Unprovided-for case  
P’s domicile’s loss-allocating law benefits D (by prohibiting action)   
D’s domicile’s law loss-allocating benefits P (by allowing action)  
wrongdoing is in P’s domicile, which has no conduct regulating interest

Currie’s solution is to use forum law

Others have recommended giving up the pro domiciliary bias, which would turn the unprovided-for case into a true conflict

The loss-allocating law of the plaintiff’s jurisdiction would burden the plaintiff, and the loss-allocating law of the defendant’s jurisdiction would burden the defendant

Two types of unprovided-for case

In the first, the law of the plaintiff’s domicile blocks his cause of action through an affirmative defense.

In the second, the law of the plaintiff’s domicile keeps the plaintiff from recovering simply because there is no cause of action

Here is one way of putting Kramer’s solution to the affirmative-defense unprovided-for case – if laws are read in the light of their purposes, the limitation of laws should be read in the light of their purposes

That means that the affirmative defense does not apply, and the plaintiff is free to recover under the law of his domicile

My argument is that we cannot understand Kramer to be pointing to genuine laws – he is pointing to interests that exist independently of laws

But if that’s so then the scope of possible interests expands beyond those Kramer points to

* Neumeier v. Kuehner (NY 1972)
* Ontario guest riding in NYer’s car
* accident in Ontario
* Ontario has guest statute
* NY doesn’t

Interests Kramer points to:

Ont. interest in compensation to Ont. guest

Ont. interest in deterrence of negligent hosts in Ont.

But there is also:

NY interest in avoiding fraud

Once those interests are introduced, all choice of law cases are transformed

e.g.

*Babcock*  
NY guest riding in NY host’s car   
accident in Ontario  
Ontario has guest statute   
NY doesn’t  
  
Ontario interest? – deterrence (which recommends liability)  
NY interests? – compensation (which recommends liability) and avoiding fraud (which recommends immunity)

It could be that the best rule to satisfy aggregate governmental interests is a rule barring liability

Ontario interests in all-Ontario case:  
Comp.Ont (3) + Deter.Ont (1) < FraudOnt (5)  
  
NY interests in all-NY case:  
Comp.NY (3) + Deter.NY (3) > FraudNY (5)  
  
Babcock? NY guest, NY host, Ont accident  
Comp.NY (3) + Deter.Ont (1) < FraudNY (5)

That would mean that in Babcock the first restatement does a better job satisfying governmental interests than interest analysis does!

But what is kramer’s solution to the no cause of action unprovided-for case?

1. Erwin v. Thomas
   1. P (married woman) (Wash) suing D (Ore) in Ore Ct for injury in Wash
   2. Suit is for loss of consortium
   3. Wash does not allow such suits by women (only men)
   4. Ore does
   5. How does Ct analyze case?
      1. Wash thinks rights of married women are not sufficiently important to disadvantage Ds
         1. Protects Ds
         2. but no Wash D here
         3. Washington has decided that the rights of a married woman whose husband is injured are not sufficiently important to cause the negligent defendant who is responsible for the injury to pay the wife for her loss. It has weighed the matter in favor of protection of defendants. No Washington defendant is going to have to respond for damages in the present case, since the defendant is an Oregonian.
      2. Ore is protective of married women as against Ds
         1. But no Ore married woman here
         2. On the other hand, what is Oregon's interest? Oregon, obviously, is protective of the rights of married women and believes that they should be allowed to recover for negligently inflicted loss of consortium. However, it is stretching the imagination more than a trifle to conceive that the Oregon Legislature was concerned about the rights of all the nonresident married women in the nation whose husbands would be injured outside of the state of Oregon.
      3. Neither state has vital interest in case
      4. So used forum law
      5. Is this incompatible with Casey v Mason
         1. Ore wife brings loss of consortium action against Wash D for accident in Wash
         2. Ore ct held that wash law applies
         3. No, not incompatible because this is a true conflict
            1. Both the Oregon and Washington law apply
         4. and Oregon court concluded that wash’s interest paramount

does the court’s of reading of washington’s interest make sense?

* + 1. Is it really true that having no cause of action for loss of consortium for married women is about protecting Ds (Wash Ds)?
    2. Isn’t it based on a theory that married women do not have the right is the sexual services of their husbands? So in losing the sexual services they lose nothing to which they were legally entitled?
       1. If that’s so wouldn’t Washington be primarily interested in its law disadvantaging Washington married women?
  1. Really a case where Ore is not interested and Wash is

Consider this case:

OR married woman sues WA D for loss of consortium concerning accident in OR.

This now turns out to be a false conflict. Washington is not interested in protecting Washington defendants, but only interested in burdening Washington married women with its view about who has the right to sexual services from whom in a Washington marriage

This is how Kramer reads Erwin

Kramer suggests that all no cause of action unprovided for cases can be solved this way

They turn out to be false conflicts too – the plaintiff simply fails to state a claim under his own law

But Erwin is a special case

there is a particular reason in Erwin why Wash law would disadvantage a Wash P

* look at a more normal no cause of action unprovided-for case
* A variation on *Hurtado v. Superior Court*. A family from the Mexican state of Zacatecas sues a Californian for wrongful death due to an accident in Zacatecas in which a Zacatecan was killed.Zacatecan law had a limit on the amount of damages for wrongful death (which was apparently part of the cause of action, not an affirmative defense); California law had no such limit.
* apparent unprovided for case concerning the amount above the limit
* how is that solved for Kramer?
* He would apparently say that the plaintiffs fail to state a claim for the amount above the limit under Zacatecan law
* but if Zacatecan loss-allocating law can be understood to burden Zacatecan plaintiffs, why can’t California loss-allocating law be understood to burden California defendants?

