

press policy favoring class actions.⁴² The court has perceived that, unless the class action is permitted, serious wrongs may remain unremedied. Moreover, if a remedy were sought by all those injured, the burden on both the courts and the litigants would often be enormous in terms of time and expense. The class action allows substantial benefits in the form of efficient litigation. These policies could also have been asserted in *San Jose*; the fact that they were not may indicate a basic change in attitude toward all class actions.

CONCLUSION

In light of these policy considerations, the court's opinion, based as it is on hypothetical injury rather than demonstrable factual grounds, is difficult to justify. If in fact it portends a new policy disfavoring all class actions, it parallels the trend in federal class actions, where judicially imposed restrictions are severely limiting their use.⁴³ This development is unfortunate. It signifies an end to the recognition that mass wrongs require mass remedies.

However, while continuing to accord validity to an outdated interpretation of community of interest used by a court hostile to class actions, the *San Jose* court also paid lip service to cases such as *Daar* and *Vasquez*, which greatly expanded use of class actions in California. Thus, it may have left the way open for future limitation of the effect of its opinion, allowing litigants and trial courts to continue to use class actions as a means of ensuring creative solutions to the pressing problems of a technological society.

III

CONFLICTS

Choice of Measure of Damages in Wrongful Death

Hurtado v. Superior Court.¹ California leads the nation in highway deaths.² Since California also is a popular destination for tour-

42. See *Vasquez v. Superior Ct.*, 4 Cal. 3d 800, 807-08, 484 P.2d 964, 968, 94 Cal. Rptr. 796, 800 (1971); *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 714-15, 433 P.2d 732, 746, 63 Cal. Rptr. 724, 738 (1967).

43. See, e.g., *Eisen v. Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974) (cost of notice to a class of several million individuals must be borne by the named plaintiff in a suit for damages).

1. 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974) (Sullivan, J.) (unanimous decision).

2. BUREAU OF THE CENSUS, SOCIAL AND ECONOMICS ADMINISTRATION, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 564 (1974).

ists,³ many who die in these unfortunate traffic mishaps are visitors from other states and countries. Consequently, suits resulting from such accidents often raise the difficult question of whose law on wrongful death applies. In the past, traditional choice of law rules pointed unhesitatingly to the law of the place of wrong, the situs of the accident. But choice of law, at least in California, is no longer so simple a matter.⁴ In 1967, with Chief Justice Traynor's landmark opinion in *Reich v. Purcell*,⁵ the California Supreme Court renounced the place of wrong rule in tort cases, adopting in its place the governmental interest approach to choice of law.⁶ In *Hurtado* the court further delineated this choice of law approach for wrongful death actions with multistate elements.⁷

The case involved a common fact pattern.⁸ Manuel Hurtado was driving his car in Sacramento County, California, when it collided with a pickup truck, owned and operated by Jack Rexius. As a result of the accident a passenger in the Hurtado vehicle died. His widow and children brought an action in California for wrongful death,⁹ naming Manuel Hurtado and Jack Rexius as defendants. Both defendants were residents of California, and both cars were registered

3. *Id.* at 216.

4. There is some doubt whether it ever was simple. Courts eroded the doctrine of *lex loci delictus* as they developed ways of avoiding the law of the place of wrong in tort cases. See, e.g., *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955); *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953); cf. Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959). See also E. SCOLLS & R. WEINTRAUB, CONFLICT OF LAWS 441-55 (1972). Moreover, scholars had long challenged the theoretical basis underlying the method. D. CAVERS, THE CHOICE-OF-LAW PROCESS 7-8 (1965); MORRIS, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951). See *Reich v. Purcell*, 67 Cal. 2d 551, 553-54, 432 P.2d 727, 729, 63 Cal. Rptr. 31, 33 (1967).

5. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

6. *Hurtado v. Superior Court*, 11 Cal. 3d 574, 579-80, 522 P.2d 666, 669, 114 Cal. Rptr. 106, 109 (1974); see *Comments on Reich v. Purcell*, 15 U.C.L.A.L. REV. 551 (1968) [hereinafter cited as *Reich Symposium*]. Led by Chief Justice Traynor, the court had suggested, prior to *Reich*, its gravitation toward interest analysis. E.g., *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955); *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953); see Traynor, *Brainerd Currie—Five Tributes*, 1966 DUKE L.J. 9 (1966); Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959). See also Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719 (1961); Kay, *The Contributions of Roger J. Traynor—Conflict of Laws: Foreign Law as Datum*, 53 CALIF. L. REV. 47 (1965). Nor can one ignore the significant post-*Reich* decision, *Travelers Ins. Co. v. Workmen's Comp. App. Bd.*, 68 Cal. 2d 7, 434 P.2d 992, 64 Cal. Rptr. 440 (1967) (Tobriner, J.).

7. No discussion of conflict of laws is profitably begun without reference to the late Professor Brainerd Currie. See notes 18 & 20 *infra*. This Note will cite extensively to the fine collection of his writings on this subject, B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963) [hereinafter cited as SELECTED ESSAYS].

8. For a summary of the facts, see 11 Cal. 3d at 578, 522 P.2d at 668, 114 Cal. Rptr. at 108.

9. Suit was brought under CAL. CODE CIV. PRO. § 377 (West 1973).

there. The plaintiffs and the decedent, however, were at all times residents and domiciliaries of the State of Zacatecas, Mexico;¹⁰ decedent was in California temporarily and only as a visitor.

While Mexico, like California, recognizes actions for wrongful death,¹¹ its statute provides a significantly different measure of damages. Under the law of Mexico, which limits recovery, plaintiffs' maximum award would have been \$1,946.72.¹² California has no limitations; its statute allows such damages "as under all the circumstances may be just."¹³ Faced with this choice the supreme court applied California law.¹⁴

The court's holding, in a unanimous opinion written by Justice Sullivan, was simple, straightforward, and at first blush apparently quite restricted in scope:

[W]e hold that where as here in a California action both this state as the forum and a foreign state (or country) are potentially concerned in a question of choice of law with respect to an issue in tort and it appears that the foreign state (or country) has no interest whatsoever in having its own law applied, California as the forum should apply California law.¹⁵

10. For convenience this Note will refer to Mexico and Zacatecas interchangeably.

11. C. CIV. ZACATECAS §§ 1889-90, cited in *Hurtado*, 11 Cal. 3d at 578-79 & n.1, 522 P.2d at 668-69 & n.1, 114 Cal. Rptr. at 108-09 & n.1.

12. This figure is equivalent to the maximum recovery of 24,334 pesos, converted at the rate of 12.5 pesos to the dollar. *Id.*

13. CAL. CODE CIV. PRO. § 377 (West 1973).

14. At the trial level defendant *Hurtado* moved the court for a separate trial on the issue of which measure of damages would apply. After submission on briefs, the trial court announced its intended decision to apply the California measure of damages. Defendant *Hurtado* then sought a writ of mandate from the court of appeal. 11 Cal. 3d at 578-79, 522 P.2d at 668-69, 114 Cal. Rptr. at 108-09. Citing *Reich* as authority, the court of appeal ruled that the law of Mexico, not California, was appropriate on the issue of measure of damages. The court reached this conclusion reluctantly:

Moved as we might be to look favorably upon plaintiffs' arguments if the question were an open one, we are bound—as an intermediate appellate court—by the guidelines set out in *Reich v. Purcell* [T]he interest of [California] in a wrongful death action insofar as compensation of survivors is concerned extends only to its local decedents and beneficiaries.

Hurtado v. Superior Court, 110 Cal. Rptr. 591, 596 (3d Dist. 1973), hearing granted, Cal. Sup. Ct. (Jan. 3, 1974). On whether or not the court was "bound" by the *Reich* "guidelines," see Ehrenzweig, *Choice of Law in California—A "Prestatement,"* 21 U.C.L.A.L. REV. 781, 795 (1974) (a court is bound only by holdings).

The supreme court, upon granting a hearing, automatically vacated the opinion of the court of appeal and reviewed defendant's original petition for writ of mandate. CAL. CONST. art. 6, § 4. The court faced initially the issue of whether mandate was an available remedy. Since the facts had been stipulated, the sole issue before the court was one of law. Therefore, mandamus was appropriate to direct the trial court to apply the proper law where, as here, there was no other adequate remedy. 11 Cal. 3d at 579, 522 P.2d at 669, 114 Cal. Rptr. at 109.

15. 11 Cal. 3d at 582, 522 P.2d at 671, 114 Cal. Rptr. at 111.

The holding interweaves several important concepts. In order to delineate these

On closer examination, the holding appears to have implica-

concepts more precisely, the author will employ throughout this Note the analytical method and definitions proposed immediately below. Although this method is derived in large part from the scholarship of Professors von Mehren and Trautman, on the one hand, and that of the late Professor Currie, on the other, it of course does not claim to be either the "functional analysis" of the former or the "pure interest analysis" of the latter. It is, in short, eclectic—a description which appears also to be substantially true of the analysis used by the court in *Hurtado*.

Method and Definitions: This Note's analytical approach employs a hierarchy of contact and legitimate governmental involvement as determinants of what law applies in any legal controversy with multistate elements. At the threshold, as the court noted, a state must have a justifiable connection to the case—that is, it must be at least "potentially concerned." See A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON THE CONFLICT OF LAWS* 76 (1965); also see note 36 *infra* and accompanying text. Without adopting in full the exacting precision of Professors von Mehren and Trautman, this Note will use the terms *concerned* and *potentially concerned* as the court apparently intended, that is, to identify each state sufficiently related to the case to bring it within the scope of the state's legitimate governmental concern.

Of higher value than concern or potential concern is "governmental interest," which presupposes a state with sufficient relationship to the case. *Governmental interest* describes those instances where application of a state's law to the precise facts of the case in question would advance a governmental policy of that state connected with that law. See generally R. CRAMTON & D. CURRIE, *CONFLICT OF LAWS, CASES-COMMENTS-QUESTIONS* 208-36 (1968) [hereinafter cited as CRAMTON & CURRIE]. Conversely, *no [governmental] interest*, as used in this Note, refers generally to those instances where, regardless of any opposing law, the facts of the case are such—considering among other things the status of the parties and the locality of the transaction—that application of a state's law would in no way advance a governmental policy of the state. Interest analysis (and this Note) refers to a state in such circumstances as *disinterested*. Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROB.* 754 (1963). A state, of course, can be concerned, that is connected to the case, yet disinterested, as a matter of governmental policy advancement, in its outcome.

