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## Conflict of Laws for the Age of Cybertorts: A Game Theoretic Study of Corporate Profiteering from Choice of Law Loopholes and Interstate Torts

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# Conflict of Laws for the Age of Cybertorts: A Game-Theoretic Study of Corporate Profiteering from Choice of Law Loopholes and Interstate Torts

Yunsieg P. Kim\*

*This Article identifies a choice of law loophole that corporations can exploit to commit interstate torts against individuals without paying damages – by inducing victims to sue in a state where they are guaranteed to lose. The Second Restatement effectively requires plaintiffs bringing interstate tort claims to allege which state has the most significant relationship to their injury, because most federal courts rely on plaintiffs' allegations to choose a state law for the purpose of resolving motions to dismiss. However, when torts are committed over state lines (for example, over the internet), plaintiffs can be misinformed or misled as to where the tortious conduct really occurred, even if their knowledge of how they were harmed is otherwise correct. Therefore, if a plaintiff is induced to sue under a wrong state's law, she would waste years litigating only to lose, even if her claims are meritorious. Her complaint would survive a motion to dismiss because her allegations are plausible, but it would be dismissed at discovery, where it would become apparent that her injury originated in a state other than the one she alleged.*

*This Article has two objectives. First, I show how corporations committing torts remotely can profit from this loophole, using a game-theoretic model and a Third Circuit case in which a corporate defendant apparently misrepresented to the court and*

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*plaintiffs the state where the alleged tort originated, resulting in the plaintiffs' complaint surviving a motion to dismiss but being dismissed after discovery years later. I argue that, if corporations use this loophole often enough, tort victims would be deterred from suing for fear that they would waste years trying cases they are effectively guaranteed to lose. Thus, once a corporation has built a reputation that it will use the loophole, it could commit torts without paying damages or even having to litigate.*

*Second, I use my study as evidence against the prevailing notion that conflict of laws scholarship is unhelpful to the practice of law. I argue that conflicts scholarship has become notorious for irrelevance because too many scholars employ logically fallacious argumentation and are overly concerned with designing theoretically ideal but practically infeasible choice of law rules. I argue that, by focusing more on studying how existing choice of law rules affect actual litigation, conflicts scholarship can lead the effort to fix our territorially tethered, increasingly unsustainable legal system and to design one fit to survive the age of cybertorts.*

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## INTRODUCTION

*[C]onflict of laws is a dismal swamp . . . inhabited by . . .  
eccentric professors who theorize about mysterious matters  
in a strange and incomprehensible jargon.*

— William L. Prosser,<sup>1</sup> 1953

*[T]he scholarly consensus [is] that choice-of-law doctrine is  
an unsalvageable mess.*

— Katherine Florey,<sup>2</sup> 2015

Depending on whom one asks, conflict of laws dates to the rise of the Roman Republic<sup>3</sup> or to the fall of the Holy Roman Empire.<sup>4</sup> Compared to classical Mediterranean merchants and medieval fiefdoms, people and states of the Internet Age interact over borders much more often.<sup>5</sup> As more interstate dealings cause more

1. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

2. Katherine Florey, *Big Conflicts Little Conflicts*, 47 ARIZ. STATE L.J. 683, 685 (2015).

3. Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT'L L. 801, 815 (2006) ("The beginnings of . . . choice of law are to be found in Roman times . . . in the 3rd century B.C."); see 1 COLEMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 277 (1911) (explaining that Ancient Rome allowed foreigners to settle disputes according to the laws of their origin).

4. *American Slavery and the Conflict of Laws*, 71 COLUM. L. REV. 74, 82 (1971) ("[T]he disintegration of the Holy Roman Empire and the appearance of the nation-states gave rise to a countervailing notion of international law, upon which, in a sense, modern conflicts is based.").

5. See ANNA MANCINI, *ANCIENT EGYPTIAN WISDOM FOR THE INTERNET: ANCIENT EGYPTIAN JUSTICE AND ANCIENT ROMAN LAW APPLIED TO THE INTERNET* 10 (2002) (explaining that legal systems in Ancient Egypt and Rome were organized territorially but the internet "cuts down the costs of international communication"); Søren Michael Sindbæk, *The Small World of the Vikings: Networks in Early Medieval Communication and Exchange*,

interstate disputes, one might expect conflict of laws—the discipline that decides which state’s law governs an interstate dispute—to become more important. However, more scholars and practitioners are discrediting American conflict of laws scholarship with each passing decade.<sup>6</sup> Why has conflict of laws scholarship fallen into disuse in both theory and practice when it should be more useful than ever before?

It may seem futile to ask why conflict of laws is declining, because so many have already complained for so long that conflicts scholarship is unhelpful, irrelevant, or unintelligible. In 1967, Professor Maurice Rosenberg quipped that choice of law doctrine is about as useful to practice as a Ouija board.<sup>7</sup> In the half-century since, conflicts scholars have acknowledged that their own discipline can seem to be “an ossified body of doctrine that fails to supply coherent answers” to real-world problems,<sup>8</sup> or “as abstruse as determining the number of angels who can dance on the head of a pin.”<sup>9</sup> Professor William Reynolds even writes that “[c]hoice of law today, both the theory and practice of it, is universally said to be a disaster.”<sup>10</sup>

This Article’s first objective is to show that conflicts scholarship can address practical problems confronting the Internet Age. To that end, I examine a loophole in conflict of laws and civil procedure practice that corporate tortfeasors can exploit to evade paying damages to their victims. In *Maniscalco v. Brother Int’l Corp.*, the defendant corporation’s affiliate in Japan (BIL) allegedly committed a tort that remotely harmed U.S. residents.<sup>11</sup>

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40.1 NORWEGIAN ARCHAEOLOGICAL REV. 59, 60, 71 (2007) (“[T]he growth of electronic communication, especially the Internet, has triggered a rapid development in the understanding of communication. . . . The critical difference between the early medieval and the modern worlds was not the scale of connections but their pervasiveness . . .”).

6. See *supra* notes 1–2 and accompanying text.

7. Maurice Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 460 (1967).

8. David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41, 47 (2014).

9. John B. Austin, *A General Framework for Analyzing Choice-of-Law Problems in Air Crash Litigation*, 58 J. AIR L. & COM. 909, 980 (1993).

10. William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1371 (1997).

11. See *Maniscalco v. Brother Int’l Corp. (USA) (Maniscalco III)*, 793 F. Supp. 2d 696, 698, 704 (D.N.J. 2011); *Maniscalco v. Brother Int’l (USA) Corp. (Maniscalco IV)*, 709 F.3d 202 (3d Cir. 2013).

