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ESSAY

Professor Juenger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a Response

Robert A. Sedler*

INTRODUCTION: IN APPRECIATION OF PROFESSOR JUENGER

The interest analysis approach to the resolution of choice-of-law problems has been the subject of unremitting academic attack ever since its inception. As a staunch proponent of the interest analysis approach, I have on numerous occasions responded to these attacks. I have tried to demonstrate that the criticisms of interest analysis as a basic approach to choice-of-law are not well-founded.¹ More significantly perhaps, I have set forth an empirical justification for interest analysis as the preferred approach to choice-of-law. Interest analysis, I maintain, is the preferred approach to resolving choice-of-law problems because it *works*. More so than any other approach to choice-of-law, interest analysis provides functionally sound and fair solutions to the choice-of-law

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¹ See, e.g., Sedler, *Interest Analysis as the Preferred Approach to Choice-of-Law, A Response to Professor Brilmayer's "Foundational Attack,"* 46 OHIO ST. L.J. 483 (1985) [hereafter *Preferred Approach*]; Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics,"* 34 MERCER L. REV. 593 (1983) [hereafter *New Critics*]; Sedler, *The Governmental Interest Approach to Choice-of-Law: An Analysis and a Reformulation,* 25 UCLA L. REV. 181, 190-220 (1977) [hereafter *Governmental Interests*].

issues. I also have demonstrated that in practice the courts that have abandoned the traditional approach to choice-of-law generally employ interest analysis to resolve choice-of-law problems. They employ interest analysis regardless of which "modern" approach to choice-of-law they purportedly are following.²

One of the most distinguished contemporary conflicts scholars is Professor Friedrich K. Juenger of the University of California at Davis School of Law. More so than any other contemporary American conflicts scholar, Professor Juenger has brought a unique comparative and historical perspective to the subject.³ He specifically has related modern American approaches to their historical antecedents on the Continent. He also has delineated the historical progression and evolution of conflicts law and theory to the present time.⁴ Because of his comparative expertise and orientation he also functions as a bridge between American and foreign legal systems. His role facilitates the exchange of knowledge and ideas between American and foreign conflicts scholars. He thus provides an international and comparative dimension to the development of American conflicts law and theory. We all are so much richer because of Professor Juenger's endeavors in this regard.

He too, however, is an unremitting critic of interest analysis. But for a number of reasons, the nature of his criticism is very special. As such, it calls for a very careful and respectful response. The purpose of this Essay, therefore, is to analyze and respond to Professor Juenger's criticisms of interest analysis. I will demonstrate anew my contention that interest analysis is the preferred approach to the resolution of choice-of-law problems.

² By this I mean that the results that courts reach in practice are consistent with the results that would be reached under the interest analysis approach as developed by the late Brainerd Currie and refined by his followers, including forum preference in the true conflict situation. For a discussion of the application of the interest analysis approach by courts in practice, see *New Critics*, *supra* note 1, at 635-43; *Governmental Interests*, *supra* note 1, at 227-33.

³ In doing so, Professor Juenger has followed in the path of the late Albert A. Ehrenzweig of the University of California at Berkeley. See, e.g., A. EHRENZWEIG, *TREATISE ON THE CONFLICT OF LAWS* (1962).

⁴ See F. JUENGER, *GENERAL COURSE ON PRIVATE INTERNATIONAL LAW* ch. 1 (1983) [hereafter *GENERAL COURSE*]; see also Juenger, *A Page of History*, 35 *MERCER L. REV.* 419 (1984).

I. PROFESSOR JUENGER'S CRITICISMS OF INTEREST ANALYSIS

A. *The Structural Unsoundness: Interest Analysis and Unilateralism*

Professor Juenger's first and most fundamental criticism of interest analysis is that it is a structurally unsound method of dealing with choice-of-law problems. Juenger relates interest analysis to its historical antecedents. He explains it as a *unilateralist* method of approaching choice-of-law. According to Juenger, in all the centuries of trying to resolve conflicts problems,⁵ three basic methods of resolution have emerged: "(1) The creation of multistate rules of decision (the substantive law approach); (2) A choice from among the potentially applicable local rules of decision premised on ascertaining their personal and territorial reach (the unilateral approach); and (3) The interposition of choice-of-law rules (the multilateral approach)."⁶

Juenger, here agreeing with Currie and other proponents of interest analysis, strongly disfavors the multilateral approach, which tries to resolve choice-of-law problems on the basis of "content-neutral" choice-of-law rules.⁷ Referring to this approach as the "classical doctrine," he says that, using the "yardsticks of fairness and stability," the classical doctrine has been a failure. The approach is "incapable of accomplishing its goal of decisional harmony," "works capriciously," and "produces sound results in multistate cases only by happenstance or through

⁵ Analytically, choice-of-law involves a decision as to the law to be applied to the resolution of legal issues in cases containing a foreign element. A case contains a foreign element when all the legally significant facts did not occur in a single state, and/or all the parties are not residents of the same state. Cases containing a foreign element do not always give rise to a choice-of-law issue. A choice-of-law issue arises only when the laws of the involved states differ on one or more of the issues presented in the case.

⁶ GENERAL COURSE, *supra* note 4, at 168. Professor Juenger states that all of these approaches have coexisted since the Middle Ages. *Id.*

⁷ Professor Juenger contends that while multilateral rules had existed since the Middle Ages and are found in Huber's and Story's view of comity, Savigny first "explicitly" a cogent and coherent rationale for neutral, even-handed conflicts rules that accord foreign law the same importance as the *lex fori*," and "laid the methodological foundation for multilateralism on which others could build." *Id.* at 163. Juenger also states that:

Multilateralism continues to occupy a commanding position, which has been seriously challenged only recently, when the American "conflicts revolution" began to take hold. Outside the United States, Savigny's ideology still dominates despite the fact that several European scholars, sufficiently disenchanted with mechanical jurisprudence, have mounted an all-out attack on Savigny's conceptual edifice.

manipulation.”⁸ Juenger states that these deficiencies are not accidental. In fact, the problems “inhere in the very structure of a seemingly simple methodology that engenders complex artificial problems, [which] in turn, call for artificial solutions.”⁹ As a result, the classical doctrine is “riddled with incongruities and requires an extraordinary level of abstraction to deal with such mundane subjects as marriage, divorce, contract and tort law.”¹⁰ Juenger’s attack on multilateralism as a basic method of dealing with choice-of-law problems adds a new dimension to the “anti-rules” position. As an opponent of the traditional approach, I am very pleased that he attacks it in this manner.¹¹

Professor Juenger, however, also adds a new dimension to the challenge to interest analysis as a basic method of dealing with choice-of-law problems. He relates interest analysis to unilateralism and contends that unilateralism is unsound because it proceeds on the same underlying premises as multilateralism. As such, it suffers from the same structural deficiencies. The essence of unilateralism, says Juenger, is making a choice from potentially applicable local rules premised on ascertaining their personal or territorial reach.¹² The assumption is that a particular rule of law “wants to apply” or “does not want to apply” to a particular situation containing out-of-state connections.¹³ Juenger

⁸ *Id.* at 206.

⁹ *Id.*

¹⁰ *Id.* According to Juenger, the “proper law” approach, as reflected in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, suffers the same deficiencies as the “traditional” or “classical” approach reflected in the original Restatement. He suggests that the “proper law” approach “tries to preserve multilateralism without paying the price,” and so “substitute[s] hollow formulae for precise connecting factors.” GENERAL COURSE, *supra* note 4, at 235. He concludes that it “fails to deal in a forthright manner with the underlying malaise whose root cause is the multilateralist assumption that choice-of-law is concerned with localizing legal relationships rather than with substantive values.” *Id.* at 235-36.

¹¹ See *Governmental Interests*, *supra* note 1, at 208-16; Sedler, *Interstate Accidents and the Unprovided-For case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 130-37 (1973) [hereafter *Interstate Accidents*]. A rules approach to choice-of-law — which Professor Juenger relates to multilateralism as a method of dealing with choice-of-law problems — is something very different from the development of rules of choice-of-law. The development of rules results from a court’s resolution of conflicts issues on a case-by-case basis with reference to considerations of policy and fairness to the parties, and the normal workings of binding precedent and *stare decisis*. See Sedler, *Rules of Choice-of-Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 978-81, 1032 (1977) [hereafter *Judicial Method*].

¹² See GENERAL COURSE, *supra* note 4, at 168.

¹³ Juenger says that Currie, like other unilateralists, “started from the dubious as-

places interest analysis in a direct line of succession from the Italian-French statistist theory and says that "these modern unilateralists share the statistists' assumption that it is possible to discern the spatial reach of rules."¹⁴ While the statistists used a system of classifying laws according to their personal or territorial purport,¹⁵ the proponents of interest analysis, whom Juenger refers to as the "neo-statistists," instead "call for an *ad hoc* interpretation of each particular rule of decision that vies for application."¹⁶ The interest analysis approach "seeks to discover which of the various substantive norms seemingly in conflict, in light of their underlying policies and the interests of the states in vindicating these policies, do in fact claim to control a given multistate issue."¹⁷

Juenger contends that unilateralism is unsound as a basic method of dealing with choice-of-law problems because it proceeds on the same unsound underlying premises as multilateralism. He states as follows:

Although they have a different thrust, require different analyses and yield different results, unilateralism and multilateralism share the fundamental tenet that solutions to multistate problems can be derived from an allocation of lawmaking power. Both are spatially oriented in the sense that they accord a personal or territorial dimension to law.¹⁸

And since they proceed from a common point of departure, they both "encounter similar theoretical and practical difficulties."¹⁹

The cause of these theoretical and practical difficulties, according to Juenger, is that in some cases the laws of more than one state may "want to apply" to the same situation. In other cases, the law of neither state "may want to apply to the same situation." As regards interest analysis, the former case presents the true conflict — both states have a real interest in applying their law in order to implement the policy reflected in that law. The latter case presents the unprovided-for case — neither state has a real interest in applying its law in order to im-

sumption that private laws are imbued with a *volonte d'application*." *Id.* at 238.

¹⁴ *Id.* at 215. Juenger also states that Wachter attempted to revive unilateralism in Germany in the 19th century by arguing that judges should inquire whether local rules of decision, in light of their "spirit" (or "policy," to use Currie's term), should be applied in a case containing a foreign element. *Id.* at 216. Wachter, however, soon was overshadowed by Savigny. *Id.*

¹⁵ See *id.* at 139-47 (discussing Italian and French statistists of Middle Ages).

¹⁶ *Id.* at 215.

¹⁷ *Id.*

¹⁸ *Id.* at 255.