"No interest whatsoever" as used in the court's holding, however, describes an analytically quite distinct concept, what this Note calls the *uninterested* rather than *disinterested* state. That is, when the law of state A would advance the policy of state B at least as well as the law of state B itself, state B is not disinterested—if disinterest is defined most precisely—but rather is simply uninterested in preferring its law to that of state A. See text accompanying notes 29-33 *infra*. Thus the court's use of "no interest," although technically correct, is somewhat imprecise. Accordingly, this Note will use *nonfrustratable interest*, a phrase adopted simply for the purpose of describing the interest of the uninterested but not disinterested state. Conversely, *frustratable interest* will be used synonymously with governmental interest, defined *supra*.

Finally, the holding concluded that "California as the forum should apply California law." 11 Cal. 3d at 582, 522 P.2d at 671, 114 Cal. Rptr. at 111. This apparently described an interest of the forum state, but one with a value, *i.e.*, a persuasive force for choosing any one particular rule of decision, falling somewhere in between governmental concern and frustratable interest. See text accompanying notes 34-37 *infra*. The court correctly did not describe this interest as the forum's interest *qua* forum, for this latter concept refers to a state's interest solely in the administration of its courts. See generally CRAMTON & CURRIE, *supra* at 121-48, 378-412. Rather, California's forum interest as described by the holding was simply the *prima facie interest* that the law of a concerned forum state not be displaced in the absence of a convincing showing that a foreign state has a governmental interest in the application of its law. Accordingly, this Note will use the terms *prima facie interest* and *nondisplacement interest* in-

tions extending well beyond the facts at issue.¹⁶ It suggests not only a strengthened commitment to governmental interest analysis as an approach to choice of law, but also an emphasis, although not without qualification, on forum preference. This emphasis is noticeable first in the court's method for identifying potentially concerned¹⁷ states: "[G]enerally speaking the forum will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state."¹⁸ More importantly, the court used forum preference in choosing between the laws of two admittedly concerned states: it held that a concerned forum has an interest, as a *prima facie* matter, in applying its law, and that therefore forum law will not be displaced unless the forum's *prima facie* interest¹⁹ is countervailed by a convincing showing of a foreign state's governmental interest.²⁰ This emphasis on the

terchangeably to describe this special and limited interest in forum preference.

In summary, then, a state, in ascending this hierarchy, would have: (1) a *concern*, if sufficiently related to the case; (2) *no interest*, if despite its concern, application of its law would not advance its policy at all; (3) a *prima facie interest*, if both concerned and the forum; (4) a *nonfrustratable interest*, if application of its law would advance its policy no more than application of the law of the other concerned state(s); and (5) a *frustratable interest*, if to advance its policy fully it must prefer its law to that of any other concerned state(s).

16. It should be noted that the court stated a rule for forum state-foreign state potential conflicts, demoting to parenthetical reference the forum state-foreign country facts at issue in the case. The implications of the opinion thus extend to all conflicts situations.

17. A state's "concern" describes the sufficiency of its relationship to the case at issue. For a fuller definition, see note 15 *supra*.

18. 11 Cal. 3d at 581, 522 P.2d at 670, 114 Cal. Rptr. at 110. This method of identification was first explained by Brainerd Currie. The court quoted Professor Kay, who in turn drew upon the work of her colleague Professor Currie:

"Only 'when it is suggested that the law of a foreign state should furnish the rule of decision' must the forum determine the governmental policy of its own and the suggested foreign laws, preparatory to assessing whether either or both states have an interest in applying their policy to the case."

Id., quoting Kay, *Reich Symposium*, *supra* note 6, at 585, quoting B. CURRIE, *SELECTED ESSAYS* 183 (1963).

The Currie approach to choice of law, which has come to be known as pure interest analysis, is reflected throughout the opinion. The court indicates its reliance on this choice of law method, with its strong forum preference, by extensive citation of Professor Currie and others who have adopted pure interest analysis. Indeed, if one discounts the 16 separate citations to *Reich*, the court relied more often on scholars than on case precedent.

19. For a discussion distinguishing a forum's *prima facie* interest from both a governmental interest and an interest *qua* forum, see note 15 *supra*.

20. 11 Cal. 3d at 581-82, 522 P.2d at 670-71, 114 Cal. Rptr. at 110-11. Of course, such a countervailing interest by itself would not require automatic application of the foreign state's rule of decision; the forum state might have a governmental interest in addition to its *prima facie* interest. See note 15 *supra*. Thus, a convincing showing of a foreign state's governmental interest serves only to trigger a search by the forum state for its own governmental interest. Under Currie's formulation, if this search uncovered governmental interests in both the forum and foreign states, the case would be one of true (or at least apparent) conflict. Currie, *Notes on Methods and Objectives*

law of the forum seems to place the court in the mainstream of "pure" interest analysis as developed by the late Professor Brainerd Currie.²¹

The court could have limited itself to its holding, and analyzed the case as a false conflict: California law applies on the strength of its prima facie interest as forum since no opposing governmental interest is present. In exploring an alternative rationale for its decision,²² however, the court went on to identify, in dicta, an additional California interest: the governmental interest in "deter[ring] the kind of conduct within its borders which wrongfully takes life."²³ The reasoning of this dicta is difficult to reconcile with the language of previous decisions. In fact, the alternative rationale obliged the court in *Hurtado* to restructure *Reich* implicitly, and explicitly but only partially reassess *Ryan v. Clark Equipment Co.*,²⁴ a court of appeal decision that relied heavily on *Reich*.²⁵ In addition, this interest in deterrence appears to compromise the court's reliance, in its holding, on forum preference. But the most significant aspect of the deterrence interest is the method the court employed in identifying the underlying governmental policy. This method, which apparently relies as much on general principles as on a rigorous examination of specific state statutes, could complicate the court's well-reasoned approach to choice of law by suggesting that governmental interests may be legitimate although based on a less than exacting inquiry into a particular state's policy.

Thus the opinion in *Hurtado* has a mixture of elements which this Note will explore in turn. It will first examine carefully the

in the *Conflict of Laws*, 1959 DUKE L.J. 171, 178 (1959) [hereinafter cited as *Methods and Objectives*], in *SELECTED ESSAYS* 183-84.

The original Currie approach to choice of law resolved true conflicts by automatic application of forum law. *Id.* at 178, in *SELECTED ESSAYS* 184. Under this approach, the discovery by the forum of its own governmental interest would end the inquiry. Currie's final formulation, however, directs the forum court, having found an "apparent conflict," to reconsider the asserted governmental interests, since "a more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict." E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBERG, *CASES AND MATERIALS ON THE CONFLICT OF LAWS* 477-78 (5th ed. 1964) [hereinafter cited as E. CHEATHAM, *CONFLICT OF LAWS*]. Even this final formulation, however, retains forum preference in its method for resolving unavoidable conflicts. *Id.*

21. See notes 18 & 20 *supra*.

22. As the court expressed it:

Nevertheless, although our holding disposes of the mandamus proceeding before us, we deem it advisable to consider the argument addressed by defendant to the interest of California in applying its measure of damages for wrongful death. We do this because the argument reflects a serious misreading of *Reich* which apparently has not been contained to the parties before us.

11 Cal. 3d at 582, 522 P.2d at 671, 114 Cal. Rptr. at 111.

23. *Id.* at 583, 522 P.2d at 672, 114 Cal. Rptr. at 112.

24. 268 Cal. App. 2d 679, 74 Cal. Rptr. 329 (1st Dist. 1969).

25. For a discussion of *Ryan*, see text accompanying notes 106-11 *infra*.

court's holding. Next, it will criticize the method the court suggests as a general model for identifying governmental policies and resultant state interests. It will then outline possible answers to the major questions left open by the court's alternative reasoning. Finally, the Note will analyze the question implicitly posed in an amicus brief,²⁶ but un-reached by the court: Can the forum state, without violating equal protection, assert an interest in reserving the benefits of its governmental policy for its residents only, and toward that end apply a foreign rule of decision even though the foreign state itself would not assert an interest in preferring its rule?

I. FALSE CONFLICT, FORUM NONDISPLACEMENT,
OR THE UNPROVIDED FOR CASE?

The court's reasoning is easy to summarize. To reach its holding, it first identified the interest of each potentially concerned state—Mexico and California—in applying its measure of damages.²⁷ It then negated any interest of Mexico in preferring its rule of limited recovery to California's contrary rule. Citing *Reich*,²⁸ the court reasoned that a state's sole interest in limited damages is to protect its local defendants. Since Mexico had no local defendants in this action, it had "no interest" in having its law applied.²⁹ In using the term "no interest," however, the court could not have meant Mexico was "disinterested"—that is, that application of its law would not advance its policy at all.³⁰ To the contrary, Mexico has an interest that its resident plaintiffs recover at least the amount permitted under its own law.³¹ Rather, on the facts of *Hurtado* Mexico was simply "uninterested" in preferring its law.³² In short, Mexico's interest in the

26. Brief for Lloyds, London, as Amicus Curiae in support of Petitioner at 5-10; see Ratner, *Choice of Law: Interest Analysis and Cost-Contribution*, 47 S. CAL. L. REV. 817 (1974).

27. 11 Cal. 3d at 580, 522 P.2d at 669, 114 Cal. Rptr. at 109. See note 15 & text accompanying note 18 *supra*.

28. *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

29. 11 Cal. 3d at 581, 522 P.2d at 670, 114 Cal. Rptr. at 110. The court offered a complementary rationale: Mexico "has no interest in denying full recovery to its residents injured by nonMexican defendants." *Id.* (emphasis added). But see text accompanying and following note 102 *infra*.

30. For a fuller definition of "disinterested," see note 15 *supra*.

31. 11 Cal. 3d at 583, 522 P.2d at 672, 114 Cal. Rptr. at 112 ("It is Mexico's interest in creating wrongful death actions which is concerned with distributing proceeds to the beneficiaries . . .") (emphasis added). While acknowledging such an interest, the court explained that that particular issue "has not been raised in the case at bench." *Id.*

32. The term "uninterested" is adopted for the purposes of this Note to suggest that Mexico would not object to a higher recovery for its local beneficiaries than its own law provided, at least so long as residents of Mexico would not be required to pay for it. For a fuller definition, see note 15 *supra*.

application of its law was nonfrustratable³³ since application of California's unlimited recovery rule would equally advance Mexico's governmental policy.