Apparently unaware that the alleged tort occurred in Japan,<sup>12</sup> the plaintiffs sued under the law of New Jersey, where Brother International Corporation (BIC) is headquartered.<sup>13</sup> Although the complaint was plausible enough to survive a motion to dismiss,<sup>14</sup> BIC apparently knew that the alleged wrongful conduct occurred in Japan, not New Jersey.<sup>15</sup> Hence, regardless of the case's merits, BIC could have moved to dismiss by revealing that the plaintiffs sued under the law of a wrong state.<sup>16</sup> However, even though BIC did successfully move to dismiss on the choice of law issue, it did so only after the case went to discovery.<sup>17</sup> Why did BIC protract for years<sup>18</sup> a case that it could have gotten dismissed almost immediately?

I argue that BIC deliberately protracted the case to prevent the plaintiffs from suing again under the correct state's law. To move to dismiss for incorrect choice of law, BIC must argue that the case is better connected to a state other than New Jersey.<sup>19</sup> To do so, BIC

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12. The plaintiff's complaint does not allege tortious conduct originating in Japan. Complaint, *Maniscalco v. Brother Int'l Corp.* (USA), 2008 WL 2559365 (D.N.J. June 26, 2008) (No. 3:06-cv-04907). When the district court partially denied BIC's motion to dismiss and thus ruled that New Jersey law applies to some of the plaintiff's claims, the court did not cite any allegations of tortious conduct originating in Japan. See *Maniscalco v. Brother Int'l Corp.* (USA) (*Maniscalco II*), 627 F. Supp. 2d 494 (D.N.J. 2009). The court refers to the fact that the defendant's tort originated in Japan only after "the Court ha[d] at its disposal the discovery provided by the parties." *Maniscalco III*, 793 F. Supp. 2d at 707 n.4.

13. *Maniscalco IV*, 709 F.3d at 204.

14. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) ("[A] claim requires a complaint with enough factual matter to suggest an agreement. Asking for plausible grounds . . . simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."); *Maniscalco II*, 627 F. Supp. 2d at 499 ("Because the Court finds that Plaintiffs have sufficiently alleged the three [New Jersey Consumer Fraud Act] elements, BIC's motion to dismiss Plaintiffs' [New Jersey] CFA claims is denied.").

15. See *Maniscalco III*, 793 F. Supp. 2d at 699.

16. See Fed. R. Civ. P. 12(d); for a more detailed discussion on when and how a court can consider extrinsic evidence introduced by the defendant in ruling on a motion to dismiss for failure to state a claim, see *infra* Section I.A.

17. See *supra* note 12 and accompanying text; *Maniscalco III*, 793 F. Supp. 2d at 710 (dismissing the suit because "New Jersey law does not apply" and the "relevant decisions [regarding the alleged wrongful conduct] were not made in New Jersey, but in Japan").

18. *Maniscalco v. Brother Int'l Corp.* (USA) (*Maniscalco I*), 2008 WL 2559365, at \*3 (D.N.J. June 26, 2008) (stating that the plaintiffs "filed suit in October 2006"); *Maniscalco III*, 793 F. Supp. 2d at 710 (dismissing the suit in 2011 because "New Jersey law does not apply").

19. See *Maniscalco III*, 793 F. Supp. 2d at 707 ("Under 148(2) [of the Restatement (Second) of the Conflict of Laws], a Court must weigh various 'contacts' between Plaintiffs' fraud claims and the relevant states to determine which state has the greatest ties to the claims.").

must effectively reveal where the alleged tort really took place. If BIC moved to dismiss too early, the plaintiffs could use that information to sue again under an appropriate state's law. However, if BIC protracted the plaintiffs' suit under New Jersey law long enough, the plaintiffs would not have any resources left with which to sue again, even after they learn that the alleged tort occurred in Japan. Indeed, when BIC's motion to dismiss was pending, BIC argued that the choice of law is "best left for resolution later,"<sup>20</sup> indicating an intent to delay revealing the case's contacts to Japan. The court denied BIC's motion to dismiss and spent two more years on the case, only to dismiss it for incorrect choice of law after conducting full discovery.<sup>21</sup> I call this tactic the Maniscalco exploit ("ME" or "the exploit") after the cases that indicate its existence.

The Maniscalco exploit arises from a defect in choice of law and civil procedure practice. When courts address a choice of law question at the pleading stage, they often rely on plaintiffs' allegations of fact.<sup>22</sup> A factual allegation critical to the choice of law is the state where the act causing the injury took place.<sup>23</sup> In cases

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20. See *Maniscalco v. Brother Int'l Corp. (USA)* (*Maniscalco II*), 627 F. Supp. 2d 494, 499 n.2 (D.N.J. 2009) ("BIC contends that New Jersey law should not apply to this case but BIC suggests that this issue is best left for resolution later. . . . Accordingly, the Court will not address it here.").

21. The trial court denied in part BIC's motion to dismiss on June 19, 2009. *Id.* at 494. The court dismissed for incorrect choice of law on June 24, 2011. See *Maniscalco III*, 793 F. Supp. 2d at 696. One of the plaintiffs appealed, which was dismissed on March 8, 2013. See *Maniscalco v. Brother Int'l (USA) Corp. (Maniscalco IV)*, 709 F.3d 202, 204 (3d Cir. 2013).

22. See, e.g., *Reginella Constr. Co. v. Travelers Cas. & Sur. Co. of Am.*, 949 F. Supp. 2d 599, 607 (W.D. Pa. 2013) (relying on the plaintiff's allegations of fact to conduct choice of law analysis in the course of considering a motion to dismiss).

23. The place of the wrong is either the decisive factor or a significant factor in the choice of law decision under the First and Second Restatements. See Restatement (First) of Conflict of Laws § 377 (1934) ("The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."); Restatement (Second) of Conflict of Laws § 145 (1971) ("Contacts to be taken into account . . . include . . . the place where the conduct causing the injury occurred."). States using the First Restatement have defined the place of the wrong as the state where wrongful conduct occurred, not the state in which harm resulting from wrongful conduct was suffered. See, e.g., *Cremin v. Brown*, 955 F. Supp. 499, 524 (D. Md. 1997), *aff'd sub nom. Banca Cremin, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017 (4th Cir. 1997) (applying the law of the state in which "the alleged misrepresentations . . . occurred" instead of the law of the state in which the loss resulting from the misrepresentations was felt). States using the Second Restatement, in the choice of law inquiry, have also distinguished between the state in which wrongful conduct occurred and the state in which injury resulted from that wrongful conduct. See *Maniscalco IV*, 709 F.3d at 208.

like car accidents, the plaintiffs usually know where the tortious act took place because they witness it.<sup>24</sup> However, in cases like *Maniscalco* in which the alleged tort occurs in another state, the plaintiffs may not know where it happened.<sup>25</sup> Yet, current practice addresses the choice of law issue at pleading, relying on plaintiffs' potentially inaccurate knowledge of where a tortious act occurred,<sup>26</sup> or after pleading and full discovery,<sup>27</sup> which would protract cases that should have been disposed of at the pleading stage for incorrect choice of law. For example, the *Maniscalco* court denied a motion to dismiss relying on the claim that the act occurred in New Jersey<sup>28</sup> but dismissed after discovery pointed to Japan.<sup>29</sup> Hence, the plaintiffs wasted years on a futile case because they could not correctly allege where the tortious act occurred, even though they alleged who harmed them and how the harm occurred plausibly enough to survive a motion to dismiss.