¹⁹ *Id.* at 256.

plement the policy reflected in that law.²⁰ The problems of "overlap" and "gap," says Juenger, have long antedated the development of interest analysis:

Whenever the parties to a lawsuit hail from different states, Currie's conceptual framework produces "true conflicts" and "unprovided-for cases." Conundrums of this kind are neither novel nor peculiar to Currie's teachings. They are merely the symptoms of a birth defect that afflicts any unilateralist approach, that is to say the attempt to resolve multistate problems by focusing on the spatial reach of substantive rules. Long before similar "discoveries" were made in the United States, foreign unilateralists wondered what should happen if more than one state "wishes" to control a given transaction, or if no state makes such a claim. European authors coined the terms "*cumuls*," to describe the overlap of multiple claims to legislative jurisdiction, and "*lacunes*," to describe the legal gaps that result from the sublime disinterest of states in a given transaction.²¹

He goes on to say that "[t]he unilateralists' unconvincing attempts to resolve the spurious problems of their own making highlight the shortcomings of their method."²² They "must either resort to a blunt forum preference²³ or introduce multilateralist solutions with their own attendant complexities."²⁴ As a result, a unilateralist approach, such as interest analysis, cannot "guarantee predictability and consistency in the adjudication of multistate disputes"²⁵ any more than multilateralism can.

Having found unilateralism as well as multilateralism unsatisfactory as a basic method of dealing with choice-of-law problems, Juenger turns to the third basic method, the substantive law or "result-selective" approach. He refers to multilateralism, as reflected in the broad state-selecting rules of the traditional approach, and unilateralism, as reflected in interest analysis, as the two "conflicts orthodoxies." He says

²⁰ See *Governmental Interests*, *supra* note 1, at 188-90 (discussing the "true conflict" and the "unprovided-for case"). Interest analysis, however, also provides for a third situation. That situation occurs when the states have conflicting policies but only one of the states has an interest in applying its law. Or, as Juenger would say, only one state's law "wants to apply." Currie calls this situation a false conflict. See *infra* notes 84-92 and accompanying text.

²¹ Juenger, *What Now?*, 46 OHIO ST. L.J. 509, 510-11 (1985).

²² *Id.* at 511.

²³ Juenger states that, "The blunt forum-law preference Currie and others have advocated is too drastic an expedient to please American judges." *Id.*

²⁴ GENERAL COURSE, *supra* note 4, at 257. Juenger argues that comparative impairment and "similar efforts to multilateralize unilateralism are too fine-spun and implausible to appeal to anybody but devoutly scholastic minds." *What Now?*, *supra* note 21, at 511.

²⁵ GENERAL COURSE, *supra* note 4, at 257.

that today, "the real clash is between a result-conscious judiciary and scholars who are committed to one or the other conflicts orthodoxy."²⁶

Juenger maintains that in multistate transactions, courts should not try "to allocate spheres of legislative competence."²⁷ Instead, courts should create "substantive rules that respond to interstate and international realities."²⁸ They should engage in a "critical comparative evaluation of 'conflicting' rules," and "quite naturally favour the law they perceive to be superior."²⁹ Like Leflar, who has identified preference for the "better law" as one of the choice-influencing considerations in conflicts cases,³⁰ Juenger says that courts do in fact take the "better law" into account. But unlike Leflar, who does not advocate the "better law" as a normative consideration,³¹ Juenger says that choice-of-law in multistate cases should be based entirely on which of the conflicting rules "better responds to interstate and international realities."

Central to Juenger's thesis is the proposition that the results in multistate cases should differ from the results in domestic cases precisely because different considerations apply to the resolution of multistate cases than to domestic ones. Here again, Juenger brings a historical perspective to the analysis. He goes back to the Roman *praetor peregrinus*, who was empowered to deal with litigation involving Romans and foreigners, and who "created a separate body of rules, which was considerably more flexible and functional than the *ius civile* that governed relations between Roman citizens."³² Likewise he goes back to the English mercantile and admiralty courts, which did not apply the common law, but instead respectively applied "a common European *lex mercatoria* [and] sources widely scattered over time and space,"³³ which could properly be referred to as a "law of nations." According to Juenger, in these situations courts "did not discharge their supranational responsibilities by pondering ways to allocate spheres of legislative jurisdiction."³⁴ Instead, they "went to the heart of the matter and devised substantive solutions responsive to the exigencies of the multi-

²⁶ *Id.* at 254.

²⁷ *Id.* at 268.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See generally Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1585-88 (1966).

³¹ See Leflar, *The "New" Choice-of-Law*, 21 AM. U.L. REV. 457, 474 (1972).

³² GENERAL COURSE, *supra* note 4, at 138.

³³ *Id.* at 151.

³⁴ *Id.* at 265.

state transactions with which they were confronted.”³⁵

Juenger emphasizes that result-selectivity, or teleology, as Juenger calls it, always has pervaded choice-of-law. He contends that result-selectivity is used in the manipulative techniques involved in the traditional approach,³⁶ in the alternative reference approaches in continental conflicts law,³⁷ in legislation and conventions,³⁸ and finally in the use of the “better law” adhered to by courts that follow Leflar’s choice-influencing considerations. In this regard, Juenger says that courts that follow Leflar’s approach “have experienced little difficulty in deciding multistate disputes justly and predictably.”³⁹

What distinguishes Juenger’s position from the other critics of interest analysis is his frank advocacy of result-selectivity or substantive law approach. According to Juenger, such an approach, unlike interest analysis, would “guarantee predictability and consistency in the adjudication of multistate disputes”:

[T]he substantive law approach promotes certainty, predictability and decisional harmony, the very goals that orthodox doctrines are unable to attain. If courts identify those rules of decision that are appropriate for multistate transactions, a new *ius commune* will evolve, composed of precepts whose merits have been judicially certified. The interstitial law-making of national courts can thus contribute to a shared fund of private law.

³⁵ *Id.* Interestingly enough, Juenger also lists the “federal common law” of the *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), era as another example of the “substantive law approach in action.” *GENERAL COURSE*, *supra* note 4, at 265.

³⁶ *Id.* at 274.

³⁷ *See id.* at 275 (discussing German choice-of-law rule in tort cases that enables plaintiff to obtain benefit of more favorable law of either place of acting or place of harm).

³⁸ *See id.* at 276-84.

³⁹ *Id.* at 275. He adds the following proviso: “except in those few cases where judges thought that the forum’s governmental interests required application of substandard forum law.” *Id.* As I will point out, whenever courts following Leflar’s choice-influencing considerations approach have found a conflict between “advancement of the forum’s governmental interests” and “preference for the better law,” they invariably have favored “advancement of the forum’s governmental interests.” Courts favor this consideration even if this meant applying the forum’s “worse law.” Whenever the forum has invoked the “better law” consideration, the “better law” not coincidentally, has been its own. This includes the situation where the forum had no real interest in applying its own law in order to implement the policy reflected in that law. In practice, the application of choice-influencing considerations invariably has meant the application of the forum’s own law, whether “better” or “worse.” And so in practice, the choice-influencing considerations approach has led to the application of the law of the forum more so than would be called for under the interest analysis approach. *See infra* notes 124-28 and accompanying text.

Though derived from domestic sources, its purport would be supranational.⁴⁰

Juenger recognizes that "the creation of such a body of uniform law presupposes a general consensus, and one may predict that courts will not invariably agree in their assessment of specific rules."⁴¹ Differences, however, can be resolved by statutes or conventions addressed to specific issues. The substantive law approach "can persuade foreign jurisdictions to conform their law to prevailing standards."⁴² In any event, Juenger maintains that the substantive law approach still is preferable because "[t]he conscious efforts of judges to adjudicate multistate disputes by applying rules that, in their opinion, are of superior quality ought to assure a greater number of sound decisions than any other doctrine could conceivably produce."⁴³

Juenger illustrates the substantive law approach in the products liability context by an alternative reference solution that identifies the connecting factors⁴⁴ and sets forth a criterion for selection among the potentially applicable laws. The connecting factors are (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the place where the product was acquired, and (4) the home state of the parties.⁴⁵ The criterion for selection, with respect to each issue involved in the case, is "that rule of decision which most closely accords with modern standards of products liability."⁴⁶

Professor Juenger's analysis of the basic methods of dealing with choice-of-law problems from an historical and comparative perspective leads him to the conclusion that "[t]he only choice-of-law approach still worth trying is one that looks to values that transcend state bounda-

⁴⁰ GENERAL COURSE, *supra* note 4, at 287-88.

⁴¹ *Id.* at 288.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ "Connecting factors" refers to the contacts the fact pattern has with the states that may furnish the substantive law for the case. Specifically, these states' substantive laws make up the pool from which a choice-of-law is made.

⁴⁵ These connecting factors are based on those used to identify the state of the most significant relationship in tort cases under RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1968).

⁴⁶ GENERAL COURSE, *supra* note 4, at 290. In a recent article, Professor Juenger has carried this alternative reference approach over to "mass disasters." The connecting factors here are (1) the place of the tortfeasor's conduct, (2) the place of injury, and (3) the home state of each party. As to each issue, "the court shall select from the laws of these jurisdictions the most suitable rule of decision." Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105, 126 [hereafter *Mass Disasters*].

ries.”⁴⁷ He thus advocates a selection process that is based on the “qualitative evaluation of conflicting rules of decision.”⁴⁸ This approach, he says, “would yield greater predictability and uniformity than either unilateralism or multilateralism can possibly guarantee.”⁴⁹ In any event, it will produce better results in particular cases.⁵⁰

In summary, Professor Juenger’s most fundamental criticism of interest analysis is that it is a structurally unsound method of dealing with choice-of-law problems because it is premised on ascertaining the personal or territorial reach of substantive law rules. This effort at the “allocation of lawmaking power” fails because it encounters theoretical and practical difficulties when the law of more than one state “wants to apply” or the law of neither state “wants to apply” to the same situation. The “overlap” occurs in the true conflict situation and the “gap” in the unprovided-for case situation. A forum preference solution, which he says is the solution that Currie advocated for both situations, is too drastic for judges to accept. Any “multilateralist solution,” such as comparative impairment or other proposed solutions to the true conflict,⁵¹ all have their “independent complexities.” As a result, interest analysis cannot “guarantee predictability and consistency in the adjudication of multistate disputes.”⁵² A substantive law or result-selective approach, contends Juenger, not only will guarantee the predictability and consistency that interest analysis lacks, but it will produce better results in particular cases. This is because it will bring about the application of the substantive law that better “respond[s] to interstate and international realities.”⁵³

In this Essay I answer Professor Juenger’s fundamental criticism of interest analysis. I accomplish this task by comparing the *results in practice* that are reached under the interest analysis approach and the results that are reached under Professor Juenger’s substantive law approach. I also discuss the different perception that these two approaches have of the function of the courts in deciding conflicts cases and the

⁴⁷ GENERAL COURSE, *supra* note 4, at 321.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See *id.* Professor Juenger also suggests that such an approach will contribute to domestic law reform because “[s]elective importation of superior foreign rules provides a powerful incentive to bring forum law up to the standards of international justice, thereby encouraging domestic reform.” *Id.*

⁵¹ See *Governmental Interests*, *supra* note 1, at 216-18 (discussing proposed solutions, other than forum preference, to true conflict situation).