California's interest, for purposes of the holding, was simply its prima facie interest as forum.³⁴ Unless the party litigant who suggests the application of foreign law demonstrates that that "rule of decision will further the interest of the foreign state,"³⁵ the forum court need do no more to choose its own law than to ascertain that it has sufficient relationship to the case to justify its governmental concern.³⁶ On the facts of *Hurtado*, California had such a relationship—it was, after all, "the place of the wrong [and] of defendants' domicile and residence"³⁷—and therefore its law applied.

The court apparently wished to label this configuration of interests a false conflict.³⁸ The difficulty, however, is that there are many types of "no conflict" cases.³⁹ Indeed, on the court's own reasoning

33. The term "nonfrustratable interest" and its antonym "frustratable interest" are adopted for the purposes of this Note. For fuller definitions, see note 15 *supra*.

34. 11 Cal. 3d at 581, 522 P.2d at 670, 114 Cal. Rptr. at 110. For a definition of prima facie interest, see note 15 *supra*.

The court had earlier quoted Currie's rule that "[n]ormally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum." *Id.*, quoting *Methods and Objectives*, *supra* note 20, at 178, in SELECTED ESSAYS 183. Evidently the reason for this is simply that there is no good reason to do otherwise. *Id.* at 178-79, in SELECTED ESSAYS 184; see Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958) [hereinafter cited as *Forum Displacement*], in SELECTED ESSAYS 3.

35. 11 Cal. 3d at 581, 522 P.2d at 670, 114 Cal. Rptr. at 110.

36. Currie stated this requirement as follows:

The court should then inquire whether the relationship of the forum state to the case at bar—that is, to the parties, to the transaction, to the subject matter, to the litigation—is such as to bring the case within the scope of the state's governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance.

Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 9-10 (1958) [hereinafter cited as *Governmental Interests*], in SELECTED ESSAYS 189.

37. 11 Cal. 3d at 580, 522 P.2d at 669, 114 Cal. Rptr. at 109.

38. The court quoted Currie as follows:

"When one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, there is no real problem; clearly the law of the interested state should be applied."

Governmental Interests, *supra* note 36, at 10, in SELECTED ESSAYS 189, quoted in 11 Cal. 3d at 580, 522 P.2d at 670, 114 Cal. Rptr. at 110.

39. See Comment, *False Conflicts*, 55 CALIF. L. REV. 74, 76-78 (1967). Rather than use the term "false conflict," this Note prefers to use the more inclusive term "no conflict" to denote all cases other than those of true conflict. Such no conflict cases include, for example, the paradigm unprovided for case (where no state related to the case has an interest in which law is applied, and the forum state is disinterested), the forum nondisplacement case (the unprovided for case but with the forum state sufficiently related to the case that it is concerned), and the traditional false conflict (where one state has a frustratable interest and the other does not). Currie used the generic term "false problems." See note 38 *supra*.

the facts of *Hurtado* appear to present at least two quite distinct kinds. The first is typified by the case where the foreign state asserts only a nonfrustratable interest, or no interest whatsoever. In this situation, the court's holding indicates that forum law will not be displaced whether or not the forum has a governmental interest in addition to its prima facie interest as a forum sufficiently related to the case at bar.⁴⁰ The second occurs where one state has a governmental (frustratable) interest in the application of its law, and the other has none. Here the law of the interested state should apply.⁴¹ *Hurtado* represents this latter type of "no conflict" if one accepts the court's explanation, in dicta, that California's unlimited measure of damages reflects a governmental interest in deterrence.⁴² The court carefully separated its discussion of the prima facie interest false conflict (holding), from that of the governmental interest false conflict (dicta).⁴³ Regarded independently, each raises separate analytical problems. Moreover, the impact of the court's dicta on its holding raises additional questions.

a. *Forum nondisplacement and the unprovided for case*

The facts of *Hurtado*—judged *solely* by the court's holding—present the "unprovided for" case, the case where no concerned state has a frustratable interest in the application of its own law.⁴⁴ Mexico, the beneficiaries' domicile, had only a nonfrustratable interest;⁴⁵ California, the defendants' domicile, could assert no governmental interest whatsoever since it had neither resident beneficiaries nor a defendant-protective limitation on recovery. By asserting California's prima facie interest as forum, the court simply refused to displace forum law on these facts, and thus in effect suggested forum preference as its method for resolving the unprovided for case.

40. Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Law*, 10 STAN. L. REV. 205, 229-32 (1958) [hereinafter cited as *Survival of Actions*], in SELECTED ESSAYS 152-56. See generally *Forum Displacement*, *supra* note 34, at 964-1028, in SELECTED ESSAYS 3-76.

41. See note 38 *supra*.

42. For critical analysis of the interest in deterrence, see text accompanying notes 85-92 *infra*.

43. This separation is further emphasized in the *Hurtado* opinion's cautiously drawn concluding paragraph, where the court noted that "the trial court *both as the forum, and as an interested state*, correctly looked to its own law." 11 Cal. 3d at 587, 522 P.2d at 674, 114 Cal. Rptr. at 114 (emphasis added).

44. This assumes the absence of a governmental interest in deterrence; the holding did not rest on the assertion of that interest. See note 43 *supra* and accompanying text. For a fuller discussion of the unprovided for case, see *Symposium, Neumeier v. Kuehner: A Conflicts Conflict*, 1 HOFSTRA L. REV. 93 (1973) [hereinafter cited as *Neumeier Symposium*]; Comment, *False Conflicts*, 55 CALIF. L. REV. 74 (1967).

45. See text accompanying notes 29-33 *supra*.

Currie, of course, initially advocated forum preference as a method of resolving these types of cases.⁴⁶ More recently, however, the unprovided for case has been subjected once again to critical scholarly examination,⁴⁷ and at least one authority has suggested a different method, one perhaps better attuned to the ultimate goals of the interest analysis approach to choice of law.⁴⁸ The case which sparked attention was *Neumeier v. Kuehner*.⁴⁹ In *Neumeier* an Ontario domiciliary, while a passenger in a New York defendant's car, died in an automobile accident occurring in Ontario. Heirs of the Ontario decedent brought suit in New York for wrongful death. Ontario at the time limited liability by a guest statute that required gross negligence by the driver as a precondition to recovery. New York had no such limitation.⁵⁰ The court held Ontario law applicable since "the plaintiff [had] failed to show that [New York's] connection with the controversy was sufficient to justify displacing the rule of *lex loci delictus*."⁵¹

Professor Sedler's suggestion, however, is that applying a "common policy" approach would better resolve the unprovided for case presented by *Neumeier*. All states, he noted, have a common policy of compensating automobile accident victims for harm caused by the negligence of a driver.⁵² Yet a number of states have limited compensation through various measures in order to protect other interests; both Ontario's guest statute and Mexico's limitation on damages are such "anti-tort policies."⁵³ The protected interests can be readily identified. In the case of the guest statute these may include either the

46. *Survival of Actions*, *supra* note 40, at 229-32, in *SELECTED ESSAYS* 152-56.

47. *E.g.*, *Neumeier Symposium*, *supra* note 44.

48. Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Keuhner*, 1 *HOFSTRA L. REV.* 125, 137-42 (1973) [hereinafter cited as *Unprovided For Case*].

49. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). The unprovided for case was originally analyzed by Currie in a hypothetical variation of *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953). For the hypothetical, see *Survival of Actions*, *supra* note 40, at 229-32, in *SELECTED ESSAYS* 152-56.

50. For more detailed facts of the case, see 31 N.Y.2d at 123-26, 286 N.E.2d at 455-56, 335 N.Y.S.2d at 66-68.

51. 31 N.Y.2d at 129, 286 N.E.2d at 458, 335 N.Y.S.2d at 71. The New York Court of Appeals, in an opinion written by Chief Judge Fuld, also suggested certain rules for choosing the appropriate law in various circumstances where one state concerned in an action has enacted a guest statute. *Id.* at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70. Predictably, the Fuld rules have been praised by some scholars, *e.g.*, Reese, *Choice of Law: Rules or Approach*, 57 *CORNELL L. REV.* 315 (1972); Reese, *Chief Judge Fuld and Choice of Law*, 71 *COLUM. L. REV.* 548 (1971); *cf.* Twerski, *Neumeier v. Kuehner: Where Are the Emperor's Clothes?*, 1 *HOFSTRA L. REV.* 104 (1973), while vigorously denounced by others, *e.g.*, *Unprovided For Case*, *supra* note 48; see Baade, *The Case of the Disinterested Two States: Neumeier v. Kuehner*, 1 *HOFSTRA L. REV.* 150 (1973).

52. *Unprovided For Case*, *supra* note 48, at 138.

53. *Id.* (footnote omitted).

host-driver or the insurance company; in either event, "it is clear that the only state interested in extending such protection is the defendant's home state."⁵⁴ In the case of a limitation on damages such as that at issue in *Hurtado*, the only state interested in extending protection is also that of the defendant, California. Thus, to paraphrase Sedler's conclusion: "If [California] does not have [limited recovery], this means that the only state interested in protecting the defendant . . . does not do so, and the common policy of both states in allowing accident victims to recover from negligent drivers should prevail, causing the court to disallow the [limitation]."⁵⁵

Sedler's premise, a common policy of compensating automobile accident victims for the negligence of drivers, is hardly assailable. If anything it is drawn too narrowly, as recent developments in the law of no-fault liability bear witness. This common policy, however, could be frustrated without good reason by rigid adherence to forum preference as a means of resolving the unprovided for case. Indeed, although the court reached the same result on the facts of *Hurtado* as it would have by using Sedler's approach, future cases might force the court, or any court which follows the *Hurtado* decision, to choose between the common policy approach and forum preference.

A hypothetical case will illustrate the potential problems. Suppose that all facts are as in *Hurtado*, except that suit is brought in Mexico. Assume also, for the sake of analysis, that Mexico uses a choice of law approach modeled on *Hurtado*.⁵⁶ Lastly, accept for the moment, as will be argued later,⁵⁷ that careful examination of California's wrongful death statute does not convincingly support the court's identification of a state interest in deterrence; and from this assume finally that Mexico does not acknowledge California's assertion of this governmental interest.⁵⁸ Applying the reasoning of *Hurtado* to these hypothetical facts would result in Mexico applying its law on the basis of its *prima facie* interest as forum, since California could assert no legitimate governmental interest.

This result seems as automatic, given the holding in *Hurtado*, as it seems unfair, given Sedler's premise. Fortunately, *Hurtado* does not necessitate such rigid adherence to forum preference. The court

54. *Id.*

55. *Id.* (footnote omitted). Sedler would, in fact, apply his theory to "limitations on wrongful death recovery." *Id.* at 138-39 n.86.