The *Maniscalco* exploit is important because it helps corporations evade liability for, and thereby reliably profit from, committing interstate torts against individuals. Consider a company that harms its customers in the course of selling its products. Without the *Maniscalco* exploit, this hypothetical company should not expect to evade liability so easily, because its victims are likely to sue and because their claims are likely to survive a motion to dismiss. The victims are likely to sue because they would know who harmed them: unlike the typical tortfeasor

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24. See, e.g., *Budget Rent-A-Car Sys., Inc. v. Chappell*, 304 F. Supp. 2d 639, 644–45 (E.D. Pa. 2004) (applying Pennsylvania law to a case arising from a car accident that occurred in Pennsylvania, under the most significant relationship test).

25. See Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1113 (2011) (“A cyber-attacker can also be physically removed from the victim. He may be . . . even across the globe.”).

26. See, e.g., *Holborn Corp. v. Sawgrass Mut. Ins. Co.*, 304 F. Supp. 3d 392, 398–400 (S.D.N.Y. 2018) (conducting a choice of law analysis on the basis of the plaintiffs' allegations of fact at the motion to dismiss stage).

27. See, e.g., *Snyder v. Farnam Cos.*, 792 F. Supp. 2d 712, 717–18 (D.N.J. 2011) (ruling that choice of law analysis for breach of warranty claims was premature at the motion to dismiss stage).

28. See *Maniscalco v. Brother Int'l Corp. (USA) (Maniscalco II)*, 627 F. Supp. 2d 494, 499 (D.N.J. 2009) (“Because the Court finds that Plaintiffs have sufficiently alleged the three [New Jersey Consumer Fraud Act] elements, BIC's motion to dismiss Plaintiffs' CFA claims is denied.”).

29. See *Maniscalco v. Brother Int'l Corp. (USA) (Maniscalco III)*, 793 F. Supp. 2d 696, 710 (D.N.J. 2011).



who remotely harms residents of other states,<sup>30</sup> this company cannot hide behind anonymity to evade liability because it has an interest in selling its goods under its own brand.<sup>31</sup> The plaintiffs' claims are likely to survive pleading because they are likely to know how they were harmed: the *Maniscalco* plaintiffs, for example, were able to allege how they were harmed specifically enough to survive motions to dismiss under plausibility pleading.<sup>32</sup>

However, if the victims can be induced to sue in a state that has no genuine contacts with the alleged tort, their case would be dismissed for incorrect choice of law regardless of its merits. Specifically, a corporate tortfeasor would use its multistate presence to obfuscate the true origin of the tort to its victims and to induce them to sue under the law of a state where they would lose on the choice of law—a state in which neither the tortious act nor the victims' injury occurred. Once the victims sue in a dummy state, the tortfeasor would protract the futile suit to drain their funds. In *Maniscalco*, the defendant's U.S. affiliate was headquartered in New Jersey, home to "one of the strongest consumer protection laws in the nation."<sup>33</sup> Apparently unaware that their injury originated in Japan,<sup>34</sup> the plaintiffs sued unsuccessfully in New Jersey instead of a state in which they suffered the injury (California or South Carolina), where they could have won on the choice of law.<sup>35</sup> The *Maniscalco* exploit promises to be all the more profitable now,

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30. See Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 821 (2004) ("[A]nonymity can also be a substantial aid to tortious conduct.").

31. Cf. Louis E. Boone & David L. Kurtz, *ESSENTIALS OF CONTEMPORARY BUSINESS* 8 (2013) ("Companies also discovered the need to distinguish their goods and services from those of competitors.").

32. See *supra* note 14 and accompanying text.

33. *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 460 (N.J. 1994); see also Baher Azmy & David Reiss, *Modeling a Response to Predatory Lending: The New Jersey Home Ownership Security Act of 2002*, 35 RUTGERS L.J. 645, 665 (2004); William J. Diggs, *Consumer Protection in an eBay Marketplace: An Analysis of the Supreme Court of New Jersey's Radir Wheels Decision to Extend Liability Under the New Jersey Consumer Fraud Act to Individual eBay Sellers*, 40 SETON HALL L. REV. 811, 811 (2010).

34. See *supra* note 12 and accompanying text.

35. See *infra* notes 77–79 and accompanying text.

when the internet makes it easier both to commit interstate torts<sup>36</sup> and to conceal one's physical location.<sup>37</sup>

Despite the Maniscalco exploit's significance, neither conflict of laws nor civil procedure scholarship has studied it. Existing works in conflict of laws neglect the exploit because, for at least fifty years, scholars have debated what an ideal choice of law rule should look like<sup>38</sup> rather than how flaws in current choice of law rules affect individual litigation results. Existing works in civil procedure do not study the exploit because they focus on a different kind of information asymmetry. Much of the work on the so-called paradox of pleading argues that many plaintiffs cannot file complaints that survive pleading because the facts they need to make plausible claims are held by the defendants.<sup>39</sup> Although the paradox of pleading is indeed grave harm to plaintiffs with valid claims, many of its victims at least avoid costly litigation because the lack of the facts they need to survive a motion to dismiss deters them from suing.<sup>40</sup> In contrast, victims of the exploit would sue,

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36. See, e.g., Christopher P. Beall, Comment, *The Scientological Defenestration of Choice-of-Law Doctrines for Publication Torts on the Internet*, 15 J. MARSHALL J. COMPUT. & INFO. L. 361, 365 (1997) ("Choice-of-law issues arise with respect to torts committed via the Internet because interstate communication is so much more prevalent and effortless in that network of networks.").

37. Granted, the means to conceal one's location over the internet may not be foolproof. See Margot Kaminski, *Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 815, 822 (2012) ("The . . . switch to IPv6 makes it even harder to go untraced online in the absence of deliberately deploying anonymizing software like Tor."). However, the Maniscalco exploit is expected to work more often than not because "[i]t is difficult for unsophisticated, private victims of Internet harassment to use tort law . . . as a remedy to Internet harassment. . . . Internet-specific issues—including the . . . need to unmask possible defendants . . . exacerbate the expense and difficulty of litigation." Winhkong Hua, *Cybermobs, Civil Conspiracy, and Tort Liability*, 44 FORDHAM URB. L.J. 1217, 1229 (2017).

