen on the basis of territorially-oriented choice of law rules, and when the accident happened in that state (p. 388). However, he also raises the equal protection issue:

Another form of equal protection problem arises if the forum would refuse to apply its own law to its own residents because the forum's traditional choice-of-law rule points to some other geographical location as having the decisive "contact." Such a refusal may be based upon an unreasonable classification of forum residents if the policies underlying the forum rule would be advanced by applying it and if such application would not interfere with the legitimate interests of any other state or unfairly surprise any party (pp. 425-26).

Thus a forum-state wife injured by her husband in the forum would recover while one similarly injured in another state would not recover in light of the forum's territorially-oriented choice of law rule. This example illustrates Professor Weintraub's conclusion that "[t]he time may be approaching when discriminating in the treatment of two forum state wives because they were injured in different states will be recognized as the kind of irrational classification that runs afoul of the equal protection clause" (p. 425). I would agree fully. Future constitutional challenges on grounds of equal protection and "privileges and immunities" may invalidate certain applications of territorially-oriented choice of law rules. In this example, then, I would argue that neither the

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22 See Sedler, supra note 9, at 95-101.
23 See Carroll v. Lanza, 349 U.S. 408 (1965), recognizing the "constitutional interest" of the state of injury in applying its law to allow recovery to a nonresident injured there, even though the injury "may have cast no burden on her or her institutions."
25 This is the "comity clause" of Art. IV, § 2, not to be confused with the privileges and immunities of national citizenship guaranteed by the fourteenth amendment. Professor Weintraub does not discuss this guarantee apart from equal protection. See generally Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, 69 Yale L.J. 1323 (1960).
state of injury nor the parties' home state could apply the immunity rule of the state of injury to deny recovery.

Professor Weintraub makes a very important—and to my knowledge unique—point with respect to the constitutionality of the forum applying its own statute of limitations. He contends that for a disinterested forum to allow a suit not barred by its own statute of limitations, but barred in the only interested state, violates due process (p. 398). The logic is unassailable, and it is surprising that this point has not occurred to any court that has applied the forum's longer statute to allow a suit admittedly "governed" by the law of another state. The forum is justified in barring a suit under its shorter statute of limitations in order to implement its procedural policy against stale claims (p. 396-97), but by definition it can have no procedural policy qua forum in allowing a suit in which it otherwise has no interest. Some years ago, I argued that the forum should disallow such suits whether or not a borrowing statute was applicable, but it never occurred to me—despite what I thought was a sensitivity to constitutional issues—that to allow such a suit could well be unconstitutional.

Professor Weintraub argues that the full faith and credit clause requires balancing the state's interest in applying its own law against the need for national uniformity (p. 411). While the full faith and credit clause clearly does not justify weighing the interests of one state against another (pp. 402-04), Professor Weintraub's "state interest-national uniformity interest" analysis makes tolerable, if not palatable, the result in cases such as Order of United Commercial Travelers v. Wolfe. There may be disagreement with the view that full faith and credit should operate as an independent limitation on choice of law at all—a view that I think I share—but if it does, Professor Weintraub has crafted a clear rationale and a sound guide to its application.

II. The Chapter on Torts

It is no easy task to compress a discussion of choice of law in conflict torts cases into some sixty pages, particularly when the discussion includes not only an overview of the most swiftly and dramatically changing area of the law, but also a development of the author's own
approach. But Professor Weintraub has managed to do it. He has also performed a very valuable service by reminding us that the place-of-wrong rule has not disappeared, as academic commentary would sometimes indicate, citing ten jurisdictions that have expressly refused to abandon the place-of-wrong rule (p. 237 n.43). He demonstrates cogently the unsoundness of the results that were reached in a number of place-of-wrong cases in comparison with the results that would be reached under interest analysis.