56. It doesn't. In fact, it rigidly applies *lex loci delictus*. See S. BAYITCH & J. SIQUIEROS, *CONFLICT OF LAWS: MEXICO AND THE UNITED STATES* ch. 15 (1968).

57. See part II *infra*.

58. This would be the case if the Mexico court determined that the California legislature had expressly rejected deterrence as an underlying rationale in enacting a cause of action for wrongful death. See text accompanying notes 85-92 *infra*. Also see note 71 *infra*.

wisely left itself an appropriate tool with which to modify its holding: "Normally . . . the court should be expected . . . to apply the [forum's] rule of decision."⁵⁹ Within that one word, "normally," is the key to the court's future adoption, should the occasion arise, of the well-reasoned Sedler approach to the unprovided for case.

California, moreover, would not be required to break entirely new ground, for at least one court has already suggested an approach similar to Sedler's. In *Labree v. Major*,⁶⁰ Massachusetts plaintiffs, while guests in an automobile registered in Rhode Island and driven by a resident of that state, were injured in an accident occurring in Massachusetts, and brought suit in Rhode Island.⁶¹ Massachusetts at the time had a guest statute, while Rhode Island did not. The Supreme Court of Rhode Island held Rhode Island's ordinary negligence rule applicable: "[W]here a driver is from a state which allows a passenger to recover for ordinary negligence, the plaintiff should recover, no matter what the law of his residence or the place of the accident."⁶² In language suggestive of the Sedler approach, the court stated its rationale. "We adopt this rule because the only state with an interest in protecting the driver and his insurer does not do so."⁶³

Thus the California Supreme Court has analogous precedent from another state, as well as an effective tool in the *Hurtado* opinion itself, for modifying the potential harshness of its forum preference analysis. With these aids the court should be able to avoid the unfair results which might otherwise flow from application of a forum nondisplacement approach to the unprovided for case.

59. This statement is taken directly from Professor Currie. *Methods and Objectives*, *supra* note 20, at 178, in SELECTED ESSAYS 183 (emphasis added), quoted in 11 Cal. 3d at 581, 522 P.2d at 670, 114 Cal. Rptr. at 110.

60. 111 R.I. 657, 306 A.2d 808 (1973).

61. For detailed facts of the case, see *id.* at 660-61, 306 A.2d at 811. The car was owned by defendant's mother, who was also a resident of Rhode Island.

62. *Id.* at 673, 306 A.2d at 818.

63. *Id.* The law of the forum state permitted less restricted recovery, and therefore the case is not directly on point with the hypothetical outlined above. The question the hypothetical poses is whether a forum should apply foreign law in the unprovided for case when to do so would best accommodate the common policy of compensation for tortious conduct. The difficulty with finding direct precedent, of course, is that in such cases plaintiffs from limited recovery states generally, and understandably, bring suit in the defendant's (or some other) full recovery state. See *Erwin v. Thomas*, 264 Ore. 454, 459-60, 506 P.2d 494, 496-97 (1973) (facts presented similar choice of law question; court applied its own law of unlimited recovery because, since neither state has an interest, "an Oregon court does what comes naturally and applies Oregon law"); cf. *Ryan v. Clark Equipment Co.*, 268 Cal. App. 2d 679, 74 Cal. Rptr. 329 (1st Dist. 1969) (plaintiff from limited recovery state brought suit in third state, California, whose law allows full recovery; the court, however, found false conflict favoring plaintiff's state). Nevertheless, the language in *Labree* strongly suggests that were Rhode Island a limited recovery state, its courts would allow full recovery when confronted with a defendant from an unlimited recovery state.

The full import, then, of the court's holding is that normally, until a frustratable foreign interest is convincingly asserted by a party litigant, the forum need not explore its own governmental interests at all; its prima facie interest as forum is sufficient to support application of its law. The court's finding in dicta of a legitimate California interest in deterrence, however, undermines analysis of *Hurtado* as an unprovided for case and casts doubt on the court's intent to use forum preference as a device for resolving such cases.

b. Governmental interest—false conflict

If on the facts of *Hurtado* the court's dicta correctly identified a California interest in deterrence derived from its unlimited recovery rule, then the case was a classic false conflict favoring California; Mexico had no interest which would be defeated by application of California law. While this result squares once again with that dictated by Sedler's premise, the difficulty with the court's dicta is determining the scope of this governmental interest in deterrence.

The opinion suggests three possible limits. The most severe limitation is that a state which has created a cause of action for wrongful death will assert an interest in deterrence only when the defendant is a resident *and* the conduct occurs within its borders. Alternatively, it might assert this interest whenever the conduct occurs within its borders, regardless of the domicile of the parties. The deterrence rationale attains its broadest scope if a state asserts an interest *either* when the conduct occurs there *or* when the defendant resides there.

The facts of *Hurtado*, of course, support directly only the first and most narrow of these possible limits. The court cautiously framed its dicta in light of these facts, stating that "California has a decided interest in applying its own law to California defendants who allegedly caused wrongful death within its borders."⁶⁴ Also, by reaffirming the *Reich* conclusion that governmental interests must be locally oriented,⁶⁵ the court provided little support for the broadest limit. An assertion by California of a governmental interest in the out-of-state behavior of its residents, as the broadest limit permits, would conflict with the court's determination that interests must be localized.⁶⁶

64. 11 Cal. 3d at 584, 522 P.2d at 672, 114 Cal. Rptr. at 112.

65. See note 101 *infra*.

66. Even this broad limit, however, finds some support in *Hurtado*. In its discussion of *Ryan v. Clark Equipment Co.*, 268 Cal. App. 2d 679, 74 Cal. Rptr. 329 (1st Dist. 1969), the supreme court identified a deterrence interest in a state, Michigan, whose resident allegedly committed an act within the state (negligent manufacturing), the effects of which occurred only outside the state. See notes 106-07 *infra* and accompanying text.

The opinion does support, however, the conclusion that the state in which the conduct occurs may assert a governmental interest regardless of the parties' domicile. The court described the policy underlying the deterrence interest as a state purpose "to deter the kind of conduct within its borders which wrongfully takes life."⁶⁷ In addition, the court looked to *Reich* as precedent for identifying the deterrence interest, and in *Reich* the state which had an interest in deterrence—Missouri—was neither the residence nor domicile of any of the parties involved.⁶⁸ Therefore, although the conduct state in *Hurtado* was also the defendants' domicile, the court's dicta would logically permit the state where the wrongful conduct occurred to assert a deterrence interest without any other connection to the parties.⁶⁹

If extended to its logical limit, this ever-present interest in deterrence might well cause complications for any court attempting to apply the reasoning of *Hurtado* to future cases. Again, a hypothetical case should help illustrate. Suppose a plaintiff from Mexico (limited recovery), a defendant from California (full recovery), an accident in Mexico and suit brought there.⁷⁰ Also, assume as before that Mexico follows the *Hurtado* choice of law method, both holding and dicta.

On these facts, Mexico is the forum as well as a state with a legitimate deterrence interest, since its law provides some recovery and hence some deterrence.⁷¹ California at first appears to have no in-

67. 11 Cal. 3d at 583, 522 P.2d at 672, 114 Cal. Rptr. at 112.

68. *Reich v. Purcell*, 67 Cal. 2d 551, 556, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34 (1967), quoted in 11 Cal. 3d at 583, 522 P.2d at 672, 114 Cal. Rptr. at 112.

69. This assumes, of course, that being the place of wrong is a contact which by itself supplies a sufficient relationship for the conduct state to be governmentally concerned with the outcome of the case. See notes 15 & 36 *supra*. Nothing in *Reich* or *Hurtado* suggests otherwise.

70. Compare *Ramirez v. Wilshire Ins. Co.*, 13 Cal. App. 3d 622, 91 Cal. Rptr. 895 (4th Dist. 1970). The hypothetical, by way of contrast, posits suit brought in Mexico. If analysis led to a no interest case—as it could, see text accompanying notes 76-80 *infra*—and if Mexico resolved no interest cases by forum preference, then the fact that suit was brought in Mexico would virtually assure the application of Mexico's law. Even if the suit were brought in California, however, the *Hurtado* approach, accepting the deterrence analysis, arguably would lead to the same result so long as the accident occurred in Mexico. This latter fact pattern, of course, is highly realistic.

71. It is not inconsistent to assume in this hypothetical that Mexico's limited measure of damages may evidence a policy of deterrence while also assuming, as in the previous hypothetical, that California's unlimited measure of damages may not suggest a deterrence policy. See note 58 *supra* and accompanying text. An examination of the legislative purposes behind, and judicial interpretation of, the respective statutes could disclose a purely compensatory purpose to California's full-recovery rule, see text accompanying notes 85-92 *infra*, while disclosing at the same time an explicit deterrent purpose to Mexico's limited-recovery rule; the limitation simply reflects a modification of damages presumably out of concern for local defendants, see 11 Cal. 3d at 581, 522 P.2d at 670, 114 Cal. Rptr. at 110. See Seidelson, *The Wrongful Death Action*, 10 DUQUESNE L. REV. 525, 528 (1972) (limited damages can nevertheless be deterrent), cited in 11 Cal. 3d at 584, 522 P.2d at 672, 114 Cal. Rptr. at 112. In short, although the

terest whatsoever.⁷² A court that followed *Labree*,⁷³ if in Mexico's place, would apparently apply California law. The defendant is from an unlimited recovery state, therefore the plaintiff should be given full recovery "no matter what the law of his residence or the place of the accident."⁷⁴

For a state bound by the reasoning of the *Hurtado* dicta, however, the application of any law other than that of the conduct state—Mexico—would require a complex, and not entirely persuasive justification. Since the conduct occurred in a forum state whose law provides some recovery, and hence arguably some deterrence, the forum, at least as an initial matter, would favor its own measure of damages. It could, arguably, assert the foreign state's altruistic interest in fully compensating those injured by its residents, but employing this device as a means of preferring foreign to forum law is analytically unsound.⁷⁵ More likely, in order to apply the law of the full-recovery state—California—the forum state would need to deny the legitimacy of its own deterrence interest.⁷⁶ It might, for instance, restrict its assertion of a deterrence interest to cases where it is the defendant's

assumptions of the two hypotheticals may appear contradictory in fact they use the same approach for identifying governmental policies.