⁵² GENERAL COURSE, *supra* note 4, at 257.

⁵³ *Id.* at 268.

purpose of conflicts law in our legal system. Professor Juenger and I vastly disagree on the function of the courts in deciding conflicts cases and the purpose of conflicts law in our legal system. My view, however, is much closer to the perception that American courts themselves have of the court's function and the purpose of conflicts law. I also establish that courts that in effect apply the interest analysis in practice reach results that functionally are sound and fair to the parties. Now, however, I want to discuss Professor Juenger's two other essential criticisms of interest analysis and his views on the operation of the interest analysis approach in practice.

B. *The Absence of "Governmental Interests" in Private Litigation*

In addition to the claimed structural unsoundness of interest analysis, Professor Juenger maintains that it conceptually is flawed because it proceeds on the assumption that states have "governmental interests" in applying rules of substantive law in litigation between private persons. Juenger insists that states do not have such "governmental interests." This being so, to base an approach to choice-of-law on the implementation of "non-existent" governmental interests is conceptually unsound.

Juenger states that no empirical evidence exists to support the proposition that states have governmental interests in litigation between private parties to effectuate the policies reflected in their substantive law, and that Currie simply considered the proposition axiomatic.⁵⁴ Juenger says that the notion that states "desire" to have their law applied in litigation between private persons is a fictitious concept.⁵⁵ He says that to believe that states do have such interests "requires a leap of faith, a willingness to cast Leviathan as a human being with wants and desires."⁵⁶ Juenger goes on to draw a distinction between what he calls "real" and "spurious" governmental interests. "Real" governmental interests refer to a state's *fiscal and proprietary* interests, such as those connected with revenue, escheat, boundary disputes, and water rights.⁵⁷

⁵⁴ Juenger, *Governmental Interests — Real and Spurious — in Multistate Disputes*, 21 U.C. DAVIS L. REV. 515, 518 (1988) [hereafter *Real and Spurious*].

⁵⁵ Juenger, *Choice-of-Law in Interstate Torts*, 118 U. PA. L. REV. 202, 209 (1969).

⁵⁶ *Real and Spurious*, *supra* note 54, at 519.

⁵⁷ *See id.* at 519-28. Juenger states that when such conflicts of "real interests" arise between states, the Supreme Court has not permitted "state courts to effectuate domestic policies at the expense of sister-states," but instead has applied "hard-and-fast rules to minimize the potential for friction in our federal system." *Id.* at 519. Juenger discusses the escheat and multiple inheritance taxation cases and other cases that have involved the exercise of the Court's original jurisdiction over "cases in which a State shall be a Party" under Art. III, § 2, cl. 2. He refers to these "real interests" as

The "governmental interests" that are the basis of the interest analysis approach, says Juenger, are "spurious," because they do not involve a state's proprietary or fiscal interests.⁵⁸ This being so, the very notion of governmental interests as the basis for resolving choice-of-law problems is "highly implausible." Further, he views interest analysis like other unilateralist approaches as "inspired by speculations about sovereignty, as Currie's exaggerated deference to governmental concerns illustrates."⁵⁹

Professor Juenger, however, also has recognized a "real" governmental interest in the application of *regulatory* laws, such as antitrust or securities laws. He does so in the context of discussing the extraterritorial application of *federal* regulatory laws. He says that "no one questions the reality of foreign and domestic interests that are at loggerheads when, for instance, the United States proceeds against restrictive trade practices that are lawful in the defendant's home country."⁶⁰ He goes to great pains to distinguish the nature of these governmental interests from "governmental interests in domestic choice-of-law cases," which are "tenuous if not entirely lacking."⁶¹

Professor Juenger unwittingly may have succeeded, by this example, in blurring what he contends is a sharp distinction between "real" and "spurious" governmental interests in the context of disputes between private litigants. The United States can enforce antitrust and securities laws directly against the offending party, but private parties can enforce these laws as well. Congress has encouraged such enforcement by providing a multiple of damages awards and the recovery of attorneys fees by successful plaintiffs. Regulatory laws such as these and other

"weighty enough to prompt the Supreme Court to assume its role as the ultimate arbiter in our federal system." *Id.* at 528.

⁵⁸ He notes that these kind of interests are "too trivial to warrant the exercise of original jurisdiction." *Id.* at 528. Juenger further argues that the states generally are not required by full faith and credit to subordinate their interest to that of another state. "Such freedom implies the power of each state to subvert the interests of any other; a conclusion that is tolerable only if the interests . . . are too trivial to arouse the states' susceptibilities." *Id.* at 529.

⁵⁹ GENERAL COURSE, *supra* note 4, at 239.

⁶⁰ Juenger, *Constitutional Control of Extraterritoriality?: A Comment on Professor Brilmayer's Appraisal*, 50 LAW & CONTEMP. PROBS., Summer 1987, at 42.

⁶¹ *Id.* Juenger also states that the problems presented by the extraterritorial application of federal regulatory laws are "quite different from run-of-the-mill conflicts questions." *Id.* at 41. Analytically, the issue is not one of choice-of-law, but of whether to enforce the domestic statute or dismiss the case. "[T]he propriety of drawing an analogy between the law of conflicts and the extraterritorial application of regulatory enactments is questionable." *Id.*

economic regulation that reflects government *regulatory* policy⁶² directly implicate the “social engineering” function of law.⁶³ As indicated by the antitrust and securities laws example, the state may rely on private persons whose interests those laws affect to implement the “social engineering” policy.⁶⁴ Thus, the United States clearly has a governmental interest in implementing the policy reflected in the antitrust and securities laws. This interest is implicated not only when the United States is acting to enforce these laws, but also when these laws are invoked by an injured party in a private action brought against an alleged violator.

As regards the state’s “real” governmental interest, it is irrelevant that private party litigation will implement the regulatory policies reflected in antitrust and securities laws⁶⁵ An even clearer example of a “real” governmental interest, if that is possible, is when the state relies on an injured party to pursue private litigation for intentional torts instead of criminal prosecution to deter and redress violations of personal security. For example, if two spouses from State X, a spousal immunity state, are involved in an altercation in State Y, a liability state, it cannot be doubted that if State Y is the forum it has a “real” governmental interest in applying its law and imposing liability on the battering spouse.

I would submit that the same “real” governmental interest is present with respect to tort rules governing enterprise liability. In this country, tort law rather than social insurance is still the primary method of providing compensation for accident victims. A state has a “real” governmental interest in having its tort law applied to implement the compensatory policy reflected in that law in the same manner as it would be interested in applying its social insurance law.⁶⁶

My point is that it is not possible, as Professor Juenger maintains, to

⁶² See, e.g., *Barnes Group Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1029-31 (4th Cir. 1983) (refusing to recognize express choice-of-law to validate covenant not to compete that was invalid under otherwise applicable law).

⁶³ For a discussion of the state’s interest in the enforcement of laws involving the “social engineering” function, see A. SHAPIRA, *THE INTEREST APPROACH TO CHOICE-OF-LAW* 64-66, 72-73 (1970).

⁶⁴ *Newman v. Piggie Park Enterps.*, 390 U.S. 400, 401 (1968) (per curiam) (discussing vindication of public interests by private litigants in enforcement of civil rights laws).

⁶⁵ See, e.g., *Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559, 574-76 (S.D. Iowa 1973) (applying Iowa law to invalidate solicitation and sale of securities in violation of Iowa securities regulation law notwithstanding parties’ express choice of New York law to govern transaction).

⁶⁶ See *Governmental Interests*, *supra* note 1, at 191-92.

draw a neat distinction between the purportedly “real” and “spurious” governmental interests of a state. Nor is it possible to limit a state’s “real interest” to laws implicating fiscal and proprietary concerns. To recognize that there is a *spectrum* of governmental interests is more accurate. The *strength* of a given governmental interest is not conclusively determined by whether that interest is being implemented by the state itself or by private persons in the context of private litigation. Depending on the nature of the particular rule of substantive law involved, a state may have as “real” an interest in having its law applied in litigation between private persons as it does in a case in which the state itself is a party.

Thus, the notion of governmental interests as a basis for resolving choice-of-law problems is not, as Professor Juenger contends, “highly implausible.” State laws do indeed “wish to be applied” in litigation between private persons when they reflect a strong policy and when that policy will be advanced by the law’s application in the particular case. The state, therefore, can have a real interest in the outcome of litigation between private persons. That interest involves the application of the state’s law to implement the policy reflected in that law. It is precisely because so many cases do present a conflict between laws reflecting strong policies of the involved states that courts make the choice-of-law decision with reference to those policies, and that the forum is unwilling to displace its own law when it has a real interest in applying that law to implement its policy. Professor Juenger simply is wrong when he denies that states can have “real” interests in the application of their law in litigation between private persons.

In any event, the interest of the state in the application of its law to implement the policy reflected in that law is *not*, in my view, the underlying premise of the interest analysis approach.⁶⁷ As Juenger has noted, I agree that “‘a conflicts case admittedly does not involve a direct conflict between states in the same manner as a boundary dispute or a dispute over spheres of interest.’”⁶⁸ I also maintain that the premise of interest analysis is *not* that the purpose of conflicts law is to advance a state’s governmental interest.⁶⁹ Rather, the purpose of con-

⁶⁷ Unlike some critics of interest analysis, Juenger does not ignore the subsequent refinements of the interest analysis approach. Thus, Juenger is a “fair” critic. For that reason, his criticism is entitled to an additional measure of respect. *Compare New Critics*, *supra* note 1, at 606-10.

⁶⁸ *Real and Spurious*, *supra* note 54, at 530 (citing *Governmental Interests*, *supra* note 1, at 191).