In view of the effectiveness of this kind of analysis, I am disappointed that Professor Weintraub did not consider more fully the "state of the most significant relationship" approach of the Restatement Second, particularly in comparison with interest analysis. His brief discussion displays ambivalence toward the policy content of the Restatement Second approach, and fails to accentuate the difference between its localizing, contact-oriented methodology and the methodology of interest analysis. This is really my only criticism as to the content of the chapter. Professor Weintraub has set forth his own approach most clearly and concisely, and somehow has managed to focus on the panoply of recurring problems.

My own approach to choice of law in conflicts torts cases departs from Professor Weintraub's analysis in two basic situations. Like Professor Weintraub, I believe that interest analysis is the soundest way to go about solving conflicts problems, particularly in the torts area. However, unlike Professor Weintraub, I adhere to Professor Currie's view that in the case of a true conflict—which I define a bit differently from Professor Currie, emphasizing real as opposed to hypothetical interests—the forum should apply its own law. Furthermore, I am very much concerned with judicial method and with the behavior of courts in dealing with the kinds of cases that actually arise. I submit that conflicts cases, particularly in the torts area, fall into certain fact-law patterns, and that courts can resolve these cases on considerations of policy and fairness to the parties. Their decisions in particular cases will serve as precedents for future ones, and in time a judicially established body of conflicts law may emerge. This orientation causes me to analyze academic solutions with reference to their impact on and relevancy for judicial behavior in conflicts cases.

Professor Weintraub's approach, here as elsewhere, calls first for identifying and eliminating false or spurious conflicts and then for

34 Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), discussed at length in another context (pp. 239-44), would be a good example of this difference.
35 See generally Sedler, supra note 9; Sedler, supra note 19; Sedler, The Territorial Imperative: Automobile Accidents and the Significance of a State Line, 9 Duquesne U. L. Rev. 394 (1971).
providing a rational basis for resolving true ones. A spurious conflict is present "when two or more jurisdictions, having some contact with the parties or the occurrence, have tort rules pointing to different results, but upon analysis of the purposes underlying the putatively relevant and divergent rules, it becomes apparent that one rule and one rule only is rationally applicable to the case in issue" (p. 201). Spurious conflicts arise when one state would substantially and legitimately advance its own policies if its rule were applied, while the contacts of the other states are such that their policies, if given effect, "would officiously interfere with the policies of the first state" (p. 201). Classic examples of spurious conflicts include an accident involving two spouses from a non-immunity state occurring in a state that still recognizes spousal immunity and a similar accident in a state that does not have a guest statute involving two parties from a state that does (pp. 221, 228).

Spurious and true conflicts are not separated by a sharp dividing line, but occupy opposite ends of "a spectrum of torts conflicts situations;" and "[b]etween these extremes," Professor Weintraub writes, "are cases in which reasonable men may differ as to whether more than one state's policies are relevant" (p. 202). Unfortunately, Professor Weintraub drops the matter at this point and moves on to the true conflict, leaving an important gap in his approach. I think explicit attention should be given to what Professor Currie has called the "un-provided-for case," in which neither state has an interest in applying its law on the issue in controversy. 37 For example, a State A decedent is killed in State A while operating a machine manufactured in State B by a State B corporation. State A has a limitation on the amount of damages recoverable for wrongful death; State B does not. The case presents neither a false conflict nor a true one, because neither state has an interest in applying its law on the particular issue: State A has no interest in applying its limitation policy for the benefit of the State B defendant; State B has no interest in allowing unrestricted recovery to the beneficiaries of a State A decedent killed in State A. 38

Professor Weintraub does not deal explicitly with this kind of case, a significant omission since these cases do arise in practice. In treating this situation, I would consider policies other than those reflected in the differing laws themselves. For example, all states impose liability for wrongful death, and limitations on this liability are exceptional. This being so, when the only state interested in limiting defendant's liability—his home state, where he will be required to bear the loss or carry insurance to cover it—does not do so, the common policy of both

37 See B. CurrIe, supra note 2, at 152-53.

states in permitting recovery for wrongful death should be respected and unlimited recovery should be allowed. As a general proposition in accident cases, when defendant's home state imposes tort liability, he should be held liable irrespective of where the plaintiff resides or where the accident occurs.