72. California has no interest, that is, other than a possible altruistic interest that its defendants bear the obligation of fully compensating victims of their conduct, whether or not the victims reside in California or were injured there. See Scoles, *Reich Symposium*, *supra* note 6, at 563, 567-68; *Methods and Objectives*, *supra* note 20, at 180, in *SELECTED ESSAYS* 186. The troubling implications of a state asserting an altruistic interest, especially when it is the forum state which asserts the altruistic interest of a foreign state, are discussed later. See note 98 & text accompanying notes 96-98 *infra*. At the very least such interests should serve no greater function than to resolve the no interest case. Cf. E. CHEATHAM, *CONFLICT OF LAWS*, *supra* note 20, at 477-78 (Currie's "more moderate and restrained interpretation" approach to resolving apparent true conflicts may suggest consideration of rational altruism). If resolving the no interest case is one duty of the altruistic interest, perhaps in this respect it is no more than Professor Sedler's common policy approach in disguise, and would better be expressed simply as such. *Unprovided For Case*, *supra* note 48, at 137-42. Cf. note 133 *infra*.

73. *Labree v. Major*, 111 R.I. 657, 306 A.2d 808 (1973).

74. *Id.* at 673, 306 A.2d at 818 (emphasis added).

75. See note 72 *supra*. Alternatively, the forum state might conjecture a foreign state interest in preferring the higher liability provided by its own law in order to advance more fully the foreign state's (presumed) policy of deterring the wrongful conduct of its residents wherever they travel. *But see* text accompanying notes 65-66 *supra*.

76. The seeds of this approach may have been sown in *Hurtado*, which after all involved the finding of a deterrence interest in a rule permitting full recovery. Although the court found two independent governmental interests in wrongful death statutes—creation and limitation—and identified the deterrence policy as emanating from the first of these interests, 11 Cal. 3d at 582-84, 522 P.2d at 671-72, 114 Cal. Rptr. at 111-12, to make this bifurcated analysis convincing it must be assumed that an unlimited liability rule was initially conceived (created) as a deterrent, but then adopted in partial-recovery form (limited) in recognition of a second governmental interest in protecting its defendants from crushing financial burdens. Cf. note 77 *infra*. For critical analysis of the court's position, see text accompanying notes 103-05 *infra*.

domicile as well as the conduct state.⁷⁷ Alternatively, the forum state might reason that its interest is nonfrustratable, since California's higher recovery would advance the forum's policy of deterrence at least as much as its own limited recovery.⁷⁸ Such reasoning, however, does no more than neutralize the forum's governmental interest; it does not create a California interest where one did not previously exist.⁷⁹ In short, this would only identify the unprovided for case;⁸⁰ and, by placing the case in that posture, it would permit the forum to apply foreign law. The alternative reasoning of the *Hurtado* dicta thus does not preclude application of the higher recovery law on the facts of the above hypothetical. It does, however, make the process cumbersome and not wholly convincing.

Perhaps the California Supreme Court, in its troublesome dicta, meant to re-establish by way of a presumption the legitimacy of a state's concern that its law apply when wrongful conduct occurs there.⁸¹ Perhaps, in fact, it would apply Mexico law in the above hypothetical. But this seems highly unlikely, for it is doubtful that the court meant to give any new vitality to the vested rights theory.⁸² Surely the state of the place of wrong, simply as such, is not interested that its lesser deterrent law always apply. If the court, on the other hand, intended a presumption in favor of applying the law which affords greater compensation, it should have framed this directly. Moreover, a discussion in *Hurtado* suggesting the future adoption of a Sedler-like approach, instead of the deterrence dicta, would have accomplished the court's apparent purpose—an alternative rationale for its conclusion—without the hidden danger, discussed next, which is implicit in the court's chosen method of identifying governmental policies.

II. IDENTIFYING POLICIES: GENERAL ASSERTIONS OR SPECIFIC EXAMINATION?

The court's identification of California's deterrence policy was contained in one bold sentence:

77. As the court in *Hurtado* suggested, "a state which prescribes a limitation on the measure of damages *modifies* the sanction imposed by a countervailing concern to protect local defendants . . ." *Id.* at 584, 522 P.2d at 672, 114 Cal. Rptr. at 112 (emphasis added). *But cf.* text accompanying and preceding notes 64-69 *supra*.

78. 11 Cal. 3d at 584, 522 P.2d at 672, 114 Cal. Rptr. at 112 (unlimited recovery strengthens the deterrent effect). *But see* note 95 *infra* and accompanying text.

79. See note 72 and text accompanying note 75 *supra*.

80. See text accompanying and following note 44 *supra*.

81. See Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQUESNE L. REV. 373 (1971).

82. For a capsule presentation of Professor Beale's vested rights theory, its history, and the criticism to which it has been subjected, see D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 5-8 (1965).

It is manifest that one of the primary purposes of a state in creating a cause of action in the heirs for the wrongful death of the decedent is to deter the kind of conduct within its borders which wrongfully takes life.⁸³

For authority the court cited no legislative history nor any case precedent. Instead, it relied on scholarly work, none of which had occasion to examine the specifics of the California wrongful death statute.⁸⁴

Despite the court's assurance to the contrary, detailed examination of California's wrongful death statute suggests that deterrence may not be an underlying purpose. Although the statute, as originally passed in 1872, provided a measure of damages which expressly included exemplary as well as pecuniary damages,⁸⁵ only two years after passage this measure was amended to the form which it retains today: "Such damages may be given as under all the circumstances of the case, may be just."⁸⁶ Since that time California courts have held consistently that the action is purely compensatory; pecuniary loss has been the sole measure of recovery, with exemplary damages expressly rejected. In *Doak v. Superior Court*,⁸⁷ the district court of appeal, quoting the leading case on point, an 1896 supreme court decision, held: "Of course, [the only damages allowable] cannot include . . . any damage allowed in the interest of the people as punishment."⁸⁸ And as recently as 1974, in *Pease v. Beech Aircraft Corp.*,⁸⁹ the court of appeal interpreted the 1874 amendment to find that its "purpose . . . must have been to take away the right to exemplary damages."⁹⁰ The court in *Pease* went on to note: "The action under the statute since the 1874 amendment is one *solely* for the purpose of compensating the heirs for the pecuniary loss suffered by them by reason of the death of the deceased"⁹¹

To be sure, the rejection of exemplary or punitive damages is not necessarily inconsistent with the retention of a deterrent purpose.

83. 11 Cal. 3d at 583, 522 P.2d at 672, 114 Cal. Rptr. at 112.

84. CAL. CODE CIV. PRO. § 377 (West 1973).

85. CAL. CODE CIV. PRO. § 377 (1872) (originally enacted in 1872 to take effect Jan. 1, 1873) ("the jury may give such damages, pecuniary or exemplary, as, under all the circumstances of the case, may to them seem just."), formerly ch. 330, § 1, [1862] Cal. Stat. 447.

86. CAL. CODE CIV. PRO. § 377 (West 1973). For the amending act, see ch. 383, § 40, [1873-74] Cal. Code Am. 294.

87. 257 Cal. App. 2d 825, 65 Cal. Rptr. 193 (2d Dist. 1968).

88. *Lange v. Schoettler*, 115 Cal. 388, 391, 47 P. 139 (1896), quoted in 257 Cal. App. 2d at 836, 65 Cal. Rptr. at 200. See also Comment, *Evidence: Death by Wrongful Act: Mitigation of Damages*, 3 CALIF. L. REV. 425, 426 (1915) ("the courts in California have repeatedly held that the action is *purely compensatory*") (emphasis added).

89. 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (4th Dist. 1974).

90. *Id.* at 461, 113 Cal. Rptr. at 424, citing *Lange v. Schoettler*, 115 Cal. 388, 47 P. 139 (1896).

91. 38 Cal. App. 3d at 461, 113 Cal. Rptr. at 424 (emphasis added).

Despite the skewing effect of liability insurance, requiring the defendant to fully compensate the victim may provide substantial deterrence.⁹² Still, this legislative history and judicial precedent militate against the boldness of the court's assertion in *Hurtado*. Deterrence may plainly be "one of the primary purposes" in some states for creating causes of action for wrongful death. That this is so in California, however, is at the very least not "manifest."

Specific examination of a particular state's underlying policy has long been an accepted and encouraged approach to choice of law through interest analysis.⁹³ The court, however, chose instead to rely on quite general authority to support its conclusion that deterrence is not only a purpose of the statute but a primary purpose. If the court is to be taken seriously, the identification of a deterrence policy—and inferentially of other governmental policies as well—does not rest on any legislative or judicial pronouncement, but rather on some commonly held but noticeably unsupported belief that this is why such statutes are passed.

It may be that the court looked to the *effect* of the statute as an implied statement of its modern purposes, rather than to the legislative *intent* as interpreted by the courts.⁹⁴ Such a justification, however, is also inadequate to support the conclusion that deterrence is a primary purpose of wrongful death statutes. It is difficult to believe that a person who already faces unlimited civil liability for *injuring* another on the highways is additionally deterred from wrongful conduct, to any significant degree, by the threat of separate liability if the victim dies.⁹⁵ It seems more likely that concern for one's own life and safety plus fear of possible penal sanctions serve as more important deterrents than liability to another for wrongful death.

92. *But see* note 95 *infra*.

93. Currie suggested precisely such specific examination: "This process [of determining governmental policy and the relation of the forum to the case] is essentially the familiar one of construction or interpretation." *Methods and Objectives, supra* note 20, at 178, in *SELECTED ESSAYS* 183-84. Professor Kay, in commenting on *Reich*, looked specifically to the legislative history and judicial interpretation of Missouri's wrongful death statute to conclude that it was compensatory in nature with a limitation of damages designed to protect local domiciliary defendants. Kay, *Reich Symposium, supra* note 6, at 584, 590-92. *But see* Ehrenzweig, *id.* at 570, 581 *passim*.

94. *See Unprovided For Case, supra* note 48, at 138 n.83. *But see* note 95 *infra*.

95. In any case, with the advent of liability insurance which is readily available and widely used—indeed, statutorily required in some states, *see, e.g., CAL. VEH. CODE* §§ 16000 *et seq.* (West 1971 & West Supp. 1974)—it is highly questionable whether the threat of liability can deter at all. If it cannot, then provision for punitive damages, excluded from the coverage of liability insurance, would seem a necessary prerequisite to suggest a governmental policy of deterrence. California, however, expressly excludes exemplary damages in wrongful death actions. *See* text accompanying notes 85-92 *supra*.