⁶⁹ *New Critics*, *supra* note 1, at 636-37 (emphasis in original).

flicts law is to enable the court to reach a functionally sound and fair result in the case before it. I maintain that the interest analysis approach in practice enables courts to reach such results in all the cases coming before them for decision. For this reason, it is the preferred approach to choice-of-law.⁷⁰

The underlying premise of interest analysis as an approach to choice-of-law is that consideration of the policies and interests of the involved states is the most *rational* and functionally sound method of resolving the choice-of-law issues in private party litigation. Whatever else Currie may have said,⁷¹ he repeatedly justified interest analysis on the ground that it provided a rational basis for making choice-of-law decisions.⁷² According to Currie, it is rational to make choice-of-law decisions with reference to policies reflected in the laws of the involved states, and to the interest of each state, in light of those policies, in having its law applied on the point in issue in the particular case. Conversely, it is not rational to make choice-of-law decisions on a basis that does not assign primary importance to policies reflected in rules of substantive law and the interest of states in having their laws applied to implement those policies.

The *rationality justification* for interest analysis, as set forth above, is not dependent on whether a state has a real interest in applying its law to implement the policy reflected in that law. When the policy behind a state's law would be advanced by its application in the particular case, the beneficiary of that law should be entitled to invoke such benefit in the choice-of-law context. The court still is resolving a dispute between private persons rather than directly resolving a conflict between the interests of the involved states. Thus, interest analysis is not designed to turn, and does not have the effect of turning conflicts into a "public law" matter. The focus still is on the private litigants who are before the court and on the most rational way to resolve the choice-of-law issues presented in the case.⁷³

The rationality justification for the interest analysis approach thus exists independently of the justification that states have real interests in applying their law in litigation between private parties. As demonstrated above, in many cases the state has a real interest in applying its

⁷⁰ See *Preferred Approach*, *supra* note 1, at 490-91.

⁷¹ For a discussion of my disagreement with Currie's overemphasis in places of the interest of the state, see *New Critics*, *supra* note 1, at 637.

⁷² See, e.g., B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 107-21, 163-72, 178-84 (1963).

⁷³ See *New Critics*, *supra* note 1, at 636-37.

law for that reason. But even if such a real interest were absent, as Professor Juenger contends (albeit erroneously), the rationality justification still would remain. Precisely because it is rational to make choice-of-law decisions with reference to the policies and interests of the involved states, the application of the interest analysis approach generally will produce functionally sound and fair results.⁷⁴

C. *The Lack of "Predictability and Consistency"*

Professor Juenger's third essential criticism of interest analysis is somewhat related to the first two and is more a matter of "comparative utility." Juenger contends that interest analysis is a structurally unsound method of dealing with choice-of-law problems because it tries to determine the personal and territorial reach of laws. Such a determination leads to overlap and gap, for which interest analysis cannot provide acceptable and workable solutions. Second, Juenger contends that interest analysis proceeds on the incorrect premise that governments have real interests in the application of substantive law to determine disputes between private litigants. This being so, the application of the interest analysis approach, *in accordance with its underlying premises and methodology*, will not "guarantee predictability and consistency in the adjudication of multistate disputes." While it may lead to functionally sound and fair results in particular cases, it is not "programmed" to do so. Since interest analysis then will not "guarantee predictability and consistency," while according to Juenger the substantive law approach will, the substantive law approach should be preferred over interest analysis.⁷⁵

Interest analysis, says Juenger, will not guarantee predictability and consistency. He believes that interest analysis accords far too much significance to the law of the parties' domiciles and in practice is a "thinly disguised pretext for applying forum law."⁷⁶ According to Juenger, "In almost all instances [Currie] deduces the legitimacy of an interest from the fact that one of the parties is domiciled in the forum state, a conclusion he derived from the consideration that governments are primarily concerned with the welfare of their citizens and residents."⁷⁷ Therefore,

⁷⁴ For a further discussion of the rationality justification for interest analysis, see *Preferred Approach*, *supra* note 1, at 489-91.

⁷⁵ See *GENERAL COURSE*, *supra* note 4, at 321.

⁷⁶ *What Now?*, *supra* note 21, at 516.

⁷⁷ Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 *AM. J. COMP. L.* 1, 9 (1984) [hereafter *Critique*]. Juenger further states that Currie "resuscitated the medieval notion of a personal law, and his approach accords the domiciliary nexus a much

interest analysis "amounts to little more than a complicated way of saying that the law of the domicile governs,"⁷⁸ which cannot resolve choice-of-law issues when the parties hail from different states. Since Currie advocates application of the forum's law in both the true conflict and the unprovided-for case, interest analysis becomes a "thinly disguised pretext for applying forum law."

What Juenger is saying is that under interest analysis, the law of the parties' home state or "common domicile" applies when both parties are from the same state, and the law of the forum applies when they are from different states. Both propositions are incorrect under the interest analysis methodology, as developed by Currie and refined by his followers, and under the application of interest analysis by the courts in practice.

Under the interest analysis methodology, a state's interest in applying its law is determined with reference to the policy reflected in that law and not on the state's connection with one or both of the parties to the litigation. A particular connection with a state, such as a party resides there, will not necessarily give rise to an interest in applying a particular rule of law in the circumstances of a particular case. A state's interest in applying its law because of a party's residence in that state will depend on the particular rule of law involved. In the ordinary accident situation, the plaintiff's home state has a real interest⁷⁹ in applying its law and allowing recovery. Such an interest exists because the consequences of the accident and of allowing or denying recovery will be felt by the victim in that state. For the same reason, the defendant's home state has a real interest in applying its law and denying recovery because the consequences of allowing or denying recovery will be felt by the defendant and the insurer in that state.⁸⁰ Conversely, in the ordinary accident situation, when the plaintiff is from a nonrecovery state, that state, based on its connection with the plaintiff, has no interest in applying its law and denying recovery. When the defendant is from a recovery state, that state has no interest, based on its connection with the defendant, in applying its law and allowing recovery.

more pervasive scope than it had ever enjoyed in Anglo-American jurisprudence." *Id.* at 9-10. Even when Currie conceded some relevance to territorial contacts, as when a nonresident was injured in the forum, "he attempted to rationalize this conclusion in personal law terms by hypothesizing a governmental concern with local parties [such as medical creditors] who may be indirectly affected by a transaction." *Id.* at 11.

⁷⁸ *Id.* at 39.

⁷⁹ See *Governmental Interests*, *supra* note 1, at 222-27 (discussing real interests).

⁸⁰ *Id.* at 202.

When a state's law reflects a people-protecting policy, such as enabling people to avoid contractual liability because of their legislatively-determined incompetence to enter into certain kinds of contracts,⁸¹ that state has a real interest in applying its law only when its resident is sought to be held liable on such a contract. The people-protecting law was indeed enacted for the benefit of that state's own residents. The policy reflected in that law will be advanced only when its application will enable a resident to avoid contractual liability.⁸² It would be presumptuous, however, for a state to purport to determine the competence of residents of other states to enter into such contracts. In this circumstance then, the interest of a state in applying its law to implement the policy reflected in that law is predicated entirely on its connection with the party to be protected.

On the other hand, when a state's law reflects an admonitory or regulatory policy, its interest in applying its law to implement that policy is not predicated on its connection with any party. Its interest is based on its connection with the conduct sought to be deterred or the transaction sought to be regulated. Thus, the state where the conduct or transaction occurred will apply its admonitory or regulatory policy against residents and nonresidents alike. The effect of the application of its law may be to enable a nonresident party to prevail against a resident.⁸³

Juenger simply is incorrect when he says that interest analysis "amounts to little more than a complicated way of saying that the law of the domicile governs."⁸⁴ Juenger says that interest analysis "works well whenever the litigants are domiciled in the same state. Since, as a rule, only that state has a legitimate interest in the controversy, a 'false conflict' is presented."⁸⁵ Juenger is referring to the ordinary accident situation in which both parties are from a recovery state and the acci-

⁸¹ See *Lilienthal v. Kaufman*, 239 Or. 1, 3-6, 395 P.2d 543, 544-45 (1964); *Milliken v. Pratt*, 125 Mass. 374 (1878).

⁸² In *Lilienthal*, the court applied the Oregon law of spendthrift immunity to enable an Oregon spendthrift to avoid liability on a California-centered contract. *Lilienthal*, 239 Or. at 16, 395 P.2d at 549.

⁸³ See, e.g., *Lichter v. Fritsch*, 77 Wis. 2d 178, 184-85, 252 N.W.2d 360, 363-64 (1977) (applying law of state of acting and imposing strict liability for harm caused by leaving keys in car); *Corrigan v. Bjork Shiley Corp.*, 182 Cal. App. 3d 166, 227 Cal. Rptr. 247 (1986), cert. denied, 479 U.S. 1049 (1987) (applying law of state of manufacture; imposing strict liability; allowing recovery of punitive damages for defectively manufactured product); *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 379-86, 248 N.E.2d 576, 580-84 (1969) (invalidating statute of frauds rule of state where significant negotiations leading to transaction occurred).

⁸⁴ See *Critique*, supra note 77, at 39.

⁸⁵ GENERAL COURSE, supra note 4, at 217.

dent occurred in a nonrecovery state. In such a case, the parties' home state has a real interest in applying its law and allowing recovery because the social and economic consequences of the accident and of allowing or denying recovery will be felt there. Meanwhile the state of injury has no real interest in applying its law to enable a nonresident defendant to avoid liability.⁸⁶ Likewise, in the ordinary accident situation in which both parties are from a nonrecovery state and the accident occurs in a recovery state, I maintain that the false conflict is also presented. In such a case, the parties's home state has a real interest in applying its law to implement the defendant-protecting policy reflected in that law. The state of injury, however, has no real interest in applying its law to enable a nonresident injured there to recover.⁸⁷ The reason why the law of the parties' home state should apply in these situations, however, is not as Juenger suggests, that under interest analysis, the law of the domicile "governs." The reason, as he recognizes, is that here only the parties' home state has a real interest in having its law applied to implement the policy reflected in that law.

Under interest analysis, the law of the parties' "common domicile" would not apply when the matter in issue involves a law that reflects an admonitory or regulatory policy. As stated above, in that circumstance a state's interest in applying its law to implement such a policy depends on its connection with the conduct sought to be deterred or with the activity sought to be regulated, and not on its connection with any of the parties. When the law of the state where the conduct or activity occurred imposes liability, that state has a real interest in applying its law in order to implement the admonitory or regulatory policy reflected in that law. Under interest analysis the state should do so.

Suppose that two spouses from a state that still retains the rule of spousal immunity are involved in an altercation in a liability state, and one spouse inflicts severe personal injuries on the other spouse. In terms of interest analysis, this case presents the true conflict. The parties' home state has a real interest in applying its law to implement the "anti-tort" policies reflected in its rule of spousal immunity. But the state where the altercation occurred also has a real interest in applying its own law in order to implement the admonitory policy reflected in its

⁸⁶ See *Judicial Method*, *supra* note 11, at 1034.