In the wrongful death example, Professor Weintraub first questions whether states do share a common policy of allowing recovery for wrongful death in view of the "great variations in the way different states compute wrongful death damages, some providing very generous recoveries, some far less." But when both states have identical measures of wrongful death recovery except that one has a statutory limit on damages—which he says is unlikely—he would agree with my view, taking the position that "[t]he remainder of the wrongful death recovery of the decedent's domicile is applicable sans the limit on recovery because the decedent's domicile at death will advance its compensation policies by providing full compensation to the surviving dependents," and "[f]ull recovery will advance the policies of the decedent's last domicile and will not conflict with the policies of the defendant's domicile."

He also makes the point that, "[w]hen the only two contact states share identical policies, but one state has an exception to that policy, if the reasons underlying the exception are inapplicable, it is highly likely that at least one of the states will have a significant interest in having the shared policy applied." This point is well taken and furnishes a sound means of analyzing the significance of what I have called "policies other than those reflected in the differing laws themselves." I think Professor Weintraub and I would take essentially the same approach to resolving the unprovided-for case, and I wish that he had developed this aspect more fully as an integral part of his functional analysis of tort problems.

When it comes to the true conflict, Professor Weintraub would not "give up and apply the law of the forum" (p. 203). I fully agree with his view that a true conflict exists when each state has a legitimate and real interest in having its own rule applied. He distinguishes, as I do, between real and hypothetical interests, pointing out that when two

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40 He says this because the limit on damages will probably have made it unnecessary for the courts in the low-limit state to resolve many of the hard problems of computing wrongful death recovery concerning which there are substantial splits of authority and which the courts in the no-limit state have had to decide. Id.
41 Id.
42 Id.
43 My statement that "no state has an interest in applying its law on the particular issue" refers only to the differing laws and does not preclude recognition of a state's interest in having the shared policy applied.
parties from an immunity state—for example, a state that has a guest statute—are involved in an accident in a nonimmunity state, any interest of the state of injury in allowing compensation to the nonresident plaintiff is "officious and hypothetical" (p. 246). When the conflict cannot be avoided, however, he would seek a rational basis for resolution, relying heavily upon four guiding factors.

First is the general movement of substantive tort law toward distributing losses resulting from accidents, which argues in favor of allowing the plaintiff to recover (p. 204). Secondly, there is the matter of unfair surprise, which Professor Weintraub does not consider significant in tort cases. Unfair surprise would be relevant only to show that the nominal defendant did not foresee any liability for his conduct and therefore failed to take out liability insurance, or that he would have taken out more liability insurance if he could have foreseen that his liability would be measured by standards of compensation different from those in the place where he acted. The insurer also would be unaffected, for as Professor Weintraub observes, insurance rates are based not upon individual cases, but upon great numbers of cases, and "[t]o talk of surprising the insurer is very likely to be talking nonsense" (p. 206).

Anachronism is a third criterion. When "a rule that is in step with general modern trends in the area [conflicts with] a rule that is clearly an anachronistic lag, resolution should be in favor of the rule that is more representative of current developments" (p. 206). He carefully distinguishes the anachronism factor from the so-called "better rule" approach, which he roundly and properly rejects (p. 207). Anachronism is intended as an objective standard: Can it be demonstrated by a scrutiny of legislative and case developments over past years that the rule in question is being displaced or modified in favor of the competing more modern rule? A rule is not anachronistic merely because judges may deem it undesirable. Guest statutes, he points out, can hardly be anachronistic when twenty-six states have them and two others require a showing of more than ordinary negligence for a guest passenger to recover against his host driver. It should be noted that whenever a court has looked to the "better rule," that rule has, not coincidentally, been its own.

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44 The individual defendant is not likely to have shaped his conduct to take account of rules of liability for negligence or the measure of damages, and, in any event, is likely to have been insured.