38. See, e.g., BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 189 (1963) (arguing that courts should apply the law of the state with the strongest policy interest in a case); Kermit Roosevelt III & Bethan Jones, *What a Third Restatement of Conflict of Laws Can Do*, 110 AJIL UNBOUND 139, 143 n.19 (2016) (debating the normative merits of the Third Restatement's proposed two-step process to choice of law).

39. See, e.g., Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 927 (2010) ("Civil rights plaintiffs alleging motive-based torts . . . cannot state a claim because they do not have access to documents . . . and they cannot get access . . . without stating a claim.").

40. Cf. Jenna Wims Hashway, *Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances Within the Protection of Usury Laws*, 17 ROGER WILLIAMS U. L. REV. 750, 758 (2012) ("[P]laintiffs' attorneys who work on a contingent fee basis screen their potential cases and accept only those with a high likelihood of success . . .").

survive pleading, and see their case dismissed for incorrect choice of law after spending years on it, because they know enough about how they were harmed to make plausible claims, but not enough about where the tort occurred to sue under a correct state's law.

This Article fills that gap in choice of law and civil procedure literature by using a game-theoretic model to study the workings and consequences of the *Maniscalco* exploit. I build a formal model using *Maniscalco*'s fact pattern, as opposed to gathering empirical data on how the exploit is used, because the exploit is likely to be unobservable in the long run. If the exploit is used often enough, plaintiffs might not sue in the long run because they expect to waste money on a case they will lose. If a mere threat to use the exploit is enough to deter litigation, observed instances of the exploit would understate its actual prevalence and impact. After modeling the exploit, I present as a solution to it flashlight discovery limited to the choice of law question conducted while a motion to dismiss is pending, so that plaintiffs would find out early whether they would lose on the choice of law issue if they proceeded to trial. In contrast, the prevailing practice would deny a motion to dismiss a plausible case, conduct full discovery, then dismiss for incorrect choice of law.<sup>41</sup> I then model the consequences of implementing this solution.

As briefly introduced so far and as will be shown in more detail, *Maniscalco* establishes that conflicts scholarship can address a salient practical problem: namely, a procedural defect that would allow companies to profit from interstate torts. However, conflicts scholarship is still considered to be anything but practically useful. Courts have shown that "methodology rarely drives judicial decisions."<sup>42</sup> Twenty-four states have dropped the discipline from their bar exams.<sup>43</sup> Even conflicts scholars admit that this "venerable

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41. See, e.g., *Arroyo v. Milton Acad.*, No. 10-cv-117, 2011 WL 65938, at \*3 (D. Vt. Jan. 10, 2011) (declining to conduct "choice-of-law analysis" because "it would be premature . . . before the completion of discovery").

42. Eugene F. Scoles, Peter Hay, Patrick J. Borchers & Symeon C. Symeonides, CONFLICT OF LAWS § 2.19, at 83 (4th ed. 2004); see also Symeon C. Symeonides, *Choice of Law in the American Courts in 1994: A View "From the Trenches,"* 43 AM. J. COMP. L. 1, 2 (1995) ("[O]f all the factors that may affect the outcome of a conflicts case, the factor that is the most inconsequential is the choice-of-law methodology followed by the court." (emphasis omitted)).

43. Laura E. Little, *Conflict of Laws Structure and Vision: Updating a Venerable Discipline*, 31 GA. STATE U. L. REV. 231, 233–34 (2015).

discipline" is in decline<sup>44</sup> and have for decades discussed how to "rethink"<sup>45</sup> and "reform"<sup>46</sup> conflict of laws, seemingly to no avail. Thus, I return to the question posed at the beginning of this Article: Why is conflict of laws considered to be impractical, when people deal across borders more frequently than ever before?

This Article's second objective is to investigate why conflicts scholarship is considered to be unhelpful at a time of unprecedented need. Existing works make the discipline's decline seem simple to reverse, by exaggerating the role of a single cause and the efficacy of a single solution. Some attribute the "turmoil that . . . besets choice of law" to a neglect of foreign law.<sup>47</sup> Others blame "abstract arguments . . . couched in pseudo-sophisticated jargon[.]"<sup>48</sup> I attribute the field's decline to more fundamental problems in what conflicts scholars consider to be important issues and how they conduct scholarly inquiry. I submit that unfalsifiable argumentation, scholars' failure to define terms vital to productive dialogue, and their obsession with comprehensive, ideal choice of law rules at the expense of studying how existing rules actually affect individual litigation results have created debates ad nauseam

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44. Cf. *id.*

45. Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 279–80 (1990).

46. Julia Halloran McLaughlin, *Premarital Agreements and Choice of Law: "One, Two, Three, Baby, You and Me,"* 72 MO. L. REV. 793, 814 (2007).

47. See, e.g., Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309, 1314 (1999); see also Ralf Michaels & Christopher A. Whytock, *Internationalizing the New Conflict of Laws Restatement*, 27 DUKE J. COMP. & INT'L L. 349, 358 (2017) ("The new Conflict of Laws Restatement provides an exciting opportunity to offer courts much-needed guidance in conflict of laws in the international context and to benefit from comparative analysis.").

48. Earl M. Maltz, *Do Modern Theories of Conflict of Laws Work? The New Jersey Experience*, 36 RUTGERS L.J. 527, 547 (2005).

over the exact same ideas,<sup>49</sup> jargon that splits hairs,<sup>50</sup> and abstruse claims that elude seemingly everyone but their fiercest disciples.<sup>51</sup>

This Article proceeds as follows. Part I elaborates on the legal basis and usage of the exploit, shows how this Article fits into choice of law and civil procedure literature, and presents a one-sided incomplete information game to model the exploit. This model is akin to the chain-store paradox entry-deterrence game, which depicts a chain store taking losses in the short run to drive out local stores in the long run.<sup>52</sup> Part II advances flashlight discovery on the choice of law question pending motions to dismiss as a solution to the exploit, and models the consequences of implementing it. Part III argues that a misunderstanding of practitioners' needs and undisciplined inquiry have relegated the discipline to an academic backwater, and proposes a shift from macro-theoretical conflict of laws (designing comprehensive, ideal choice of law rules) to micro-applied conflicts (studying how existing rules immediately affect individual litigation outcomes). I then conclude by discussing the debate over the alleged irrelevance of legal scholarship as a whole.

Although this Article's immediate subject matter is conflict of laws, civil procedure, and torts, I intend its practical benefits to reach beyond those fields. The practical need for conflict of laws scholarship has arguably never been greater than now, when the internet's omnipresence is making our territorial legal system as it exists increasingly unsustainable.<sup>53</sup> By helping to cure the

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49. See, e.g., Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 1, 47 (2001) ("[I]n choice of law theory, we observe a debate that cycles endlessly, regarding whether choice of law by courts should be governed by detailed, predictable rules, or, instead, by broad standards, such as balancing tests."); Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 997 (1991) ("Every argument advanced either for or against [renvoi] has turned out to be inconclusive or question-begging. Each step in the debate has led us back to the starting point—a veritable *circulus inextrabilis*.").