In short, the court appears to have promoted to a position of prominence a rather ephemeral and perhaps nonexistent policy. The method by which it identified this policy is problematic, raising the question of what distinguishes legitimate from highly conjectural policies for choice of law purposes. For example, using the court's method it is not difficult to construct an interest of Mexico that its residents be restricted to the limited recovery which its law affords, even when the other involved state stands ready to provide a greater recovery. It might be argued, for example, that Mexico's policy demonstrates a justified apprehension of overly sympathetic damage awards, and consequently an interest in protecting defendants from potentially unreasonable liability. Furthermore, "[s]tate interest is not only a selfish, provincial, self-protecting interest: it is an interest in seeing justice done The policy of a state may be furthered by doing justice even when a resident's personal interest is defeated."⁹⁶ Thus, Mexico arguably could have an interest in protecting resident and non-resident defendants alike, even at the cost of occasionally disadvantaging resident plaintiffs. Indeed, such disadvantage could itself be part of the state's interest, since Mexico might expect her residents, as examples for others, not to "avoid obligations that her policy calls for them to bear."⁹⁷ In summary, if this is all that is required—not that the policy was ever in fact advanced by the state either legislatively or judicially, not that it is literally "primary" or even significant, only that it is reasonably conceivable—then even such a highly debatable if not downright silly policy as that just proposed can surely suffice.⁹⁸

III. REANALYZING *Reich* AND RESOLVING TRUE CONFLICTS

If nothing else, the court's method for identifying a governmental policy of deterrence promises to increase the frequency with which an interest in vindicating the policy is asserted. One result of this, of course, could be an increased number of true conflicts. To date the court has avoided the need to resolve true conflicts. Deferring this important question much longer, however, will be difficult in light of two developments within the *Hurtado* opinion: the restructuring of the *Reich* holding⁹⁹ and the reassessment of *Ryan v. Clark Equipment*

96. Scoles, *Reich Symposium*, *supra* note 6, at 563, 567.

97. *Id.* at 568 (footnote omitted).

98. Altruistic interests, such as the one posited above, are also discussed by Currie. *Methods and Objectives*, *supra* note 20, at 180, in *SELECTED ESSAYS* 186 ("there is no need to exclude the possibility of rational altruism"). He would assign them significance, however, only as secondary interests for avoiding no interest or true conflict cases, not for creating true conflicts. See E. CHEATHAM, *CONFLICT OF LAWS*, *supra* note 20, at 477-78. But Currie's objections are based in policy not logic; others might conceivably treat such interests as giving rise to true conflicts.

99. *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

Co.¹⁰⁰ necessitated by the court's application of the "new" *Reich*.

a. *Reich v. Purcell*

In seeking to identify a California interest in addition to its prima facie interest as forum, the court in *Hurtado* faced alternative courses: it could have asserted either an interest in extending full compensation beyond its borders, or an interest in deterring wrongful conduct. Either course faced obstacles from *Reich*. The former encountered rather strong language that governments have only local interests.¹⁰¹ The court chose instead the latter course, where it faced the somewhat smaller blockade of the statement in *Reich* that "[l]imitations of damages for wrongful death . . . are concerned . . . with how survivors should be compensated."¹⁰² A plain reading of this statement leads directly to the conclusion reached by the court of appeal in *Hurtado*: a state's measure of damages in wrongful death, however limited or proscribed, expresses a governmental interest in distributing the proceeds from that action to local beneficiaries. Thus the law of the beneficiaries' domicile, so long as it provides any recovery at all, applies unless opposed and displaced.

Implicit in the *Reich* plain meaning is the assumption that limited damages are nonetheless distributable damages; hence the resultant interest in the beneficiaries' domiciliary state. To overcome the barrier that *Reich* thus presented, the court in *Hurtado* challenged this assumption by dividing the seemingly unitary concept of limited distributable damages into "two completely independent state interests"—creation of a cause of action and limitation of recovery.¹⁰³ With the interests carefully separated the court could then assign purposes to each. Creating a cause of action suggests two purposes: compen-

100. 268 Cal. App. 2d 679, 74 Cal. Rptr. 329 (1st Dist. 1969).

101. At three separate points in *Reich*, Chief Justice Traynor expressed the court's local orientation to the identification of governmental policies and interests: "Missouri is concerned with conduct *within her borders*," 67 Cal. 2d at 556, 432 P.2d at 730, 63 Cal. Rptr. at 34 (emphasis added); a state's interest in distributing the proceeds from a wrongful death action "extends only to *local* decedents and beneficiaries," *id.* at 556, 432 P.2d at 731, 63 Cal. Rptr. at 35 (emphasis added); the concern with protecting defendants from excessive financial burdens "is also *primarily local*," *id.* (emphasis added). This orientation unmistakably continues in *Hurtado*, 11 Cal. 3d at 583-84, 522 P.2d at 672, 114 Cal. Rptr. at 112.

This attachment to localized interests has subjected interest analysis to recent, vigorous criticism, especially of the governmental interest approach to the unprovided for case. See, e.g., Twerski, *To Where Does One Attach the Horses?*, 61 Ky. L.J. 393 (1973). See also Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQUESNE L. REV. 373 (1971).

102. 67 Cal. 2d at 556, 432 P.2d at 730-31, 63 Cal. Rptr. at 34-35.

103. 11 Cal. 3d at 582, 522 P.2d at 671, 114 Cal. Rptr. at 111.

sating victims and deterring wrongdoing.¹⁰⁴ Limiting recovery is concerned solely with protecting defendants from excessive financial burdens. This, of course, did not end the reanalysis, for Mexico obviously had both created and limited its cause of action, and presumably therefore retained the compensatory interest described in *Reich*. The *Hurtado* court, however, rather artfully disposed of this issue.

[T]he entire controversy revolves about the choice of an appropriate rule of decision on the issue of the proper *measure* of damages It is Mexico's interest in *creating* wrongful death actions which is concerned with distributing proceeds to the beneficiaries and *that issue has not been raised in the case at bench*.¹⁰⁵

b. Ryan v. Clark Equipment Co.

The reanalyzed *Reich*, however, caused problems for a case which had relied on the "old" *Reich* and which was cited extensively by both sides in *Hurtado*. *Ryan v. Clark Equipment Co.*¹⁰⁶ involved a plaintiff from Oregon whose decedent, also a resident of that state, was killed in an Oregon employment accident. The defendant was the Michigan corporate manufacturer of the machinery which allegedly caused the death.¹⁰⁷ It did business both in Oregon and California; its contacts in the latter state supplied jurisdiction for the suit brought there. The choice of law issue concerned the different measures of damages: Oregon imposed a \$20,000 limit on recovery in wrongful death, while Michigan had no such limit.¹⁰⁸ The court of appeal, relying on the "old" *Reich*, analyzed the case as a false conflict favoring Oregon. "Oregon is the only state which was any real interest in how the decedent's survivors are to be compensated."¹⁰⁹

104. For consideration of any possible deterrence policy in California, see text accompanying notes 85-92 *supra*.

105. 11 Cal. 3d at 583, 522 P.2d at 671-72, 114 Cal. Rptr. at 111-12 (emphasis added in second sentence). The fact is, of course, that Mexico's statute *created* a cause of action for *limited recovery*. The two concepts, in short, are not so easily separated. See note 76 *supra*. Perhaps the court meant its statement ("that issue has not been raised") to suggest that Mexico's compensatory interest was nonfrustratable. See note 15 *supra*. In any event, the critical role of focusing the inquiry on only certain issues prompted the court to observe later: "The key step in [making a choice of law] is delineating the issue to be decided." *Id.* at 584, 522 P.2d at 672-73, 114 Cal. Rptr. at 112-13.

106. 268 Cal. App. 2d 679, 74 Cal. Rptr. 329 (1st Dist. 1969).

107. The plaintiff had earlier settled a claim, arising from the same accident, against other defendants, the Oregon employers, recovering \$35,000 under Oregon's Employer's Liability Act. *Id.* at 681, 74 Cal. Rptr. at 330.

108. Oregon law at the time required that any recovery under the Employer's Liability Act, see note 107 *supra*, be set off against any recovery for wrongful death. The \$35,000 previously received exceeded Oregon's \$20,000 limit on wrongful death recovery. Thus, applying Oregon law would have precluded plaintiff from any additional recovery, while application of Michigan law would not. *Id.*

109. *Id.* at 683, 74 Cal. Rptr. at 331.

The reasoning employed by the *Ryan* court in finding no interest in Michigan was irreconcilable with the *Hurtado* reanalysis of *Reich*. As in *Hurtado*, the wrongful conduct at issue in *Ryan*—negligent manufacturing—was committed in the higher recovery state, Michigan, and by a resident of that state. Thus, according to the “new” *Reich* and the *Hurtado* dicta, Michigan had an interest in deterrence.¹¹⁰ Moreover, Oregon’s compensatory interest, as was Mexico’s in *Hurtado*, was nonfrustratable, since the law of the opposing state permitted greater recovery than its own. Seemingly, therefore, the *Hurtado* result was dictated: apply Michigan law.

The court, however, found an additional interest in its examination of the *Ryan* facts which was missing in *Hurtado*, the otherwise identical counterpart, and which permitted the court to justify the *Ryan* result without accepting its reasoning. The supreme court observed that “[i]nsofar as the defendant did business in Oregon, that state had an interest in protecting the defendant’s financial security by limiting damages”¹¹¹ Thus, according to the court’s reanalysis, *Ryan* presented not a false conflict, but a special species of true conflict arising from the distinct governmental interests of two states in the same corporate party: Michigan’s interest in deterring defendant’s wrongful conduct by imposing full liability and Oregon’s interest in limiting liability in order to protect the defendant’s financial security. This approach raises two important issues for resolution in future cases.

1. *Nexus*. The initial difficulty with the court’s reassessment of *Ryan* is its failure to explain or even suggest what degree of involvement a party must have with a state to give it a legitimate governmental interest in the party. The defendant in *Ryan* was incorporated in Michigan and was doing sufficiently extensive business in California to confer jurisdiction there. That much is clear, but the more critical question—the defendant’s involvement with Oregon—was left unexplored, or at least unexplained. Neither the *Hurtado* discussion of *Ryan* nor the *Ryan* opinion itself gave any indication of the extent of defendant’s connection with Oregon, except for the observation in *Hurtado* that “while not incorporated in Oregon, [it] was lawfully doing business there.”¹¹² Yet from this meager basis the *Hurtado* court

110. 11 Cal. 3d at 585, 522 P.2d at 673, 114 Cal. Rptr. at 113.