48 See, e.g., Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968); Clark v. Clark, 107 N.H. 851, 222 A.2d 205 (1966). For rejections of the "better rule" when it was not the rule of the forum, see, e.g., Satchwill v. Vollrath Co., 293 F. Supp. 533 (E.D. Wis. 1968); Fuerste v. Bemis, 156 N.W.2d 831 (Iowa 1968); DeFoor v. Lematta, 249 Ore. 116, 437 P.2d 107 (1968).
Finally, a state's choice of law decisions delineating the cases in which it would apply its substantive law may serve as a guide to the purposes underlying that law and the state's interest in applying it to the situation in question (pp. 207-08). As a shorthand statement of "all that has been said," Professor Weintraub proposes the following formulation: "An actor is liable for his conduct if he is liable under the law of any state whose interests would be advanced significantly by imposing liability unless imposition of liability would unfairly surprise the actor" (p. 209).

I tend to be somewhat skeptical about proposals for resolving true conflicts, at least in the tort area, primarily because the case in which the forum would be expected to displace its law under these proposals is unlikely to arise in practice, and secondly, because whenever a court has been faced with a true conflict, it has almost invariably applied its own law—unless it has continued to apply the place-of-wrong rule. In those true torts conflicts cases that actually arise the forum court generally applies its own law, as Professor Currie advocates, and more significantly, in these cases the commentators that have attempted to resolve true conflicts would usually agree that this is how the particular case should have been decided. I will try to illustrate this point with reference to the formulation that Professor Weintraub has proposed.

Suppose a resident of a state that does not have a guest statute is injured there while a passenger in a vehicle operated by a driver from a guest statute state. This obviously presents a true conflict. The victim's home state is interested in applying its law to allow recovery to its resident who was injured there. The driver's home state, where the vehicle is insured and where insurance rates theoretically will be affected, is equally interested in protecting its resident, or more accurately, his insurer, no matter where the accident occurs. Professor Currie would say that the plaintiff's home state should apply its own law in a true conflict. Professor Weintraub would also resolve the true conflict in favor of the law of the plaintiff's state, but because its interests would be advanced significantly by the application of its law and because the imposition of liability would not unfairly surprise the actor. They disagree only about what the defendant's home state should do: Professor Currie would say that it should apply its own law in a true conflict, and Professor Weintraub would say that it should defer to the policy of the plaintiff's home state. But this case will never arise. The plaintiff will sue in his home state, obtaining jurisdiction under the non-resident motorist or nonresident tortfeasor's act, and that state will apply its own law, as Professor Currie and Professor Weintraub would both advocate.47

The strong relationship between jurisdiction and choice of law,

47 See Sedler, supra note 19, at 66-67.
which Professor Weintraub describes (pp. 67-69), is particularly clear in terms of predictability of result. In a true conflict case the plaintiff will sue in his home state if he can obtain jurisdiction there, and that state is almost certain to apply its own law. Speculating on what the defendant's home state would or should do if suit were brought there may be an interesting academic exercise, but it is totally irrelevant to the realities of conflicts litigation. If plaintiff is unable to obtain jurisdiction in his home state—for example, when he is injured in defendant's home state and defendant is not otherwise amenable to process in plaintiff's state—he would waste his time suing in defendant's state, because that state will always apply its own law.48

The choice of forum becomes even more significant when the injury occurs in defendant's home state and the defendant wants the plaintiff to recover. Guest statute cases are a good example. There will almost always have been a prior relationship between the parties—the fictitious ungrateful hitchhiker has not yet made his appearance in an actual conflicts case—and the nominal defendant will want the plaintiff to recover against his insurance company. Here again, Professor Weintraub, looking to the interest of the plaintiff's home state in allowing recovery and the clear absence of unfair surprise to either the nominal defendant or his insurer, would agree that the plaintiff's home state should apply its own law. A problem may arise, however, because of what may be called the "territorial hang-up." Plaintiff's home state has had no difficulty applying its own law when some of the facts leading up to the accident, such as the origin of the trip, occurred there.49 But in Cipolla v. Shaposka,50 the accident occurred in Delaware, a guest statute state, on a trip originating in Delaware, and the Pennsylvania Supreme Court became one of the few policy-centered courts in recent years not to apply its own law in a tort case presenting a true conflict.51