⁸⁷ See Sedler, *Judicial Method Is "Alive and Well": The Kentucky Approach to Choice-of-Law in Interstate Automobile Accidents*, 61 KY. L.J. 378, 382-83 (1973); Sedler, *Choice-of-Law in Michigan: Judicial Method and the Policy-Centered Conflict of Laws*, 29 WAYNE L. REV. 1193, 1214-16 (1983). In practice, courts disagree on the preferred result in this situation. See *infra* notes 124-26 and accompanying text.

law, and should do so when suit is brought there.⁸⁸

The point to be emphasized is that interest analysis is not, as Juenger contends, premised on the assumption that the law of the domicile "governs" when the parties are from the same state. Nor for that matter is it premised on the assumption, as Juenger also contends, that a state enacts laws only for the benefit of its own residents.⁸⁹ Depending on the policy reflected by a particular rule of law, a state's interest in applying its law in order to implement the policy reflected in that law may indeed be predicated on a party's residence in that state. Tort rules imposing liability to implement compensatory policies or tort rules protecting defendants from liability, and rules reflecting people-protecting policies fall into this category. A state's interest in applying laws that reflect admonitory or regulatory policies, on the other hand, is predicated on a state's connection with the conduct sought to be deterred or with the activity sought to be regulated, and has nothing to do with a party's connection with the state.

Contrary to Professor Juenger's assertion, domicile does not have overriding analytical or functional significance in interest analysis. Rather, domicile is an important connecting factor in many cases because a state's interest in applying its substantive law is predicated on the state's connection with the parties involved rather than with the underlying transaction. And as emphasized above, a state's interest in applying a particular rule of law in the circumstances of a particular case depends not only on its connection with a party, but on the content of the rule of substantive law. Again, in the ordinary accident situation, the plaintiff's home state has no real interest in applying a rule of law that denies liability while the defendant's home state has no real interest in applying a rule of law that imposes liability. It is not a state's connection with a party that is relevant as such, but a state's interest in applying its law in the circumstances of a particular case in order to implement the policy reflected in that law.

We may turn now to Professor Juenger's contention that under interest analysis, the law of the forum applies whenever the parties are from different states. In this circumstance, interest analysis is "a thinly disguised pretext for applying forum law." Again, this proposition is simply incorrect. First, in the false conflict situation in which the parties are from different states and the forum is the "disinterested state,"

⁸⁸ See Sedler, *Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUT.-CAM. L.J. 8, 67-68 (1970).

⁸⁹ See GENERAL COURSE, *supra* note 4, at 216.

the forum should displace its law in favor of the law of the other state. One example of the forum as the "disinterested state" occurs when the law of the defendant's home state reflects an admonitory policy, the defendant acted in the home state, and the action caused harm to the plaintiff in the plaintiff's home state, the law of which does not impose liability. If the plaintiff sues in the plaintiff's home state, that state will apply the law of the defendant's home state. The plaintiff's home state has no real interest in applying its own law while the defendant's home state has such an interest.⁹⁰

Another example of the forum as the "disinterested state" occurs in regard to the tort liability of an employer to an employee who is covered by worker's compensation. Courts agree that the tort liability of the employer should be determined by the law of the state where the employer has taken out worker's compensation to cover the particular employee. This is so even when under the law of the employee's home state, the employee is entitled to maintain a tort action against the employer and suit is brought in that state.⁹¹ As these examples indicate, in the false conflict situation, when the parties are from different states and the forum is the "disinterested state," interest analysis dictates that the forum displace its own law.⁹²

⁹⁰ See, e.g., *Gravina v. Brunswick Corp.*, 338 F. Supp. 1 (D.R.I. 1972). A Rhode Island plaintiff brought suit in a Rhode Island federal court to recover for invasion of privacy resulting from the unauthorized use of her name and photograph in an advertising flyer. The defendant had its principal place of business in Illinois, and the flyer was sent from there. The federal court assumed that Rhode Island law would not allow recovery. The court held that since Illinois law allowed recovery, Illinois had a real interest in applying its law to implement the admonitory policy reflected in that law. *Id.* at 3-7; see also *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1983). In *Acme Circus*, a right of publicity was infringed by a Florida enterprise in Florida, causing injury to the California holder of the right in California. Applying California conflicts law, the court held that California would look to Florida law and imposed liability for such infringement. *Id.* at 1545-46.

⁹¹ See SEDLER, *ACROSS STATE LINES: APPLYING THE CONFLICT OF LAWS TO YOUR PRACTICE* 62 nn.33 & 34, 63 n.35 (1989) [hereafter *ACROSS STATE LINES*] (reviewing cases). The law of the state where the employer has acquired worker's compensation insurance to cover the particular employee also applies to determine whether the injured employee can maintain a tort action against a coemployee for a work-related injury and to determine questions of contribution in the case of third-party liability to the employee. In effect, courts have agreed that only one state has a real interest in applying its law on the point in issue, and where the employer has taken out worker's compensation insurance covering the particular employee in another state, the forum will displace its own law. For an illustrative case where the forum displaced its own law in this situation, see *Wilson v. Faull*, 27 N.J. 105, 141 A.2d 768 (1958).

⁹² See also *Denny v. American Tobacco Co.*, 308 F. Supp. 219 (N.D. Cal. 1970). A

In the true conflict situation, Currie maintained that the forum should apply its own law to implement the policy reflected in that law. I agree fully with forum preference as the proper means of resolution of the true conflict.⁹³ Subsequently, I will compare the forum preference solution to the true conflict situation with Professor Juenger's "better law" solution. At this juncture, it is sufficient to point out that there is nothing "disguised" about Currie's forum preference solution to the true conflict. Currie advocated forum preference as the only proper means of resolving the true conflict and not as a "disguised" preference for the forum's own law.

In the unprovided-for case, the parties are from different states. By definition neither of the involved states has a real interest in having its law applied to implement the policy reflected in that law. This type of case analytically presents the most difficulty for the interest analysis approach. Interest analysis can identify the unprovided-for case, but it cannot provide a means for its resolution. That is, the choice-of-law decision must be based on considerations other than the policies reflected in the laws of the involved states and the interest of each state in applying its law to implement those policies. The unprovided-for case arises with more frequency than Currie anticipated. As might be expected, it is the unprovided-for case that has given courts the most difficulty in practice.⁹⁴

Currie did suggest that application of the forum's law was an appropriate way of resolving the unprovided-for case. In fact, some courts have adopted this solution.⁹⁵ I have maintained that an appropriate way of resolving the unprovided-for case is to look to the common policy of the involved states. Often the point as to which the laws of the involved states differ will involve a substantive rule that is an exception to the common policy reflected in the law of both states. Examples of exceptions to the common policy would include the traditional "anti-tort" immunities, such as guest statute immunity or spousal immunity, and

California resident solicited a finder's fee by sending a letter to an officer of a New York-based corporation. The letter advised the officer that a California-based company might be for sale. The defendant did not reply, but eventually acquired the company. The plaintiff sued in California. The plaintiff alleged that under California law he was entitled to recover reasonable compensation if the defendant took advantage of the "tip." Under the New York statute of frauds, the defendant would not be liable. The court held that New York law applied on the issue of the statute of frauds. *Id.* at 223.

⁹³ See *Governmental Interests*, *supra* note 1, at 227-33.

⁹⁴ See *Interstate Accidents*, *supra* note 11, at 137-42.

⁹⁵ See, e.g., *Erwin v. Thomas*, 264 Or. 454, 458, 506 P.2d 494, 496 (1973) (applying law of forum).

limitations on wrongful death recovery. Since the state whose law provides an exception to the common policy has no interest in having its law applied in the circumstances of the particular case, the common policy should be applied.

For example, if the plaintiff was from a state with a guest statute and the defendant was from a liability state, the guest statute exception to liability should not be recognized.⁹⁶ Going further, I would say that whenever the defendant comes from a liability state, the defendant generally should be held liable irrespective of where the plaintiff resides or where the accident occurs. The defendant would have expected to have been held liable in accordance with the law of the defendant's home state at the time the defendant undertook the act in question or insured against liability.

As a practical matter, in the unprovided-for case in which the plaintiff's home state has an exception to liability, the plaintiff is likely to bring suit in the defendant's home state. The plaintiff should do this both when the accident occurs there and when it occurs in the plaintiff's home state, on the quite realistic assumption that it is easier to persuade a court to apply its own law than to apply the law of another state. In practice, the majority of courts addressing the question have allowed recovery, emphasizing that the defendant's home state imposes liability. Some, however, have denied recovery, emphasizing that the law of the plaintiff's home state did not allow recovery.⁹⁷ In any event, under my view, the law of the defendant's home state that imposes liability generally should apply in the unprovided-for case. Since the plaintiff is likely to sue in that state, in practice there will be a coincidence of the law of the forum and the law of the defendant's home state. But, under my view, the unprovided-for case should be resolved in accordance with the law of the defendant's home state, not the law of the forum. The same result should be reached in the unlikely event that the plaintiff brings the suit in the plaintiff's home state.

My point is that Juenger simply is incorrect when he says that when the parties are from different states, interest analysis is a "thinly disguised pretext for applying forum law." Under interest analysis, at least as I have reformulated it, the law of the forum *qua* forum is to be applied only to resolve true conflicts. In the false conflict situation, the applicable law is the law of the only interested state, whether this is the forum or another state. This is so whether both parties are residents of the same state or are residents of different states. In the unprovided-for

⁹⁶ See *Governmental Interests*, *supra* note 1, at 233-36.

⁹⁷ For a review of these cases, see *ACROSS STATE LINES*, *supra* note 91, at 57-58.

case, the applicable law is that of the defendant's home state. At the time the defendant undertook the act in question or insured against liability the defendant could anticipate the application of this law.

As the above discussion clarifies, interest analysis, again at least as I have reformulated it, is neither conceptually nor operationally difficult. In fact, it is an extremely simple methodology. There are three propositions under my reformulation.⁹⁸ First, when the forum has a real interest in applying its own law in order to implement the policy reflected in that law,⁹⁹ it should do so.¹⁰⁰ Second, when the forum does not have a real interest in applying its own law in order to implement the policy reflected in that law, but the other involved state does have such an interest,¹⁰¹ the forum should apply the law of the other state. Third, in the unprovided-for case, in which neither state has a real interest in applying its law in order to implement the policy reflected in that law, the generally applicable law should be the law of the defendant's home state.¹⁰²

I have maintained that interest analysis is the preferred approach to choice-of-law *because it works*.¹⁰³ More than any other approach to choice-of-law, interest analysis facilitates the court's role in a conflicts case because it provides functionally sound and fair solutions to the choice-of-law issues.¹⁰⁴ The interest analysis accomplishes this task by focusing on what courts consider to be the most *rational* consideration in making choice-of-law decisions: the policies reflected in a state's substantive law and a state's interest in applying its law to implement

⁹⁸ See *Governmental Interests*, *supra* note 1, at 220-21.