50. Cf. Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925, 926–28 (2004).

51. Cf. LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS*, at xiii (1991) (acknowledging a "wild-eyed community of intellectual zealots" in conflict of laws and that the field's "reputation as arcane and abstract . . . is well deserved").

52. DAVID DRANOVE, DAVID BESANKO & MARK SHANLEY, *ECONOMICS OF STRATEGY* 200 (2017).

53. See, e.g., Estelle Shirbon, *Press Ban in Tatters as UK Celebrity Threesome Story Spreads Online*, REUTERS (Apr. 20, 2016), <https://uk.reuters.com/article/uk-britain-legal/press-ban-in-tatters-as-uk-celebrity-threesome-story-spreads-online-idUKKCN0XH1WO> (describing how English residents circumvented a gag order on English tabloids by accessing the banned

discipline's generations-old malaise,<sup>54</sup> this Article aims to prod conflicts scholarship to leave its echo chamber and to contribute to designing a legal system fit to survive the age of cybertorts.

# I. THE MECHANISM AND MATERIAL CONSEQUENCES OF THE MANISCALCO EXPLOIT

## A. The Legal Basis and Tactical Usage of the Maniscalco Exploit

The series of cases named *Maniscalco v. Brother International Corp.* arose from an alleged defect in certain printer models sold by the defendant (BIC), which is headquartered in New Jersey.<sup>55</sup> The plaintiffs, who purchased the printers at issue in California and South Carolina, sued under the New Jersey Consumer Fraud Act (CFA) alleging, inter alia, that BIC knowingly sold "machines that they know are likely to fail" due to the defect.<sup>56</sup> In 2009, the U.S. District Court for the District of New Jersey denied BIC's motion to dismiss the CFA claims, ruling that the claims were sufficiently specific.<sup>57</sup> For the purpose of considering the motion to dismiss, the trial court applied New Jersey law without considering another state's law because BIC argued that the choice of law question is "best left for resolution later[,] and the plaintiffs did not object."<sup>58</sup>

However, the plaintiffs' case fell apart once discovery revealed that Brother Industries Limited (BIL), BIC's parent entity located in Japan, had manufactured the printers at issue and printed the manuals that should have disclosed the alleged defect.<sup>59</sup> Once this evidence was revealed, BIC moved successfully to dismiss, arguing

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information on Scottish press through the internet); OLGA KIESELMANN, DATA REVOCATION ON THE INTERNET, at v (2017) ("[S]ometimes users . . . want to delete their . . . data from the Internet. . . . [T]o delete previously published data, the user would need to delete it on a foreign server, i.e., where she has absolutely no control."); Zhongjie Wang, Yue Cao, Zhiyun Qian, Chengyu Song & Srikanth V. Krishnamurthy, *Your State Is Not Mine: A Closer Look at Evading Stateful Internet Censorship*, PROCEEDINGS OF THE 2017 INTERNET MEASUREMENT CONFERENCE 114 (arguing that the INTANG measurement-driven censorship evasion tool can circumvent Chinese state censors at "near perfect evasion rates").

54. See *supra* notes 1–2 and accompanying text.

55. *Maniscalco v. Brother Int'l Corp.* (USA) (*Maniscalco II*), 627 F. Supp. 2d 494, 497 (D.N.J. 2009).

56. *Id.* at 500 (emphasis omitted).

57. *Id.* at 506.

58. *Id.* at 499 n.2.

59. *Maniscalco v. Brother Int'l Corp.* (USA) (*Maniscalco III*), 793 F. Supp. 2d 696, 707 n.4 (D.N.J. 2011).

that New Jersey law does not apply under the most significant relationship rule because the failure to disclose any alleged defect occurred in Japan.<sup>60</sup> The court agreed that New Jersey had fewer contacts with the case than did Japan,<sup>61</sup> and ruled that the laws of the plaintiffs' home states (South Carolina and California) have the most significant relationship to the case because the plaintiffs purchased the allegedly defective printers and relied on any misrepresentation in those states.<sup>62</sup> The Third Circuit affirmed, ruling that New Jersey law does not apply because at least some of the allegedly tortious conduct "emanated from Japan."<sup>63</sup> The court also ruled that the law of the appellant's home state (South Carolina) would apply to the case, despite the lack of a presumption for applying its law.<sup>64</sup>

I argue that BIC could have disposed of *Maniscalco* during pleading, but deliberately protracted the case to discovery in order to drain the plaintiffs' funds on a futile case. BIC knew in November 2002 that BIL had investigated in Japan the alleged defect at issue in *Maniscalco*.<sup>65</sup> Hence, when the plaintiffs sued under New Jersey law in 2006<sup>66</sup> alleging that BIC investigated the defect and concealed it,<sup>67</sup> BIC could have disposed of the case at the motion to dismiss stage by revealing the fact that the alleged tortious conduct occurred in Japan. (The court could have considered extrinsic evidence at pleading by converting the motion to dismiss into a motion for summary judgment<sup>68</sup> or by using incorporation by reference.<sup>69</sup>) However, had BIC disposed of the case early,

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60. *Id.* at 707.

61. *Id.* at 710.

62. *Id.* at 708.

63. *Maniscalco v. Brother Int'l (USA) Corp. (Maniscalco IV)*, 709 F.3d 202, 211 (3d Cir. 2013).

64. Following the trial court's dismissal, only the South Carolina-based plaintiff appealed. *Id.* at 208.

65. *Maniscalco III*, 793 F. Supp. 2d at 699–700.

66. *Maniscalco v. Brother Int'l Corp. (USA) (Maniscalco I)*, 2008 WL 2559365 at \*1, (D.N.J. June 26, 2008).

67. *Maniscalco IV*, 709 F.3d at 206.

68. See Fed. R. Civ. P. 12(d); *Messer v. V.I. Urb. Renewal Bd.*, 623 F.2d 303, 307 (3d Cir. 1980) ("[W]here matters outside the pleadings are considered by the district court, a motion under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted will be treated as a Rule 56 motion for summary judgment.").