51 In Casey v. Manson Constr. Co., 247 Ore. 274, 428 P.2d 893 (1967), the Oregon court refused to apply its law allowing recovery for loss of consortium in favor of an Oregon wife whose husband was injured while on the defendants' property in Washington. The defendants were Washington corporations registered to do business in Oregon. In Barrett v. Foster Grant Co., 450 F.2d 1146 (1st Cir. 1971), it was held that New Hampshire would not apply its tort law apparently imposing a higher duty of care, in favor of a New Hampshire plaintiff injured while working on land located in Massachusetts, in a suit against a corporation having its principal place of business in Massachusetts. The "territorial imperative" seems even stronger when the injury occurs on the defendant's land located in another state. Id. at 1152. Professor Weintraub argues that in Casey the defendant had some nexus with Oregon that made it reasonable for Oregon to assert its interest (p. 248). I agree. In Barrett, since the corporation was subject to suit in New Hampshire, it may be assumed that it was doing business there. The issue, however, involved the duty of care owed to an invitee, and it could be argued that there may have been some reliance on the Massachusetts standard. Barrett is a hard case, but if the decision is correct, it is because application of New Hampshire law would have been
Professor Weintraub would disagree with the result in that case. After paying some obeisance to the "territorial hang-up" by conceding that plaintiff's home state should not apply its law unless either the defendant or his injurious conduct had some nexus with it, he proposes an exception that essentially "swallows up the rule" by enabling the plaintiff to recover under his home state's law if he boarded the vehicle there or the trip was intended to end there (pp. 248-49). This exception covers the few guest statute cases that have arisen in this vein, including Cipolla. Only the "territorial hang-up" could have caused the Pennsylvania Supreme Court to decide Cipolla as it did, and here again Professors Weintraub and Currie would agree that Pennsylvania should have applied its own law.

Miller v. Miller was another true conflict case in which defendant wanted plaintiff to recover. At the time of the fatal accident defendant was a resident of Maine, which then had a $20,000 limitation on damages recoverable for wrongful death. The victim was defendant's brother, and the accident occurred while he was visiting defendant in Maine. The defendant subsequently moved to New York, where his brother's survivors brought suit. Undoubtedly, even if he had not moved to New York, he would have allowed himself to be served there. At the time of the suit Maine had also removed the limitation. The New York court applied its own law to allow unlimited recovery. Again Professor Weintraub agrees with the result, but here on the ground that post-accident changes in residence may properly be considered in determining interests where this does not produce unfairness nor penalize a party for the change of residence (pp. 249-53). The New York court, after emphasizing its interest in allowing unlimited recovery and the absence of unfairness to the Maine insurer, noted that defendant was now a New York resident and that the Maine limitation had since been removed.

I would submit that the result in Miller would have been the same if the nominal defendant had not changed his residence to New York. New York had a clear interest in allowing the beneficiaries of a New York decedent unlimited recovery, particularly against a nominal defendant who wanted them to recover. The insurance policy covered out-of-state accidents, and as the court observed, insurance policies do not distinguish between liability for personal injuries and liability for wrongful death. Thus, the insurance company could expect to be held unfair since the defendant may have conformed its behavior to the requirements of the Massachusetts standard.

Though Professor Weintraub disagrees that the exception "swallows up the rule," his examples, apart from the guest statutes, involve the unlikely situation of individual defendants who have been personally served in the forum.

to unlimited liability, and it was not prejudiced by being held to that standard merely because the accident had not occurred in New York. In addition, the insurance company was doubtlessly doing business in New York, and New York certainly could hold the company to the New York standard under a benefit theory if one of its residents were injured by the company's insured elsewhere. 54 Using the interest and fairness criteria then, the application of New York law would be proper whenever a New York resident was killed or injured by a person insured with a company doing business in New York. 55 Only the "territorial hang-up" would produce a different result.