⁹⁹ In Currie's terms, this covers both the true conflict and the false conflict where the forum is the only interested state.

¹⁰⁰ This assumes, of course, that the application of the forum's law is not fundamentally unfair to the other party. As I have emphasized many times, fairness to the parties is an independent choice-of-law consideration. The forum will not, and constitutionally cannot, apply its own law, despite a real interest in doing so, when the application of its law would be fundamentally unfair to the other party. See *New Critics*, *supra* note 1, at 611-15.

¹⁰¹ In Currie's terms, this is the false conflict brought in the disinterested state.

¹⁰² This results from looking to the common policy reflected in other laws of the involved states, which usually will lead to the application of the law of the defendant's home state, or from looking directly to the law of the defendant's home state, since the application of that law could have been anticipated by the defendant at the time the defendant undertook the action in question or insured against liability.

¹⁰³ See *New Critics*, *supra* note 1, at 635-43.

¹⁰⁴ By functionally sound and fair results, I mean results that are acceptable in that they do not produce unfairness to the litigants and do not require the application of the law of a state in circumstances in which the application of such law would be considered objectively unreasonable. *Id.* at 639.

those policies. I also have demonstrated that courts which have abandoned the traditional approach generally employ interest analysis to resolve choice-of-law issues regardless of which "modern approach" to choice-of-law they are purportedly following.¹⁰⁵ Professor Juenger does not dispute this point, and no one else seriously controverts it. Finally, I have contended that if courts in fact are applying interest analysis, and if courts are reaching functionally sound and fair results, then the validity of interest analysis as a basic approach to choice-of-law has been empirically demonstrated.¹⁰⁶ Again, Professor Juenger does not dispute this point.

Professor Juenger fully agrees with my contention that "in the 'real world' interest analysis does work and generally will produce functionally sound and fair results."¹⁰⁷ But Juenger contends this is not because interest analysis is methodologically or operationally sound.¹⁰⁸ Rather, interest analysis has worked in practice because it has enabled the forum to apply its own law in tort cases. Thereby the forum *avoids the application of the substandard tort law of the other involved state*. In essence, Juenger believes that interest analysis produces functionally sound and fair results only because it enables the forum to apply its own "better law."

II. THE CRUX OF THE CHALLENGE: INTEREST ANALYSIS VERSUS THE SUBSTANTIVE LAW APPROACH

We now come to the crux of Professor Juenger's challenge to interest analysis. Essentially, Juenger's criticism of interest analysis is based on his strong advocacy of a substantive law or "result-selective" approach to choice-of-law.¹⁰⁹ Such an approach, contends Juenger, not only will guarantee the predictability and consistency that interest analysis lacks, but will produce better results in particular cases. This is because the substantive law approach will result in the application of the substantive law that better "respond[s] to interstate and international realities."¹¹⁰

Juenger's advocacy of the result-selective approach is related to his

¹⁰⁵ See *supra* note 2.

¹⁰⁶ See *New Critics*, *supra* note 1, at 638.

¹⁰⁷ *What Now?*, *supra* note 21, at 513.

¹⁰⁸ *Id.* at 514-16.

¹⁰⁹ Professor Juenger repeatedly decries the acceptance of interest analysis by academic commentators and courts. See, e.g., *id.* at 516-17; *Critique*, *supra* note 77, at 8, 14.

¹¹⁰ GENERAL COURSE, *supra* note 4, at 268.

view of the function of a court in a conflicts case and the purpose of conflicts law in our legal system. Juenger's view of the court's function and of the purpose of conflicts law is quite grandiose. In a conflicts case, the judge is "compelled to act as a multistate decision-maker, for his judgment will affect relationships that, by definition, are not confined to his own territory and law."¹¹¹ Thus, judges in conflicts cases should act in the tradition of the Roman *praetor peregrinus*. They should "go to the heart of the matter and devise substantive solutions responsive to the exigencies of the multistate transactions with which they are confronted."¹¹² If courts will "identify those rules of decision that are appropriate for multistate transactions,"¹¹³ then it may be hoped that "a new *ius commune* will evolve, composed of precepts whose merits have been judicially certified."¹¹⁴ Further, there is no danger that judges will always find the law of the forum to be the "better law," since they do not lack the ability to "question the wisdom of established law."¹¹⁵ Thus, concludes Juenger, "The conscious efforts of judges to adjudicate multistate disputes by applying rules that, in their opinion, are of superior quality ought to assure a greater number of sound decisions than any other doctrine could conceivably produce."¹¹⁶

The essential difference between interest analysis and Juenger's substantive law approach relates to a fundamental disagreement over the proper function of a court in a conflicts case and to the purpose of conflicts law in our legal system. Juenger says that the function of a court and the purpose of conflicts law is to "devise substantive solutions responsive to the exigencies of multistate transactions." This means, according to Juenger, solutions that result in the application of "rules of superior quality." He has no doubt that judges can determine what rules are "superior," or that they will apply the "superior" rules whether they are those of the forum or the other state.

Under interest analysis, in contrast, the proper function of a court in a conflicts case simply is to achieve a functionally sound and fair result

¹¹¹ *Id.* at 265.

¹¹² *Id.*

¹¹³ *Id.* at 287-88.

¹¹⁴ *Id.* at 288.

¹¹⁵ *What Now?*, *supra* note 21, at 522.

¹¹⁶ GENERAL COURSE, *supra* note 4, at 288. A valuable by-product of the substantive law approach, says Juenger, is that judicial opinions on the merits of the competing rules will result. Thus, "By signalling deficiencies in foreign and domestic law, teleology supplies an important incentive for scholars, legislatures and courts to ponder the need for reform." *Id.* at 287.

in the particular case before it. The purpose of conflicts law is to facilitate the court's achievement of such a result. Interest analysis does not look for "substantive solutions that respond to the exigencies of multistate transactions," and it does not try to identify the "better law." Rather it proceeds on the premise that the most rational way to achieve functionally sound and fair results in conflicts cases is to focus on the policies reflected in the laws of the involved states and the interest of each state in applying its law to implement those policies.

There is no objective way by which this fundamental disagreement over the function of a court in a conflicts case and over the purpose of conflicts law can be resolved. What we can do, however, is to learn something from the behavior of courts in actual cases. In looking at what courts *do* in practice, it becomes clear that they do not see their function in the grandiose way that Professor Juenger does. Rather they see their function as reaching functionally sound and fair results in the particular cases coming before them for decision. Courts apparently believe that such results are achieved by making the choice-of-law decision primarily with reference to the policies and interests of the involved states. This is why judicial decisions generally are consistent with interest analysis results, including the application of the forum's own law in the true conflict situation.

Interest analysis sometimes leads to a court's resolution of the conflict by applying the "worse" law in stark contrast to Juenger's substantive law approach. Juenger says that the court should apply the "better law," whether it be that of the forum or the other involved state. The practice of American courts, however, indicates that (1) the forum will apply its own "worse" law when it has a real interest in implementing the legislative or judicial policy; and (2) whenever the forum applies the "better law," that law, not coincidentally, is its own.

Juenger points to the "better law" consideration under Leflar's choice-influencing considerations approach as an example of the substantive law approach. Juenger's observations on this choice-influencing consideration in practice are more revealing than he perhaps realizes. He states: "Courts that have adopted Leflar's choice-influencing considerations have experienced little difficulty in deciding multistate disputes justly and predictably, *except in those few cases where judges thought that the forum's governmental interests required application of substandard forum law.*"¹¹⁷ He uses *Maguire v. Exeter & Hampton Electric Co.* to illustrate the latter situation.¹¹⁸ *Maguire* also is the case

¹¹⁷ *Id.* at 275 (emphasis added).

¹¹⁸ 114 N.H. 589, 325 A.2d 778 (1974).

that I use to demonstrate that under Leflar's approach, the "advancement of the forum's governmental interests" consideration¹¹⁹ takes precedence over the "better law" consideration. In that case, a Maine resident temporarily was employed in New Hampshire by a New Hampshire employer and was killed in an accident there. The wrongful death action was brought against the employer in New Hampshire, the only state where it was subject to jurisdiction. At that time, New Hampshire law limited liability in wrongful death to \$50,000. Maine law had no such limitation. While conceding that the Maine rule of unlimited recovery was the "better rule," the New Hampshire court nonetheless applied New Hampshire law. After all, New Hampshire's law advanced the forum's real interest in protecting the New Hampshire employer from unlimited liability.

The New Hampshire court failed to seize the opportunity to displace its own law in favor of the admittedly "better law" of Maine. The reason, I submit, is the result of the court's view of the proper function of a court in a conflicts case. The court tried to achieve a functionally sound and fair result in the case before it. When the forum has a real interest in implementing the policy reflected in its own law and the application of its law is not fundamentally unfair to the other party,¹²⁰ the court finds it reasonable to apply the forum's law to advance the forum's interest. Courts tend to see a conflicts case essentially as a domestic case with an added foreign element. When the same reasons that call for the application of the forum's law in a domestic case are equally present in a conflicts case, courts consider it reasonable to apply their own law. Again, unlike Professor Juenger, they do not view their function in a conflicts case as being to "devise multistate solutions re-

¹¹⁹ Leflar defines this choice-influencing consideration in terms of the forum's "total governmental interests," and not merely its interest in applying its own law to implement the policy reflected in that law. Leflar asserts that a state's total governmental interest is to be ascertained from the considerations that properly motivate a state in its lawmaking and law-administering tasks. He further states that the interest is not synonymous with the application of its substantive law. In certain circumstances, such as when a state's substantive law is "archaic," its total governmental interest may dictate that its law not be applied. See Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1587-88 (1966). In practice, however, courts following Leflar's approach apply this choice-influencing with reference to the forum's interest in applying its own law to implement the policy reflected in that law, in accordance with the interest analysis approach. Courts do not refer to the forum's total governmental interest, as Leflar has defined that concept. See *ACROSS STATE LINES*, *supra* note 91, at 42-43.