69. Usually, courts invoking incorporation by reference consider extrinsic evidence pending a motion to dismiss only when certain conditions are met—for example, if the

the plaintiffs may have sued again under a correct state's law because they would now know where the alleged tortious act occurred. Instead, BIC asked the court not to consider the choice of law issue at pleading<sup>70</sup> and moved to dismiss only after discovery revealed what it knew already,<sup>71</sup> thereby protracting the case for two more years until the inevitable dismissal.<sup>72</sup>

One may argue that BIC's failure to disclose the case's Japanese contacts at pleading was not the result of a deliberate attempt to protract litigation. Instead, BIC might have involuntarily waited until after discovery to move to dismiss for incorrect choice of law, because the District Court has ruled in past cases that "it can be inappropriate or impossible for a court to conduct [choice of law] analysis at the motion to dismiss stage when . . . no discovery has taken place."<sup>73</sup> However, this argument fails to answer two questions. First, if the court would have waited until discovery to decide the choice of law anyway, why did BIC preemptively ask the court to delay addressing the issue?<sup>74</sup> Second, if BIC did not intend to protract the case, why didn't BIC supply the facts that the court needed to decide the choice of law early? In fact, the District Court has used extrinsic evidence in the past to dismiss claims, over plaintiffs' objections.<sup>75</sup> Moreover, the plaintiffs would likely not have objected to BIC introducing extrinsic evidence, because

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authenticity of the extrinsic evidence is not disputed and the complaint relies on the extrinsic evidence. See *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 560 (3d Cir. 2002). However, federal courts have frequently considered extrinsic evidence pending a motion to dismiss even when these conditions do not apply. See, e.g., *Calkins v. Dollarland, Inc.*, 117 F. Supp. 2d 421, 429 n.4 (D.N.J. 2000) (considering extrinsic evidence introduced by the defendant without converting the motion to dismiss to a motion for summary judgment, despite the plaintiff's opposition); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (considering extrinsic evidence that is neither attached to nor cited by the plaintiff's complaint).

70. *Maniscalco v. Brother Int'l Corp. (USA) (Maniscalco II)*, 627 F. Supp. 2d 494, 499 n.2 (D.N.J. 2009).

71. See *supra* note 12 and accompanying text; *Maniscalco v. Brother Int'l Corp. (USA) (Maniscalco III)*, 793 F. Supp. 2d 696, 710 (D.N.J. 2011) (dismissing the suit because "New Jersey law does not apply" and the "relevant decisions [regarding the alleged wrongful conduct] were not made in New Jersey, but in Japan").

72. See *supra* note 21 and accompanying text.

73. *In re Samsung DLP Television Class Action Litig.*, 2009 WL 3584352, at \*3 (D.N.J. Oct. 27, 2009); see also *Arlandson v. Hartz Mountain Corp.*, 792 F. Supp. 2d 691, 699-700 (D.N.J. 2011).

74. See *Maniscalco II*, 627 F. Supp. 2d at 499 n.2.

75. See *Calkins v. Dollarland, Inc.*, 117 F. Supp. 2d 421, 429 n.4 (D.N.J. 2000).



knowing that the case is connected to Japan would have saved the plaintiffs from years of futile litigation.

However, preventing the victims from suing under the law of the state where the tortious act occurred, on its own, does not guarantee success with the exploit. To maximize the likelihood that the plaintiffs' case will be dismissed on the choice of law issue, they must also be prevented from suing under the law of the states in which they suffered the alleged injury. In *Maniscalco*, the courts ruled that the laws of California and South Carolina—where the plaintiffs purchased the allegedly defective printers—apply to the case, according to the most significant relationship rule.<sup>76</sup> Applying the law of the state where the injury was suffered is unlikely to be an anomaly, as courts facing similar circumstances in other states that use the Second Restatement have done the same.<sup>77</sup> Courts in states that follow the First Restatement have also ruled that the place of the wrong is the state where the injury was suffered, not the state where the act causing the injury occurred.<sup>78</sup> Hence, a tortfeasor using the exploit must induce victims to sue under the law of a state where neither the tortious act nor the injury occurred. Notably, the *Maniscalco* plaintiffs sued in New Jersey, which has “one of the strongest consumer protection laws in the nation.”<sup>79</sup>

Of course, not all tortfeasors may find the exploit useful. Unlike many corporations, which cannot act completely anonymously because they need to market their goods and services under their own brands, individual tortfeasors who act alone over the internet can be difficult to catch.<sup>80</sup> Because they may not be brought to trial to begin with, such lone wolves may not need to use the exploit.

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76. See *Maniscalco III*, 793 F. Supp. 2d at 708; *Maniscalco v. Brother Int'l (USA) Corp. (Maniscalco IV)*, 709 F.3d 202, 208–9 (3d Cir. 2013).

77. See *Pa. Emp., Benefit Tr. Fund v. Zeneca, Inc.*, 710 F. Supp. 2d 458, 475 (D. Del. 2010) (applying New York law because New York is “the forum where he relied on Defendants’ alleged misrepresentations”).

78. See, e.g., *Bullard v. MRA Holding, LLC*, 740 S.E.2d 622 (Ga. 2013) (ruling that the place of the wrong under *lex loci delicti* is the state in which injury is felt, not the state in which the conduct causing the injury occurred).

79. See *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 460 (N.J. 1994) (citing Governor’s Press Release for Assembly Bill No. 2402, at 1 (Apr. 19, 1971)).

80. See, e.g., Marcus Chung, *A New Wave of Ransomware Is Coming This Fall (and You’re Probably Not Prepared)*, 20 J. HEALTH CARE COMPLIANCE 37, 37 (2018) (“[O]ne of the easiest assaults on a computer system is ransomware—a debilitating attack through which an anonymous criminal encrypts your files and then forces you to pay them whatever amount they request in order to regain access to your system . . .”).

Even if the tortfeasor is a corporation who cannot act anonymously, the exploit would also be unhelpful if its cost exceeds its revenue. For example, if a tort returns \$30,000 in gains but it would cost \$50,000 to protract a futile trial to discovery, the exploit would seem to be not worth its cost. However, this cost-benefit calculation does not account for the exploit's long-term gains. Assume that the tortfeasor commits ten torts that each returns \$30,000, and that the tortfeasor goes to trial and uses the exploit for a total of four times, each at a cost of \$50,000. If the plaintiff stops suing with the fifth tort because the previous losses have built an expectation that she will lose at trial, the tortfeasor would make an overall profit of \$100,000 despite initial losses. Section I.C.3 describes in detail how a tortfeasor may take short-term losses for greater long-term gains.

Moreover, although corporate tortfeasors can still use the *Maniscalco* exploit even if none of the material acts occur over the internet, the rising volume of cross-border transactions made over the internet<sup>81</sup> promises to make the exploit both easier to use and more effective.<sup>82</sup> Since long before the internet existed, companies, unlike individuals, have maintained a presence in many states simultaneously.<sup>83</sup> Even in *Maniscalco*, none of BIL's allegedly tortious conduct took place over the internet; the plaintiffs sued under New Jersey law because they apparently did not know that the tortious act occurred in Japan.<sup>84</sup> However, the fact remains that the internet makes it easier to commit torts over state borders<sup>85</sup> and to disguise one's actual location.<sup>86</sup> Although the widely available

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81. See Sindbæk, *supra* note 5.