111. *Id.*

112. *Id.* at 585, 522 P.2d at 673, 114 Cal. Rptr. at 113. Nor do the briefs submitted in *Ryan* add any clarity; in fact, the issue was almost entirely overlooked, even by the party seeking application of Oregon law. Brief for Respondent at 4. Indeed, it is questionable whether the trial court record on summary judgment would add much, since the fact that defendant “did business in Oregon on the date of the accident and [the date of appeal]” was stipulated by the parties following the entry of summary judgment. *Id.* at 4 & n.10.

confidently declared, not for itself but for a sister state, that "Oregon had an interest extending to such a resident business entity in applying that state's limitation of damages" ¹¹³

The precise question thus left open is what criterion a court should employ in judging the legitimacy of a state's interest in a party: residency, engagement in business, or some combination of both elements. Indeed, the *Ryan* discussion may even imply that some less substantial party-state connection could suffice in certain cases. The court's use of the term of art, "lawfully doing business," might suggest that jurisdiction is the key. To be sure, a corporate entity is generally considered for jurisdictional purposes to reside wherever it conducts business. ¹¹⁴ But presence, even transitory presence, can confer jurisdiction as well. ¹¹⁵

If presence alone, or even presence related to business, suffices for the assertion of a governmental interest, then certainly the number of true conflicts will multiply. Hypothesize a case with facts identical to *Hurtado*, but with suit brought in Mexico on defendant's subsequent business (or even pleasure) trip there. California, according to the *Hurtado* dicta, would have a deterrence interest. The court's analysis of *Ryan*, however, suggests that Mexico might also assert a governmental interest. It might articulate this interest as a sense of justice, reasoning that its limitation of damages was designed to protect defendants from potentially unreasonable liability based on overly sympathetic damage awards, ¹¹⁶ and that therefore its protection should extend to all within its borders, regardless of resident status or business purpose. Alternatively, if the defendant conducted any business in Mexico, or potentially might, the Mexico interest could be articulated as was Oregon's in *Ryan*, to protect the defendant's financial security for future business transactions. ¹¹⁷ This last interest, of course, is logically assertable whether or not the accident which subjected defendant to liability was related to the business whose future Mexico seeks to protect. In either event the danger is the same: that a state, or

113. 11 Cal. 3d at 585, 522 P.2d at 673, 114 Cal. Rptr. at 113. The designation of the defendant as a *resident* business entity is somewhat bold. See note 112 *supra*.

114. See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, *rehearing denied*, 343 U.S. 917 (1952). Of course, one must look to the applicable state statute for jurisdictional limits. A. EHRENZWEIG & D. LOUISELL, *JURISDICTION IN A NUTSHELL* 35-38 (2d ed. 1968).

115. *Pennoyer v. Neff*, 95 U.S. 714 (1877); see *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

116. See text accompanying and preceding note 96 *supra*.

117. Professor Kay goes a step further and posits—tongue in cheek, one suspects—an interest of Mexico in increasing tourism by shielding visitors of even the shortest duration from excessive liability. Kay, *Supplementary Cases & Materials* 196 (Fall 1974) (to be included in the forthcoming edition of D. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS*).

even one state for another,¹¹⁸ could create a true conflict on a rather insubstantial basis, the happenstance of jurisdictional presence.

Perhaps the court was eager to avoid suggesting that the *Ryan* result was incorrect. Perhaps the defendant was more nearly a domiciliary than a visitor to Oregon. Perhaps corporations can be treated, as a matter of choice of law doctrine, somewhat differently than natural persons. But nothing of this appears in the court's reassessment of *Ryan*. Once again the court apparently declined a specific examination of facts and individual legislative purposes; it chose instead a general approach and concluded that states intend their defendant-protective rules, as a general proposition, to apply to the advantage of corporate entities doing some business in the state although not incorporated there. This result may create more true conflicts than would a careful and individual assessment of a state's policies. Accordingly, the court would have been better advised to ask the more difficult, but more accurate question: On these precise facts would Oregon consider this particular defendant within the ambit of its provision limiting damages recoverable for wrongful death?¹¹⁹

2. *Resolving true conflicts.* The reassessment of *Ryan* creates a second problem. Now that the court has identified at least one species of true conflict,¹²⁰ courts will need to develop a method for resolving such conflicts. While the supreme court expressly declined to offer guidance on this pressing issue,¹²¹ soundings taken from the *Hurtado* opinion itself may give indications of the court's ultimate direction.

The first portion of the decision may suggest forum preference as

118. The hypothetical can be changed to fit more closely the facts of *Ryan*. Suppose that suit were brought neither in California nor in Mexico, but in a third state where the defendant, say, had a summer residence.

119. On this point the court should not be judged too harshly. The problem may be more its failure to articulate a future method than any inability to justify the particular result in *Ryan*. The very fact that the plaintiff in *Ryan* brought suit in California, not Oregon, is evidence that (at least in the mind of one interested party) Oregon would have protected the defendant.

120. "*Ryan* is a case of true conflict; both states there involved had a legitimate interest in the measure of damages." 11 Cal. 3d at 585, 522 P.2d at 673, 114 Cal. Rptr. at 113.

121. It must be noted that the court suggested somewhat deceptively that the court of appeal in *Ryan*, while incorrectly identifying the interests, did view the case as a true conflict resolved in favor of Oregon on a balance of interests: "The Court of Appeal resolved the conflict by applying . . . Oregon law and declared that Oregon's interest 'overrides any possible concern of Michigan in the regulation of manufacturers.'" *Id.*, citing *Ryan*, 268 Cal. App. 2d at 683, 74 Cal. Rptr. at 331. The *Ryan* court's heavy reliance on *Reich* belies this suggestion. Noting that Michigan, the full-recovery state, was the place of wrong, the *Ryan* court quoted *Reich* in holding that the "conduct of defendant is not determinative of a choice question [since] '[l]imitations of damages for wrongful death . . . have little or nothing to do with conduct.'" 268 Cal. App. 2d at 683, 74 Cal. Rptr. at 331, quoting *Reich v. Purcell*, 67 Cal. 2d 551, 556, 432 P.2d 727, 730-31, 63 Cal. Rptr. 31, 34-35 (1967).

a resolution device.¹²² Such an approach is simple to apply and finds some support in scholarly authority.¹²³ But forum preference would provide little aid where the forum is disinterested, as was the case in *Ryan*.¹²⁴ Thus, while the court has indicated a general acceptance of forum preference as an underlying doctrine, there are reasons countervailing its universal use as a resolution principle.

In addition, the discussion of the *Ryan* opinion is framed in a gentle tone of acceptance which may suggest other outlines to the court's future approach. After labeling the *Ryan* case a true conflict, the court implicitly characterized the court of appeal's approach as one of resolving the true conflict between Michigan's interest in deterrence and Oregon's interest in protecting defendants.¹²⁵ The court of appeal resolved the conflict, the supreme court then noted, by "declar[ing] that Oregon's interest 'overrides any possible concern of Michigan.'" ¹²⁶ In other words, in the supreme court's view the court of appeal appeared to weigh the competing interests, finding Oregon's controlling as the more significant one. While the supreme court was quick to point out the error in identifying Oregon's interest,¹²⁷ it never suggested that the process used in reaching *Ryan's* conclusion lacked merit.¹²⁸ Thus the supreme court, as a very general matter, may already have accepted some form of interest balancing for resolving true conflicts.¹²⁹

With little difficulty the court might move from this general acceptance of interest reappraisal to a position far beyond Currie's "moderate and restrained interpretation of policy" approach to apparent

122. See text accompanying notes 17-21 *supra*.

123. It is, of course, a significant feature of pure interest analysis. See note 20 *supra*.

124. Currie recognized the inherent difficulties of a disinterested forum confronted with "an unavoidable conflict . . . between the interests of two other states." E. CHEATHAM, *CONFLICT OF LAWS*, *supra* note 20, at 477-78. The final formulation of his approach provides alternatives to the forum state which finds itself in this delicate position. It can either apply forum law, or "by a candid exercise of legislative discretion, resolv[e] the conflict as it believes it would be resolved by a supreme legislative body having power to determine which interest should be required to yield." *Id.*

125. 11 Cal. 3d at 585-86, 522 P.2d at 673, 114 Cal. Rptr. at 113. *But see* note 121 *supra*.

126. *Id.*

127. The court of appeal had derived from Oregon's limited recovery rule an Oregon interest in compensating local plaintiffs. *Id.* at 586, 522 P.2d at 673, 114 Cal. Rptr. at 113.

128. The court did not, however, expressly accept the conclusion. ("Without addressing ourselves to the accuracy of this conclusion . . ."). *Id.*

129. Professor Currie inveighed against weighing competing interests in true conflict cases, *see, e.g., Methods and Objectives*, *supra* note 20, at 176-77, in *SELECTED ESSAYS* 181-82, except in the rare case of a true conflict in a disinterested forum, *see* note 124 *supra*. Thus, if the court is to retain the pure interest analysis it has so far seemed to espouse, it should apply this approach only when it is a disinterested forum.

true conflicts.¹³⁰ It could adopt the method of "comparative impairment" first propounded by Professor Baxter,¹³¹ but more recently included in a major work on California choice of law authored by Professor Horowitz.¹³² Indeed, variations of Professor Sedler's "common policy" approach are also available.¹³³ But all this, of course, is only speculation. The important point is that the court has not bound itself inextricably to any one approach.

IV. EQUAL PROTECTION: THE UNREACHED ISSUE

Under *Hurtado's* holding and dicta a choice of law favoring plaintiff appears unassailable: Mexico had "no interest whatsoever," while California had interests at two levels favoring its full-recovery measure of damages. One of the defendants in *Hurtado*, however, had a "final contention," and a novel one at that.¹³⁴ By *amicus curiae*, the defendant accepted the court's conclusion that the case presented a false conflict with only California interested.¹³⁵ According to

130. E. CHEATHAM, *CONFLICT OF LAWS*, *supra* note 20, at 477-78. The court, when confronted with an apparent conflict, would reconsider its initial conclusions, seeking a more moderate interpretation (accommodation) to avoid the conflict.

131. Baxter, *Choice of Law and the Federal System*, 16 *STAN. L. REV.* 1 (1963). See note 132 *infra*.

132. Horowitz, *The Law of Choice of Law in California—A Restatement*, 21 *U.C.L.A.L. REV.* 719, 748-58 (1974). The court, when confronted with an apparent conflict, would ask: "Which state's interest would be more impaired if its policy were subordinated?" *Id.* at 748.