¹²⁰ See *supra* note 100 (discussing fairness to parties as independent choice-of-law consideration).

sponsive to the exigencies of multistate transactions."¹²¹

By the same token, when a forum resident is injured by a nonresident party in that party's home state, it also is reasonable for the forum to apply its own law. Of course, this determination assumes that the application of its law will not be fundamentally unfair to the other party. Consider the Minnesota case of *Schwartz v. Consolidated Freightways Corp.*¹²² Minnesota, like New Hampshire, expressly follows Leflar's choice-influencing considerations. In *Schwartz*, a Minnesota resident was involved in an accident with an interstate trucking company in Ohio. The company had its principal place of business in Ohio. The plaintiff brought suit in Minnesota. The Ohio company was subject to jurisdiction on the basis of forum-defendant contacts. Under Ohio law, contributory negligence would bar plaintiff's recovery. Minnesota law, however, allowed recovery based on comparative negligence. The application of Minnesota law would produce no unfairness to the defendant since the defendant's driver did not rely on the Ohio contributory negligence rule before becoming involved in the accident there. Since Minnesota had a real interest in applying its law to implement the policy reflected in that law, and since the application of its law produced no unfairness to the Ohio defendant, the forum's application of its own law was reasonable, and so it did so.¹²³

The results in *Maguire* and *Schwartz* are consistent with interest analysis. In both cases the forum applied its own law in the true conflict situation. They are inconsistent, however, with the "better law" concept that is at the heart of Juenger's substantive law approach. When a court has a real interest in applying its own law to implement the policy reflected in that law, it simply does not consider it reasonable to displace its own law in favor of the "better law" of the other involved state. This is why the New Hampshire court in *Maguire* "thought that the forum's governmental interests required application of substandard forum law." Again, courts do not view their function in a conflicts case as being to "devise substantive solutions responsive to the exigencies of multistate transactions." Instead, they see their function as reaching a functionally sound and fair result in the case before it. They believe that they achieve this objective by applying the forum's law in a case in which the forum has a real interest in having that law applied.

When the forum has no real interest in applying its law, courts fol-

¹²¹ GENERAL COURSE, *supra* note 4, at 265.

¹²² 300 Minn. 487, 221 N.W.2d 665 (1974).

¹²³ *Id.* at 493-94, 221 N.W.2d at 669.

lowing Leflar's approach sometimes rely on the "better law" consideration to justify the application of the forum's "better law." This has occurred when suit is brought in a recovery state regarding an accident in that state and involving parties both of whom are from a nonrecovery state.¹²⁴ As I have emphasized, in this situation the state of injury has no real interest in applying its law and allowing recovery. The consequences of the accident and of allowing or denying recovery will be felt by the parties in their home state.¹²⁵ Thus, in this situation the "better law" consideration leads to the application of the forum's "better law" when the forum has no real interest in applying its own law.¹²⁶ But when the forum does have a real interest in applying its own law in order to implement the policy reflected in that law, as in *Maguire*, the "better law" consideration is subordinate to the forum's governmental interests. In practice, the operation of Leflar's choice-influencing considerations approach simply has meant the application of the forum's own law, whether "better" or "worse." Juenger rather conveniently ignores this point.¹²⁷ Again, when the forum applies the "better law," that law, not coincidentally, has been its own.¹²⁸

¹²⁴ See, e.g., *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973); *Gagne v. Berry*, 112 N.H. 125, 290 A.2d 624 (1972); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968). The out-of-state plaintiff always will bring suit in the recovery state under the "long-arm" act. If plaintiff brings suit in the home state, that state will apply its law and deny recovery. See, e.g., *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968); *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966); *Tower v. Schwabe*, 284 Or. 105, 585 P.2d 662 (1978).

¹²⁵ See *supra* note 87.

¹²⁶ For cases in which the forum refused to apply its own law in this circumstance and applied the nonrecovery rule of the parties' home state, see *Vick v. Cochran*, 316 So. 2d 242 (Miss. 1975); *Schultz v. Boy Scouts of America*, 65 N.Y.2d 189, 480 N.E.2d 679 (1985); *Mager v. Mager*, 197 N.W.2d 626 (N.D. 1972).

¹²⁷ If Juenger says that interest analysis is a "thinly disguised pretext for applying forum law," what would Juenger say about Leflar's choice-influencing considerations?

¹²⁸ See *Bigelow v. Halloran*, 313 N.W.2d 10 (Minn. 1981). The court followed Leflar's choice-influencing considerations and displaced its own "worse" law. The court displaced its law to enable an Iowa victim of an intentional tort committed by a Minnesota defendant in Iowa to recover against the defendant's estate. It held that Iowa's rule permitting survival of intentional tort causes of action was "better" than Minnesota's abatement rule. *Id.* at 12. The next year, however, when faced with the application of Minnesota's abatement rule in a purely domestic case, the Minnesota court found that its abatement rule violated the equal protection clause of the state constitution. *Thompson v. Estate of Petroff*, 319 N.W.2d 400, 406-07 (Minn. 1982). Thus, in retrospect *Bigelow* was a "no-conflict" case.

Likewise, in *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978), the California court assumed that California law recognized tort liability for the loss of a "key employee." *Id.* at 163, 583 P.2d at 274, 148

The problem with Juenger's substantive law approach is that courts *will not* use it to displace the forum's substantive law when the forum has a real interest in applying its law. Some courts probably would seize on its result-selectivity as an excuse, as they seize on Leflar's "better law" consideration as an excuse, to apply the forum's "better law." Whatever else the substantive law approach may accomplish, it surely will not "guarantee consistency in the adjudication of multistate disputes"¹²⁹ as Professor Juenger asserts. Indeed, it only will encourage plaintiffs to sue in the state with the "better law." Plaintiffs will hope that the forum will decide to prefer its "better law" at the expense of the real interests of the parties' home state. Simply put, the substantive law approach will lead to the "forum shopping" that Juenger purportedly deplors.

Even if courts *will not* "devise substantive solutions responsive to the exigencies of multistate transactions," the question still remains whether courts, as Juenger contends, *should* do so. Here, I will meet Juenger on his own terms and assert that courts *should not* do so. It is not their function to "police the multistate order." Their only purpose is to reach a functionally sound and fair result in the cases coming before them for decision. They will not reach such results by deciding what law is the "better law" since they have no objective standards by which to make such a determination. Even if they did, a court should not refuse to recognize a constitutionally permissible *legislative policy choice* simply because the court disagrees with that policy choice.

Under the constitution of every American state, legislation takes precedence over common law rules. A court must apply constitutional legislation whether or not it considers the policy embodied in the legislation "substandard." The same considerations that justify the application of the law in a domestic case, implementing legislative pol-

Cal. Rptr. at 870. The court held that in the true conflict situation, California law would be "less impaired" than the law of Louisiana where the defendant resided and the accident occurred. *Id.* at 169, 583 P.2d at 729, 148 Cal. Rptr. at 875. *Offshore* thus was another example in which the forum seemingly displaced its own law in the true conflict situation. *Offshore*, however, also turned out to be a "no conflict case." The California court subsequently held that California law did not recognize this "aberrational" kind of tort liability. *I.J. Weinrot & Son v. Jackson*, 40 Cal. 3d 327, 335, 708 P.2d 682, 686, 220 Cal. Rptr. 103, 108 (1985). The retrospective "no conflict" thus cannot be counted as an instance where the forum displaced its own "worse law" in the true conflict situation. In practice, in the true conflict situation, no case can be found where the forum displaced its own "worse law."

¹²⁹ GENERAL COURSE, *supra* note 4, at 257.

icy, justifies its application in the conflicts case.¹³⁰ Thus, when the application of the forum law advances the policy reflected in that law in a conflicts case in the same manner as in a domestic case, it does not seem rational or appropriate for the court to displace its own law on the ground that the law of the other state is the "better law."¹³¹ By the same token, when the forum does not have a real interest in applying its own law to implement the policy reflected in that law, but the other involved state does have such an interest, the forum should not refuse to recognize the validity of the other state's policy choice.

The patent unsoundness of courts trying to "devise substantive solutions responsive to the exigencies of multistate transactions" clearly is demonstrated by Professor Juenger's proposed "substantive solutions" to product liability and "mass disaster" cases.¹³² Juenger proposes an alternative reference solution that identifies the connecting factors and that sets forth a criterion for selection among the potentially applicable laws. Under this criterion, the applicable law in products liability cases would be with respect to each issue "that rule of decision which most closely accords with modern standards of products liability,"¹³³ and in

¹³⁰ See *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964). The court held that an Oregon law enabling "spendthrifts" to avoid contracts should be applied to enable an Oregon defendant to avoid a contract centered in California with a California defendant. *Id.* at 15-16, 395 P.2d at 549. The court noted that: "Courts are instruments of state policy. The Oregon Legislature has adopted a policy to avoid . . . possible expenditure of Oregon public funds which might occur if the spendthrift is required to pay his obligations. In litigation Oregon courts are the appropriate instrument to enforce this policy." *Id.* at 15, 395 P.2d at 549. In that case, plaintiff argued that the Oregon court should "devise substantive solutions responsive to the exigencies of multistate transactions." Specifically, plaintiff argued that commercial considerations dictated the displacement of Oregon law so that out-of-state parties would not avoid commercial dealings with Oregonians. *Id.* at 14, 395 P.2d at 545. In rejecting this argument, the court stated: "The substance of these commercial considerations, however, is deflated by the recollection that the Oregon Legislature has determined, despite the weight of these considerations, that a spendthrift's contracts are voidable." *Id.* at 15, 395 P.2d at 549.

¹³¹ I am not saying that it would be "constitutionally or politically" improper for the court to refuse to apply the forum's law in such a situation. See *New Critics*, *supra* note 1, at 637. Rather, a court is unwilling to displace the forum's own law where application would advance the policy reflected in that law. It does not seem rational for a court to displace its own law in that circumstance. The application of the forum's law in that circumstance seems objectively reasonable.

If the conflict is brought about by a common law rule of the forum that is concededly the "worse law," the forum can avoid the conflict simply by changing its own common law rule. The California court effectively did this "retroactively" in *Offshore*. See *supra* note 128.

¹³² See *supra* notes 45, 46 and accompanying text.

¹³³ See *supra* note 46.

“mass disaster” cases, with respect to each issue simply “the most suitable rule of decision.”¹³⁴

The most obvious difficulty with Professor Juenger’s substantive law approach in both contexts is the lack of objective standards — or for that matter, any standards whatsoever — by which the court can determine which rule of substantive law meets Professor Juenger’s stated criterion for selection. How is it remotely possible to determine which “rule of decision most closely accords with modern standards of products liability,” or in a “mass disaster” case, what is the “most suitable rule of decision?” Products liability law is in a state of extreme flux, with disagreement among courts over many fundamental issues. This disagreement ranges all the way from the underlying basis for imposing liability for defectively made products to the appropriateness of an award of punitive damages. The matter of the “most suitable rule of decision” in “mass disaster” cases is utterly impossible to define. Dramatic changes in substantive tort law have occurred in the last few years. State after state has enacted various forms of “tort reform” legislation, all designed to limit enterprise tort liability and to reduce the amount of recovery, especially for noneconomic loss.