82. Although this Article focuses on the use of the *Maniscalco* exploit in litigation arising from torts, it could also be used in cases arising from contracts because corporations could deceive plaintiffs as to which state has the most significant relationship to a contract. Of course, I am not claiming that the exploit can be used in *all* cases arising from torts and contracts. In product liability suits, for example, it would be difficult to misrepresent the state with genuine contacts to a case because plaintiffs would sue in the state where the product at issue was manufactured.

83. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (establishing personal jurisdiction in Washington against a Delaware corporation whose principal place of business was in Missouri).

84. See *supra* note 12 and accompanying text. The *Maniscalco II* plaintiffs could not have won on the choice of law issue because they were not New Jersey residents and, therefore, the effect of their injury was not felt in New Jersey.

85. See Beall, *supra* note 36.

86. Charles A. Weiss, Note, *Available to All, Produced by Few: The Economic and Cultural Impact of Europe's Digital Single Market Strategy Within the Audiovisual Industry*,

means to conceal one's location while acting via the internet are not foolproof,<sup>87</sup> I submit that they need not be foolproof for the exploit to work, given that attorneys<sup>88</sup> and the public<sup>89</sup> that they represent in court tend to be unfamiliar or inept with cybersecurity practices.

One may argue that BIC could have evaded liability in *Maniscalco* without using the exploit because an act material to the plaintiffs' alleged injuries—the "failure to disclose latent defects" in the printers at issue<sup>90</sup>—was committed by BIC's parent entity, not by BIC. However, neither the district court nor the Third Circuit ever states that Brother could have gotten the case thrown out by invoking the corporate veil. Moreover, the rule that "a subsidiary is not liable for acts of its parent" does not hold if the veil is pierced.<sup>91</sup> Because the corporate veil is not always available and can only be pierced if one legal entity is the alter ego of another in the commission of a tort,<sup>92</sup> the argument that the *Maniscalco* exploit can be a useful tool for corporate tortfeasors still stands. Moreover, the rule that one cannot invoke the tortious acts of a subsidiary to obtain personal jurisdiction against a parent entity without

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2016 COLUM. BUS. L. REV. 877, 897-98 (2016) (describing how users of virtual private networks "can disguise their location with [a proxy] in a different territory").

87. See Kaminski, *supra* note 37.

88. See, e.g., Cheryl B. Preston, *Lawyers' Abuse of Technology*, 103 CORNELL L. REV. 879, 922 (2018) (stating that law firms are "woefully unprepared" for cyberattacks) (quoting Victor Li, *How Prepared Are Law Firms for Cyber Breaches? And How Often Are Firms Being Attacked?*, A.B.A. J. (June 29, 2017, 8:41 AM), [https://www.abajournal.com/news/article/how\\_prepared\\_are\\_law\\_firms\\_for\\_cyber\\_breaches\\_and\\_how\\_often\\_are\\_they\\_being](https://www.abajournal.com/news/article/how_prepared_are_law_firms_for_cyber_breaches_and_how_often_are_they_being) [https://perma.cc/8RM9-BEAE]; Gerald O'Hara, *Cyber-Espionage: A Growing Threat to the American Economy*, 19 COMM. LAW CONCEPTUS 241, 243 (2010) ("Private firms are often unaware of data breaches, sometimes discovering cyber attacks only after they have been ongoing for months or even years.").

89. See, e.g., Aaron Smith, *What the Public Knows About Cybersecurity*, PEW RSCH. CTR. (Mar. 22, 2017), <http://www.pewinternet.org/2017/03/22/what-the-public-knows-about-cybersecurity/> ("Of the 13 questions [about cybersecurity] in the survey, a substantial majority of online adults were able to correctly answer just two of them."); Lawrence J. Trautman, *Cybersecurity: What About U.S. Policy?*, 2015 U. ILL. J.L., TECH. & POL'Y 341, 349-50 (2015) ("[T]echnical issues surrounding cybersecurity are not widely understood by the general public.").

90. *Maniscalco v. Brother Int'l (USA) Corp. (Maniscalco IV)*, 709 F.3d 202, 211 (3d Cir. 2013).

91. See, e.g., *Phonometrics, Inc. v. Resinter N. Am. Corp.*, No. 97-1101, 1997 WL 580519, at \*1 (Fed. Cir. Sept. 17, 1997) ("[A] subsidiary is not liable for acts of its parent, and vice versa (absent some piercing of the corporate veil).").

92. See, e.g., *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir. 1985).

sufficient contacts to the alleged tort<sup>93</sup> does not apply to *Maniscalco* because, in that case, the parent did have genuine contacts.

Finally, a qualification is in order about the significance of the *Maniscalco* exploit in the tactical considerations made by corporate tortfeasors and their victims. The fact that this Article focuses on the exploit should not be taken to mean that it is the *only* factor that affects corporate tortfeasors' decision to misrepresent the origin of a tort as a certain state, or the victims' decision to sue under the laws of a particular state. Whether a borrowing statute affects the statute of limitations<sup>94</sup> or even whether counsel has an office in a state may affect the parties' decisions. This Article simply argues that the exploit is a significant factor that would affect the parties' tactical calculus and that existing scholarship fails to address it.

Section I.A having established the legal basis of the *Maniscalco* exploit, Section I.B discusses how this work fits into conflicts and civil procedure literature. Section I.C models the consequences of the *Maniscalco* exploit using entry deterrence games under one-sided incomplete information.

### *B. The Scholarly Significance of the Maniscalco Exploit in Conflict of Laws and Civil Procedure*

To my knowledge, no work in conflict of laws or civil procedure studies the *Maniscalco* exploit. I submit that conflicts literature overlooks the *Maniscalco* exploit because conflict of laws scholars tend to focus on designing theoretically ideal choice of law rules, but the exploit is about how a defect in an existing choice of law rule immediately affects litigation outcomes. The history of American conflict of laws is scholars vying to replace the prevailing choice of law rule with their idea of a theoretically superior alternative. The First Restatement's *lex loci* rule, once dominant, was overthrown by scholars and judges in the so-called choice of law revolution of the 1960s.<sup>95</sup> Since then, the discipline has seen

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93. See *Daimler AG v. Bauman*, 571 U.S. 117 (2014); see also Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1 (1986).

94. See, e.g., *Miller v. Stauffer Chem. Co.*, 581 P.2d 345, 348 (Idaho 1978) ("Borrowing statutes change the common law rule governing choice of the applicable statute of limitation.").