133. See text accompanying notes 52-55. In a sense the true conflict and the unprovided for case are mirror images. In the former the question is which policy will be subordinated, whereas in the latter it is which will be promoted. Both, it seems, present a problem which, to quote Professor Currie for a broader proposition than he was advancing, "cannot be rationally solved by any method of conflict of laws." *Governmental Interests*, *supra* note 36, at 10, in *SELECTED ESSAYS* 190. Thus Professor Sedler's "common policy" approach might be as useful with true conflicts as with no interest cases.

A number of contemporary legal scholars have built upon interest analysis in an attempt to find a means of "rationally" resolving true conflicts. They include Professor Cavers, who propounded his "principles of preference," D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 114-224 (1965); Cavers, *Contemporary Conflicts Law in American Perspective*, *ACADEMIC DE DROIT INT'L, THE HAGUE, III RECUEIL DES COURS* 75-308 (1970); Professor Leflar, who proposed five basic "choice-influencing considerations," Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 *N.Y.U.L. REV.* 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 *CALIF. L. REV.* 1584 (1966); Professors von Mehren and Trautman, who presented a "functional" analysis and subjected it to intensive scrutiny in their formidable casebook, A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* (1965); and Professor Weintraub, who also developed a version of functional analysis, R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* (1971).

134. 11 Cal. 3d at 586, 522 P.2d at 674, 114 Cal. Rptr. at 114.

135. As the *amicus* brief put it:

The purpose [of the limited recovery rule] may be to avoid the imposition of excessive financial burdens on Zacatecas defendants. If [this] purpose is assumed, Zacatecas appears to have no interest in the application of its rule, be-

defendant, however, California's interest was in the application not of California law but of Mexico law since plaintiff—being from Mexico, a limited-recovery, hence low-insurance state—had not contributed to the far greater cost of California's full-recovery, hence high-insurance system:¹³⁶

The policy underlying the California unlimited-recovery rule is to provide Californians with full recovery for loss from wrongful death by distributing the cost of that full recovery to all Californians.¹³⁷

The court, however, did not present itself squarely to defendant's proposition. Rather, it skirted the issue of a resident's interest in application of nonresident law, and chose instead to characterize the contention as addressed, in turn, to the lack of a California interest,¹³⁸ the inherent limitation of a plaintiff's recovery rights,¹³⁹ and the interest of the plaintiff's state in denying recovery.¹⁴⁰ Thus characterized the court had little difficulty negating defendant's contention.

The court, in avoiding defendant's real contention, did no more than distinguish away cited authority;¹⁴¹ it did not attempt to defeat

cause the California defendants are not members of the class that the Zacatecas rule is apparently designed to benefit (i.e., Zacatecas defendants).

Brief of Lloyds, London, as Amicus Curiae in support of Petitioner at 6. Compare, however, the analysis in the text accompanying and following note 102 *supra*.

136. *Id.* at 10.

137. *Id.* at 7 (emphasis in original). Subsequent to *Hurtado* the author of the Lloyds brief, Professor Leonard Ratner, prepared an article containing his theory of cost-contribution analysis. Ratner, *Choice of Law: Interest Analysis and Cost-Contribution*, 47 S. CAL. L. REV. 817 (1974).

138. "Defendant's final contention is that California has *no interest* in extending to out-of-state residents greater rights than are afforded by the state of residence." 11 Cal. 3d at 586, 522 P.2d at 674, 114 Cal. Rptr. at 114 (emphasis added).

139. "Defendant urges seemingly as an absolute choice of law principle that plaintiffs . . . are *not entitled* to recover more than they would have recovered under the law of the state of their residence." *Id.* (emphasis added).

140. "In effect defendant argues that the state of plaintiffs' residence has an *overriding interest* in denying their own residents unlimited recovery." *Id.* (emphasis added). This characterization allowed the court simply to reassert its earlier conclusion: "A policy of limiting recovery in wrongful death actions 'does not reflect a preference that widows and orphans should be denied full recovery.'" *Id.*, quoting D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 151 (1965). Earlier in its opinion, the court used the same emotion-laden quotation from Cavers as a premise for its holding. *Id.* at 581, 522 P.2d at 670, 114 Cal. Rptr. at 110.

141. Defendant sought support for its proposition in a principle derived from *Reich* and the apparent application of that principle in two subsequent court of appeal decisions, *Ryan v. Clark Equipment Co.*, 268 Cal. App. 2d 679, 74 Cal. Rptr. 329 (1st Dist. 1969) and *Howe v. Diversified Builders, Inc.*, 262 Cal. App. 2d 741, 69 Cal. Rptr. 56 (2d Dist. 1968). In *Reich* the court found no interest of Missouri, the place of wrong but the residence of neither party, "in extending the benefits of its [defendant-protective] limitation of damages to travelers from states having no similar limitation." *Reich v. Purcell*, 67 Cal. 2d 551, 556, 432 P.2d 727, 731, 63 Cal. Rptr. 31, 35 (1967). *Howe* involved a Nevada (limited-recovery state) plaintiff suing, in California, a California corporate defendant for an employment accident occurring in Nevada. In that case the

the underlying reasoning. Perhaps this was a wise act of judicial restraint, going no further than necessary to decide the case. The initial difficulty with this view, however, is that the court had already ranged far afield. Moreover, the court's holding that no party had asserted an interest in applying Mexico law sufficient to displace forum law simply ignored the fact that the defendant had asserted such an interest which, unless defeated, appeared sufficient. Finally, the avoidance was unnecessary because the court could easily have demolished the defendant's proposal.

The analysis suggested by defendant runs afoul of the equal protection clause. The cost-contribution theory says no more than this: California's measure of damages is more advantageous to recovery by plaintiffs than Mexico's measure, and Californians pay for this advantage. From this perspective the fact of higher payment for higher benefits—that is, the policy of full recovery—creates a class of recipients identifiable by use of a criterion other than resident status. Allowing only Californians to benefit is therefore arguably legitimate under equal protection analysis.¹⁴² Such a classification, however, is

Reich "principle" took on a new and broader form. Holding Nevada law applicable, the court of appeal stated, "California has no interest in extending to Nevada residents greater rights than are afforded them by the state of their domicile." 262 Cal. App. 2d at 745-46, 63 Cal. Rptr. at 59 (emphasis added). Neither *Ryan* nor *Howe*, and certainly not *Reich*, of course, lent direct support to defendant's contention. Lack of interest in extending benefits out-of-state is not equivalent to an affirmative interest in denying them. Moreover, as the *Hurtado* court correctly asserted, in both *Ryan* and *Howe* the states which afforded limited recovery (Oregon in *Ryan*, Nevada in *Howe*) had affirmative governmental interests in applying their defendant-protective laws. 11 Cal. 3d at 585, 522 P.2d at 673, 114 Cal. Rptr. at 113.

142. As Professor Ratner further explained:

The . . . interest is not simply a preference for a resident litigant over a non-resident litigant, a preference that would contravene equal protection The recovery-state's interest rests not on the identity of the defendant as a resident nor on the identity of the plaintiff as a nonresident but on implementation of its contribution-compensation policy.

Ratner, *supra* note 137, at 836-37.

Professor Ratner, in both his amicus brief and article, sought additional justification for the cost-contribution classification from the fact that it includes not only residents of the full-recovery state, but also residents of any state allowing full recovery. "The class of contributors includes all California residents, and it also includes the residents of other states with an unlimited recovery rule, because all such states have a mutual, reciprocal interest in unlimited recovery by their respective residents." Brief of Lloyds, London, as Amicus Curiae in support of Petitioner at 8. This is unconvincing in two respects. First, a choice-of-law problem regarding different measures of damages arises, by definition, only when one state's rule allows greater recovery (and hence involves higher insurance and costs) than the other. In such a setting the cost-contribution classification, which is purported to be neutrally based, reduces in fact to congruence with residence status. See text preceding note 143 *infra*. Second, Professor Ratner has failed to demonstrate in any event how the fact that residents of, say, New York pay insurance premiums (and other costs of a full-recovery system) equal in amount to what Californians pay benefits California in any substantive way that would rationalize their inclusion in California's governmental policy. *Kay, supra* note 117, at 194.

little more than a game of charades, since its *effect* in a conflict, such as *Hurtado*, between a full-recovery and a limited-recovery state is to identify a class congruent with an impermissible classification, all residents of the one state (full-recovery) to the exclusion of nonresidents. A court could, therefore, find it violative of equal protection.¹⁴³ Moreover, the problems such an argument presents have already been exposed and analyzed in depth by legal scholars,¹⁴⁴ whose writings belie defendant's position. To paraphrase the analysis of Professor Currie,¹⁴⁵ when a state enacts recovery for wrongful death, as California has, it adopts a policy for the benefit of the victim, and primarily for resident victims. It has *not* retained a general policy of protecting defendants, subject only to an exception in favor of local victims. Therefore:

To withhold from citizens of other states . . . the right [to full recovery], while granting the right to residents similarly injured, would rather clearly be a denial of [equal protection]. To extend the privilege to nonresidents . . . only if their home states give them similar "protection" would be "not so much a differential treatment in good faith of persons differently situated as a mere attempt to preclude recovery by as many foreigners as possible."¹⁴⁶

The defendant's suggested application of Mexico's law was premised on the assumption that the benefits of a full-recovery policy are not gotten for nothing.¹⁴⁷ True. In fact, this is probably true of most programs which make one state's policy more advantageous than that of another state (or country).¹⁴⁸ But this is what equal protection, with its prohibition of resident-nonresident or citizen-noncitizen discrimination, is all about. It is this constitutional obstruction that cost-contribution analysis simply ignores.¹⁴⁹

143. Cf. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

144. E.g., Currie & Schreter [now Kay], *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960), in *SELECTED ESSAYS* 526; Currie & Schreter [now Kay], *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960), in *SELECTED ESSAYS* 445; *Unprovided For Case*, *supra* note 48, at 143-49; but see Ratner, *supra* note 137, at 836-37.

145. Currie & Schreter [now Kay], *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1374-75 (1960), in *SELECTED ESSAYS* 505-06.

146. *Id.* (footnotes omitted); see *Unprovided For Case*, *supra* note 48, at 145-46.

147. Brief of Lloyds, London, as Amicus Curiae in support of Petitioner at 7-8; Ratner, *supra* note 137, at 833-34.

148. Examples might be welfare benefits or the cost of education. See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Vlandis v. Kline*, 412 U.S. 441 (1973).

149. But see *CRAMTON & CURRIE*, *supra* note 15, at 428 (equal protection not yet firmly established as a limitation on choice of law).