Professor Juenger has argued that “substandard tort law” should not be applied in multistate cases. His definition of “substandard tort law” is built around the largely abandoned defendant-favoring rules, such as guest statute and spousal immunity or limitations on wrongful death recovery. When referring to the “most suitable rule of decision,” he obviously has in mind the conventional plaintiff-favoring rules, such as liability for ordinary negligence in all circumstances, comparative negligence as opposed to contributory negligence, and unlimited recovery for wrongful death. *He simply has not taken account of the “tort revolution” reflected in modern “tort reform” legislation.* The current trend in tort law is no longer “recovery with loss distribution through the tortfeasor’s liability insurance.”¹³⁵ The trend is limitation or even denial of recovery, designed to protect defendants and insurers from what legislatures consider to be excessive liability for enterprise activity. The discredited defendant-favoring immunities and limitations on wrongful death recovery have been replaced by caps on recovery, and above all, by limitations on recovery for noneconomic loss. The debate over “tort reform” continues in many states. When a legislature adopts a defendant-favoring “tort reform” rule, it has made an important policy choice. The legislature presumably wants their choice implemented in any

¹³⁴ *Id.*

¹³⁵ R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 359 (3d ed. 1986).

case, domestic or multistate, in which a forum enterprise is involved as a defendant.

Today, therefore, it is impossible to determine objectively or even at all, whether a rule of products liability "most closely accords with modern standards." States strongly disagree over what those standards should be. Likewise, what rules of substantive tort law constitute the "most suitable rule of decision" is impossible to determine. Again the states strongly disagree over what is the "most suitable rule of decision." Moreover, the substantive rules of products liability and of tort law that have emerged from the "tort reform revolution" reflect current and strongly-held policies of the involved states. That a court would or should make a "qualitative evaluation" of these rules, as Professor Juenger purportedly would have them do, simply is impossible to believe.

I will use two hypothetical examples to illustrate why the substantive law approach advocated by Juenger is incapable of application. The hypotheticals also demonstrate why the interest analysis approach will produce functionally sound and fair results.¹³⁶ In the products liability context, the manufacturer manufactures the product in New York and puts it into national distribution. The plaintiff, a resident of California, purchases the product in her home state. She is injured, allegedly due to a design defect in the product. The plaintiff sues the manufacturer in California, where it is doing business. Under New York products liability law, for all practical purposes a manufacturer can be held liable on a design defect claim only on the basis of negligence. The plaintiff must prove that the product was defective, and if the product conformed to the state-of-the-art at the time of manufacture, the manufacturer is relieved from liability. Under California law, however, if the plaintiff demonstrates that an alleged design defect is the cause of the injury, the burden shifts to the defendant to prove that the product was not defective under risk-utility guidelines.¹³⁷ That the California rule is extremely favorable to plaintiffs and effectively imposes strict liability for design defects is widely acknowledged.

In terms of interest analysis, of course, this case presents the true conflict. California has a real interest in applying its plaintiff-favoring rule for the benefit of the California plaintiff injured there. Conversely,

¹³⁶ These examples are taken from Sedler & Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. (1990) (forthcoming).

¹³⁷ *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 431-32, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978).

New York has a real interest in applying its manufacturer-protecting rule for the benefit of the New York manufacturer who manufactured the product there. In this case of true conflict, California would apply its own law and allow recovery.¹³⁸

Now let us consider how this case would be resolved under Juenger's substantive law approach. California law could be selected because the plaintiff resides there, the product was acquired there, and the injury occurred there. Likewise New York law could be selected because the defendant has its principal place of business there, and the product was manufactured there. Which law "most closely accords with modern standards of products liability?" Is it New York law because practically all other states take New York's approach to liability for design defects? Or, is it California's law because California law is on the "cutting edge" and enables the tort victim to recover, a result that Professor Juenger seems to favor? Here, of course, there is no clearly "substandard tort law" to be rejected in multistate cases, and there is no objective way or any other way by which a court can determine whether the California law or the New York law "most closely accords with modern standards of products liability." Carrying Juenger's substantive law approach to its logical conclusion, the court simply may have to decide whether it wants to favor plaintiffs or manufacturers. This approach hardly seems a proper way to go about "devising substantive solutions responsive to the exigencies of multistate transactions."

In any event, the California court has fashioned what it believes to be an appropriate substantive rule for design defect products cases. As the forum, California will apply that rule in this case because the policy reflected in the rule will be advanced by such application. The result functionally is sound and fair to the parties. California has a real interest in applying its law to enable the California plaintiff to recover. The consequences of the accident and of allowing or denying recovery will be felt by the plaintiff in California. The application of California law to this issue in this case was fully foreseeable to the New York manufacturer, who shipped the product into California. In this case, therefore, interest analysis produces a functionally sound and fair result. Juenger's substantive law approach, however, is incapable of providing any solution at all to the question of which state's law should

¹³⁸ The case will not arise in New York, because the plaintiff obviously will sue in California. This is not "forum-shopping," but more appropriately a legitimate "forum-selection." California can exercise jurisdiction on the basis of both forum-defendant and forum-transaction contacts and can constitutionally apply its own substantive law. Therefore, the plaintiff has brought the suit in a "proper forum."

apply.

The second example is a hypothetical "mass disaster" in which an accident involves a large number of victims. Fifty members of the Elks Club of Denver, Colorado, charter a bus for a trip to Arizona for an Elks Convention. The bus company, Colorado Coaches, Inc. is a Colorado corporation doing business mostly within the state. In Phoenix, thirty Arizona Elks members get on the bus for a local sightseeing trip. Due to the negligence of the driver, the bus hits a culvert, causing the bus to overturn. All the passengers suffer serious and debilitating injuries. A Colorado statute adopted in 1987¹³⁹ limits recovery for noneconomic loss for ordinary negligence to \$250,000 for each plaintiff. Arizona law has no such limitation. Both the Arizona and Colorado plaintiffs bring suit against Colorado Coaches in Arizona to recover for their personal injuries.

Under interest analysis, the result in both cases is easy. The suit by the Arizona plaintiffs presents a true conflict: Arizona has a real interest in applying its law to allow unlimited recovery for noneconomic loss to the Arizona plaintiffs, while Colorado has a real interest in applying its law to limit the liability of the Colorado defendant. The application of Arizona law to allow unlimited recovery produces a functionally sound and fair result. Arizona has a real interest in applying its law for the benefit of the Arizona plaintiffs, and the Colorado defendant could foresee the application of Arizona law when it operated the bus in that state. The suit by the Colorado plaintiffs against the Colorado defendant, however, presents a false conflict. Colorado has a real interest in applying its law to limit the liability of the Colorado defendant. However, Arizona has no real interest in applying its law to allow recovery to the Colorado plaintiffs, since the consequences of the accident and of allowing or denying recovery will be felt by the plaintiffs in Colorado. The application of interest analysis produces "inconsistent results." The Arizona plaintiffs and the Colorado plaintiffs, injured in the same bus accident, obtain different measures of recovery. This, however, is because the parties' home states have different rules as to the amount of damages recoverable. The consequences of the accident and of imposing or denying liability will be felt by the parties in the states in which they reside. In this circumstance, to limit each victim to the measure of recovery afforded by the law of the victim's home state is fully reasonable.¹⁴⁰

¹³⁹ COLO. REV. STAT. § 13-21-102.5(3) (Supp. 1987).

¹⁴⁰ Juenger believes that it is "unfair" to subject the claims of different victims of the same "mass disaster" to different substantive laws. *See Mass Disasters, supra* note 46,

Under Juenger's substantive law approach, either Colorado or Arizona law could apply. Since one set of plaintiffs and the defendant reside in Colorado, that law could apply. Or, since the other set of plaintiffs reside in Arizona, and the accident occurred there, Arizona law could apply. Juenger would require that the same law govern the claims of both sets of plaintiffs.¹⁴¹ This would mean that the Arizona plaintiffs would lose the benefit of the law of their home state if Colorado law applied. Alternatively, the Colorado plaintiffs would get a "windfall" because they happened to be on a bus with Arizona plaintiffs. Further, as to the Colorado plaintiffs, the Colorado defendant would lose the protection provided by the Colorado legislature. But which law is the "most suitable rule of decision" to govern the claims of both sets of plaintiffs? Is it Colorado law because that law is in accord with modern trends that seek to limit enterprise tort liability, especially for noneconomic loss? Or, is it Arizona law either because it is "unjust" to limit recovery for noneconomic loss, or because for some unexplained reason, it is more "just" to favor plaintiffs over defendants? Again, there is no objective way, or any way at all, by which a court can determine whether Arizona law or Colorado law is the "most suitable rule of decision."

Professor Juenger's proposed substantive law solution in the products liability and "mass disaster" areas demonstrate the patent unsoundness of the result-selective approach that he advocates. Such an approach requires the forum court to sacrifice its own policies and interests or the legitimate interests of the other involved state. Further, the approach simply is unworkable under its own terms. When conflicting laws, especially modern laws, reflect carefully considered legislative policies, no objective or realistic means exists for a court to determine the "better law." The assumption of Professor Juenger's substantive law approach, that a court can determine the "better law," makes the approach fall of its own weight. Not only is it not the function of an American state court to "devise substantive solutions responsive to the exigencies of multistate transactions," but they could not do so anyway.

Thus, Professor Juenger's substantive law approach will not "guarantee the predictability and consistency that interest analysis lacks." Nor will it "produce better results in particular cases." It simply will

at 109. It is difficult to see the "unfairness" since each plaintiff is treated the same in that each plaintiff gets the measure of recovery afforded by the law of the plaintiff's home state.

¹⁴¹ See *supra* note 140.

not work at all.

Interest analysis, however, does work. It produces functionally sound and fair results in the cases actually coming before courts for decision. It does so by focusing on the most rational consideration in making choice-of-law decisions: the policies reflected in a state's rule of substantive law and a state's interest in applying its law to implement those policies in the particular case. As this comparison with Juenger's substantive law approach clarifies, interest analysis indeed is the preferred approach to choice-of-law.

CONCLUSION

Professor Friedrich K. Juenger brings a unique perspective to the challenge to the interest analysis approach to choice-of-law. In this Essay, I have tried to give his criticisms of interest analysis, and the substantive law approach he proposes in its stead, the respectful consideration due the views of such an outstanding scholar in the field. In comparing the results that are reached in practice under interest analysis with Professor Juenger's proposed substantive law approach, I believe that I have demonstrated that interest analysis can withstand Professor Juenger's challenge. Consequently, interest analysis will remain as the preferred approach to choice-of-law in the United States.