The crucial lesson is that in actual practice tort cases presenting true conflicts almost invariably follow the substantive law of the forum, as Professor Currie has advocated. More importantly, the formulation for resolving true conflicts that Professor Weintraub has proposed would produce the same result in each of these cases. The cases in which he would argue that the forum should displace its own law are simply not likely to arise. 56 In terms of predicting the behavior of courts in actual cases, I would submit that Professor Currie has carried the day. The forum will almost invariably apply its own law, unless it has retained the place-of-wrong rule or is caught in a "territorial hang-up" as in Cipolla. Relying on the "rational basis" for resolving true conflicts may be academically interesting, but may not have much relevance for the real world in which the non-experts must operate.

III. The Chapter on Contracts

Professor Weintraub builds his analysis of contracts conflicts problems around the approach of the Restatement Second, which incorporates "the two rules that now seem to have emerged from the welter of contending rules as kings of the hill" (p. 263). These are the rule of

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54 In Pryor v. Swarner, 445 F.2d 1272 (2d Cir. 1971), the court held that New York would not apply its law to allow recovery where the guest-passenger was a resident of New York, the defendant was a resident of Florida, a guest statute state, and the accident occurred in Ohio, also a guest statute state. Quasi in rem jurisdiction was obtained in New York by attachment of the insurance policy obligation of the defendant's insurer under Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). This case raises most cogently the question of whether the forum should hold an insurer doing business in the forum to the forum's standard whenever a forum resident is insured by one of its out-of-state insureds. The court never considered this question, making the completely erroneous observation that, "we can safely assume that the Swarners' insurance premiums were calculated with the Florida guest statute in mind." 445 F.2d at 1272. There was also no discussion of Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1966). The accident occurred on a return trip from New York to Ohio, and the trip originated in Ohio. It may be queried whether the New York Court of Appeals would have reached the same result.


56 Barrett v. Foster Grant Co., 450 F.2d 1146 (1st Cir. 1971), would perhaps be such a case. I think Professor Weintraub would disagree with the result in Pryor v. Swarner, 445 F.2d 1272 (2d Cir. 1971), since the accident occurred on the return trip from New York.
party autonomy, which generally permits parties to choose the governing law, and the "most significant relationship" rule—that in the absence of an effective choice, the governing law is the law of the state with "the most significant relationship to the transaction and the parties." 57 Professor Weintraub begins by drawing the all-important distinction between matters going to the validity of the contract—under the domestic law of one state having some contact with the problem a provision in the contract is invalid, but under the law of another contact state the same provision is enforceable—and matters of construction, in which the intent of the parties on some important aspect of their agreement is unknown and unknowable, and the contact states would construe the contract differently (pp. 263-64). The great majority of cases, of course, involve matters going to validity.

Professor Weintraub argues that the parties should be given full autonomy to choose the governing law with respect to matters of construction, which is in accord with the Restatement's position,58 and with which I fully agree.69 However, as to matters going to validity, he rejects party autonomy on the ground that party autonomy rules “either go too far or not far enough” (p. 273). If the express choice of law selects a validating rule, then the court is actually applying a rule of validity; this should give rise to a presumptive rule of validity in all cases, whether or not the parties have made an express choice of law (p. 274). There will be circumstances, however, when functional considerations will lead the court to find that the presumption of validity has been rebutted, whether or not the parties have made an express choice of law (p. 273). Professor Weintraub’s essential position, then, is that functional analysis should be employed in contracts cases as in any other. False conflicts should be identified and the law of the only interested state applied, while true conflicts should be resolved in accordance with a rebuttable presumption of validity (pp. 267, 284). His analysis makes express choice of law irrelevant for all questions of validity. It likewise requires rejection of the Restatement Second’s “state of the most significant relationship” rule. Although that rule invites a “process of inquiry into substantive contract policies,” a danger exists that it “will be interpreted to direct the counting of physical contacts with the parties and with the transaction and the awarding of the palm to the state with the ‘most’ contacts” (pp. 276-77). The Restatement Second’s approach, while taking policy into account, is essentially a localizing rule built around factual contacts.60