In the end, Kramer turns these cases into true conflicts. Furthermore his solution to no cause of action unprovided-for cases is not original. It has long been suggested that one way of solving the unprovided-for case is to read loss-allocating rules as both burdening as well as benefitting domiciliaries.

1. Reconciling true conflicts
   1. Biggest debate
   2. Currie, use forum law
      1. A forum court is beholden to its own sovereign
2. Lilienthal v kaufman
   1. Ore (1964)
   2. Kaufman (Ore) went to Cal
   3. Entered into an agreement w/ P for joint venture
   4. Kaufman executed in Cal two promissory notes
   5. P demanded payment on notes
   6. D declared spendthrift under Ore law
   7. No such law in Cal
   8. How does ct analyze?
      1. Traditional Choice of law approaches would say Cal law applies
         1. Place of K
         2. place of perf
         3. rule of validation
   9. *Thus far all signs have pointed to applying the law of California and holding the contract enforceable. There is, however, an obstacle to cross before this end can be logically reached. In Olshen v. Kaufman, supra, we decided that the law of Oregon, at least as applied to persons domiciled in Oregon contracting in Oregon for performance in Oregon, is that spendthrifts' contracts are voidable. Are the choice-of-law principles of conflict of laws so superior that they overcome this principle of Oregon law?*
      1. confused
      2. really should be saying:
         1. Cal law applies bc Cal has interest
         2. Question now is whether Ore law applies
         3. look to Ore interests
         4. ct concludes that ore has interest in protecting Ore spendthrifts
      3. Does not seem to matter to the Oregon court whether oregon’s interest is stronger than California’s or not
   10. Concurrence
       1. Agrees,
       2. *To distinguish the Olshen case* [on all Oregon case in which the spendthrift law was applied to disadvantage an Oregonian on the other side of the contract ] *it would be necessary to assume that although the legislature intended to protect the interest of the spendthrift, his family and the county when local creditors were harmed, the same protection was not intended where the transaction adversely affected foreign creditors. I see no basis for making that assumption. There is no reason to believe that our legislature intended to protect California creditors to a greater extent than our own.*
       3. Why protect Cal expectations when Or expectations aren’t
       4. Is that true?
          1. might Oregon recognize that the problems of expectations are worse when there is a Californian on the other side of the contract and the contract was entered into in California?
          2. There may in fact be a reason to protect Californians more than Oregonians
3. not many states use a forum law approach in true conflicts

7) What if this case was brought in Nevada? What would Currie say?

* + 1. Dismiss on forum non convenience grounds
    2. Or use more enlighten and humane law

If

why didn’t the Californian sue in CA in Lilienthal? A California Court would likely have applied California law

Forum shopping, in combination with the application of forum law in true conflicts (assuming the forum is interested) will in fact result in a simple pro plaintiff rule. The law favoring liability will always be chosen, because the plaintiff will always choose a forum with pro plaintiff law that is interested.

* Maybe that’s not so bad?
* The law favoring the plaintiff tends to be the more basic background law
* The law favoring the defendant is deviant law
* If maybe it is better in a conflict between background and deviant law to favor the background law
* After all, both jurisdictions have the background law

Other ways to solve true conflicts

1. Bernkrant v Fowler (Cal. 1961)
   1. Ps owed D (Granrud) $24K concerning purchase of Nev apt complex
   2. D allegedly made oral promise to Ps (Nev domicile) to forgive debts in his will in exchange for partial payment and refinancing of P’s debt to him
   3. Died – nothing in will
   4. Suit to compel cancellation of debt
   5. Cal statute of frauds barred oral agreements to make provision in will
   6. Nev statute of frauds would prohibit only if real property transaction
      1. But an agreement discharging an obligation secured by real property does not fall under statute
      2. So there is a contract under Nev law
   7. Which law applies?
   8. Look at this from a 1st Rest perspective
      1. If K, place of the K
      2. Anything other possibility?
         1. is it is really a testamentary disposition?
         2. of personalty?
         3. then it is the law of the domicile at time of death
         4. domiciled in Cal at death
   9. but Ct (Traynor) uses interest analysis –
      1. Does Cal have an interest?
         1. what is purpose of Cal law?
         2. protect Cal estates and beneficiaries from fraud
         3. this is a Cal estate
      2. BUT ct says we need to make sure that Cal would really be interested in a case involving multistate contacts
      3. Here a Nev K, perf in Nev, Ps (and maybe decedent) domiciled in Nev at time of K
      4. If decedent domiciled in Nev at time of K, would upset reasonable expectations of Ps to use California law
         1. like People v One 1953 Ford Victoria
            1. automobile mortgaged in TX
            2. moved to Cal by mortgagor
            3. seized in connection with drug trafficking
            4. mortgagee’s interest forfeit under Cal law
            5. Under Cal law there is a duty to investigate mortgagor (who was drug dealer)
            6. Cal law not applied, even though interested
            7. Reason was expectations of the mortgagee
            8. cannot apply Cal law simply because mortgagor moved car to Cal
         2. idea is that expectations of parties put limits (although not const’l limits?) on application of law
      5. BUT even if decedent domiciled in Cal at time of K
         1. Cal’s interest should still be limited by expectations of parties
            1. Cal would have an interest only if decedent remained in Cal
            2. And parties at the time of the contract could not be sure that that would be true
         2. Given the other contacts with Nev, the moderate and restrained interpretation still recommends Nevada law
   10. Currie claimed example of moderate and restrained interp approach is a way of identifying false conflicts
       1. If true conflict then reexamine forum’s interests in the light of the expectations of the parties
   11. How would lilienthal come out in the moderate and restrained interp approach?
       1. Limit Oreg interest on basis of expectations of Cal creditor?
       2. Maybe