57 Restatement (Second) of the Conflict of Laws § 186-88 (1968) [hereinafter cited as Restatement Second].
58 Restatement Second § 187(1).
60 Id.
I am in basic agreement with Professor Weintraub's view as to party autonomy and the "state of the most significant relationship" rule. I would draw the line a little differently, however. On the one side, I would put matters of construction and matters such as the requirement of consideration, which, while analytically going to validity, are what Professor Weintraub calls in another context "a difference of detail rather than basic policy" (pp. 286-87). I would recognize fully the parties' express choice of law in matters of construction and matters that do not involve a strong policy of the involved states. In situations in which the parties have not made an express choice of law, I would employ the localizing concept of the "state of the most significant relationship" rule on the ground that it may serve to determine the parties' implied intent. In the event factual contacts are so divided between various states that localization is impossible, and the parties have not made an express choice of law, I would uphold the contract as to matters of "non-strong policy validity," and would probably apply the law of the forum—assuming that it is one of the contact states—to matters of construction.

Most cases, however, will involve differing laws about matters that reflect strong policies of the concerned states, and like Professor Weintraub, I would solve these problems by a functional analysis. In the case of the false conflict, of course, I would apply the law of the only interested state. Likewise, I would agree that because of the possibility of reliance on the law of a particular state and because of the common policy of all states in protecting the legitimate expectations of the parties, the forum may be disposed in a contracts case to find that the conflict can be avoided by a more moderate and restrained interpretation of its own policy and interest. But when a true conflict is clearly presented, I would have the forum apply its own law, as in torts cases. Ordinarily application of the forum law will produce no fundamental unfairness.

At this juncture I again find myself in disagreement with Professor Weintraub's "rational bases for resolving true conflicts." In the contracts area, he begins with a rebuttable presumption of validity, which is justified in his view because of the common policy of all states in "making commercial transactions convenient and reliable by enforcing commercial contracts in the absence of compelling countervailing con-

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61 As to the significance of the requirement of consideration, for example, see A. Ehrenzweig, Conflict of Laws 479-80 (1962). The Uniform Commercial Code, for example, does not require consideration in the case of firm offers between merchants. Uniform Commercial Code § 2-205.

62 See Sedler, supra note 59.

63 Id. Professor Weintraub suggests that rules of construction may also reflect policy considerations and would approach construction problems in terms of interest analysis where the contract contains no choice of law clause (pp. 293-94). His point is well taken.
siderations articulated in a particular invalidating rule” (p. 284).

Professor Weintraub details five criteria for determining whether the presumption of validity is to be rebutted (pp. 285-92). In view of the strong presumption of validity he would generally invalidate the contract only where one or more of the following factors is present: (1) the invalidating rule reflects a viable, current trend in the law of contracts such as the growing concern for protection of the party in the inferior bargaining position; (2) the invalidating rule differs in basic policy, rather than minor detail, from the validating rule; (3) the parties should have foreseen the substantial interest that the state with the validating rule would have in controlling the outcome; (4) the context of the contract is non-commercial; (5) the courts of the state with the validating rule have, in similar interstate cases, deferred to policies underlying the foreign invalidating rule (p. 292).

I contend that in the contracts area, as in torts, the forum court will apply its own law when a conflict cannot be avoided by a more restrained interpretation of the interest of one state,64 and that the result will not be fundamentally unfair to the other party.65 Nevertheless, I do think that the factors Professor Weintraub has set forth to resolve a true conflict are very useful in determining how such a conflict can and should be avoided by a more moderate and restrained interpretation of the policy or interest of one state. But when this cannot be done, the forum should, and I would submit does, generally apply its own law.

Finally, I must take serious issue with respect to Professor Weintraub’s approach to choice of law in claims of usury. He appropriately distinguishes between usury laws and small loan laws, explaining that the transactions covered by small loan laws are almost surely adhesive, but that general commercial loans may or may not be contracts of adhesion (p. 281). He then claims, however, that there is a justifiable difference in treatment between ordinary commercial loan and small loan cases, because the difference between small loan laws is one of policy while that between usury laws is merely one of detail. General usury statutes vary little in allowable interest rates—differences are seldom more than one or two percent in conflict cases (p. 287). From Professor Weintraub, this kind of analysis is surprisingly superficial. The difference in the policy reflected in usury laws has little to do with the permissible rate of interest,66 but everything to do with the sanction

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66 However, a difference in interest rates can be very significant in a long-term transaction. On a ten-year loan of $10,000, a 2% differential would mean an added payment of between $1100 and $2000, depending on whether interest was calculated on the
that is imposed in the case of a usurious contract. The states have employed widely divergent sanctions to deal with usury, and the nature of the sanction will demonstrate most clearly the strength of a state's policy against usury. Some states merely deprive the lender of the excess interest and fully enforce the contract on the remainder of the loan. Others require a forfeiture of all interest. Still others require a forfeiture of a multiple of the interest charged or taken. At the farthest end of the spectrum, some states, such as New York, hold that a usurious contract is completely unenforceable, resulting in a forfeiture of all interest and principal. Approximately one-third of the states impose possible criminal penalties as well. The difference between the sanction of complete forfeiture of all principal and interest and the sanction of forfeiture of only excess interest cannot by the remotest stretch of the imagination be characterized as a mere "difference in detail." In Crisafulli v. Childs, for example, both states connected with the transaction, New York and Pennsylvania, allowed only 6 percent interest. The contract called for 10 percent interest. Under Pennsylvania law, however, only excess interest was forfeited. If Pennsylvania law applied, the borrower would be entitled to recover $165, representing excess interest already paid. If New York law applied, the contract would be void, and the borrower would receive a $15,000 "windfall." Surely this does not reflect a "difference in detail."

As the court in Crisafulli indicated, the real reason for applying the "rule of validity" in usury cases has been to protect lenders against such severe sanctions, and the rule in effect is that the court applies the law of the state having the lightest sanction. This is blatant judicial preference for lenders as a class over borrowers as a class in defiance of usury policy of a "strong sanction" state and in complete disregard for the fundamental premises on which interest analysis rests. If Professor Weintraub is going to advocate this clear departure from interest analysis, he will have to come up with a more convincing reason than that the difference in usury laws is a "difference in detail." When different sanctions are employed, the difference is one of basic policy, and the rate of interest contained in the law of either state is irrelevant.

Usury cases can and should be approached purely in terms of interest analysis. When the contract is usurious under the law of the forum, and the borrower is a resident of the forum, the forum should apply declining balance method. See Westen, Usury in the Conflict of Laws: The Doctrine of Lex Debitoris, 55 CALIF. L. REV. 123, 229 (1967).

67 Id. at 232-33 nn. 567-75.
69 In the leading case setting forth the "rule of validity" in usury cases, Seaman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927), the transaction was usurious under both New York and Pennsylvania law, and the Court applied Pennsylvania law, imposing the lighter sanction.
its law to protect him, 70 unless the borrower sought out the lender in the lender's state and the lender was entitled to rely on the law of that state. 71 When the contract is not usurious under the law of the borrower's state, the defense should not be allowed unless the contract is usurious under the law of the lender's state, and (1) the law of the lender's state reflects an admonitory policy, 72 and (2) the borrower's state (if suit is brought there) has no interest in applying its more liberal usury law to encourage the inflow of foreign capital. 73

IV. A Concluding Note

Brainerd Currie once observed, "I know of no sincere way to honor a scholar except to subject his scholarship to critical analysis." 74 My critical analysis of Commentary on the Conflict of Laws has produced some disagreement reflective primarily of my different approach to the resolution of the true conflict. But it has produced most of all a deep appreciation that the field of the Conflict of Laws has attracted scholars such as Russell J. Weintraub who have established a basic framework of scholarship upon which the rest of us can draw in hopes of developing our own solutions to the problems that arise in that "one litigated case out of every hundred which may involve a question of the conflict of laws." 75