95. See Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847, 1868 (2015).

repeated proposals and takedowns of the same few choice of law rules such as interest analysis, comparative impairment, and the better rule of law.<sup>96</sup> The debate over interest analysis remains especially memorable, both for its longevity<sup>97</sup> and the acrimonious tone taken by some interlocutors, rare even for legal academia.<sup>98</sup>

Amid such heightened passions for ideal choice of law rules, scholars have neglected the value of studying how litigants and judges interact with existing choice of law rules. For example, conventional conflicts scholarship does not study how uncertainty over the facts of a case affects courts' choice of law. A "classic choice of law problem[]" asks, "[I]f two friends from Maine get into a car accident . . . in Chad, which law governs whether the passenger can sue the driver for negligence?"<sup>99</sup> Scholars of classic choice of law problems tend to assume that two Mainers really did get into a car accident in Chad, and argue over which state's law should apply to that case.<sup>100</sup> In contrast, this Article is uninterested in whether it would be just to apply New Jersey law to *Maniscalco*. Instead, it

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96. See, e.g., Gene R. Shreve, *Currie's Governmental Interest Analysis – Has It Become a Paper Tiger?*, 46 OHIO STATE L.J. 541, 542 (1985) ("Today, Currie's governmental interest analysis is scarcely more than a paper tiger."); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2466 (1999) ("Interest analysis is the leading scholarly position, and the only doctrine that could plausibly claim to have generated a school of adherents."); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 77 (1989) (arguing that the Second Restatement "mystifies rather than clarifies"); William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 19 (1963) (advancing the comparative impairment approach); William H. Allen & Erin A. O'Hara, *Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1035–36 (1999) (criticizing the comparative impairment approach); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1586–88 (1966) (advancing the "better rule of law" approach); Note, *Bundled Systems and Better Law: Against the Leflar Method of Resolving Conflicts of Law*, 129 HARV. L. REV. 544 (2015).

97. See, e.g., Lea Brilmayer, *What I Like Most About the Restatement (Second) of Conflicts, and Why It Should Not Be Thrown Out with the Bathwater*, 110 AJIL UNBOUND 144, 144 (2016) ("This symposium's essay by . . . Kermit Roosevelt III[] seems to retain what may be the least defensible aspects of governmental interest analysis . . .").

98. See, e.g., Bruce Posnak, *Choice of Law – Interest Analysis: They Still Don't Get It*, 40 WAYNE L. REV. 1121, 1131 (1994) ("[Professor Brilmayer] refuse[s] to 'get it' and abuse[s] Currie's ideas, [and] she has spawned a whole school of misinformed fry-critics. . . . [T]hey have . . . infected both courts and practicing lawyers . . . ." (footnotes omitted)).

99. Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 978 (1991).

100. See, e.g., H. Thomas Byron III, Comment, *A Conflict of Laws Model for Foreign Branch Deposit Cases*, 58 U. CHI. L. REV. 671, 671–72 (1991) (describing foreign bank deposit cases as a "classic conflict of laws problem" and arguing that "courts should resolve this problem . . . by explicitly . . . balancing the interests of the affected jurisdictions").

points out that in actual litigation—unlike in classic choice of law problems—there can be uncertainty over whether the wrongful act occurred in New Jersey at all, and that defendants may abuse that uncertainty to evade liability. Put differently, if classic choice of law debates the philosophical reasons for whether one should drive on the left or right side of the road, this Article simply shows that driving on the right is correlated to more accidents.<sup>101</sup>

To my knowledge, the work to come closest to discussing the exploit is an endnote in a casebook by Brilmayer, Goldsmith, and O'Hara O'Connor. The difference is that the endnote presents uncertainty over the facts of a case during pleading as an unfair advantage for plaintiffs, whereas this Article argues that the uncertainty benefits tortfeasors. The endnote discusses a case in which LCD panel manufacturers had allegedly fixed prices in violation of California law. The district court dismissed, ruling that only “plaintiffs who purchased products in California” may invoke California law,<sup>102</sup> but the plaintiffs did not plausibly allege that the purchases at issue had occurred in California.<sup>103</sup> The Ninth Circuit reversed, ruling that the plaintiffs’ allegations that the defendants had committed wrongful acts in California were enough to apply California law at pleading: “Wherever the outer limit of due process constraints may lie . . . [the] Defendants’ alleged illegal activity within California created more significant contacts with California than the contacts described in *Allstate* created with Minnesota.”<sup>104</sup> The endnote in the casebook then asks:

Doesn't the Ninth Circuit's ruling allow plaintiffs to unfairly control the choice of law, simply by making allegations of contact with the forum? The proper standard of proof for such allegations, made at the outset of the case and before the trier of the fact has evaluated the evidence, has been the subject of some dispute. Under the Supreme Court's current standard, a plaintiff must have “enough facts to state a claim to relief that is plausible on its face” to survive a 12(b)(6) motion for dismissal. *Bell Atlantic*

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101. See J.J. LEEMING, ROAD ACCIDENTS: PREVENT OR PUNISH? 26 (1969).

102. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, Nos. M 07-1827, C 09-4997 SI, 2010 WL 4705518, at \*2 (N.D. Cal. Nov. 12, 2010), *rev'd sub nom.* AT&T Mobility LLC v. AU Optronics Corp., 707 F.3d 1106 (9th Cir. 2013).

103. *In re TFT-LCD Antitrust Litig.*, 2010 WL 4705518, at \*1.

104. *AU Optronics*, 707 F.3d at 1111.

Corp. v. Twombly, 550 U.S. 544, 547 (2007). Does *Allstate v. Hague* meet this standard?<sup>105</sup>

*AU Optronics* indeed shows that plaintiffs can obtain favorable choice of law rulings by falsely asserting contacts.<sup>106</sup> However, the endnote's implied concern that the ruling unfairly benefits plaintiffs, or that plaintiffs might sue under the laws of unrelated states en masse, is unjustified. Plaintiffs are unlikely to falsely assert contacts because, even if they can trick a court into applying a favorable state's law and denying a motion to dismiss, their scheme would be exposed at discovery. The exception that proves this rule is *Hatfill v. Foster*, in which the plaintiff falsely asserted contacts with Virginia for a favorable choice of law ruling but was exposed during further proceedings.<sup>107</sup> Even if the court does not expose the plaintiffs sua sponte, the defendants are likely to do so because they often know more about how the plaintiffs were harmed than the plaintiffs do.<sup>108</sup> Indeed, plaintiffs' ability to control the choice of law by alleging contacts with a state is more likely to harm the plaintiffs themselves; as this Article shows, the Maniscalco exploit enables tortfeasors to evade liability by inducing plaintiffs to sue under the law of a state where they cannot win.

Unlike most conflict of laws scholars, many civil procedure scholars have studied a problem that, like the Maniscalco exploit, arises from an information asymmetry between plaintiffs and tortfeasors.<sup>109</sup> However, the paradox of pleading in civil procedure

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105. LEA BRILMAYER, JACK GOLDSMITH & ERIN O'HARA O'CONNOR, CONFLICT OF LAWS: CASES AND MATERIALS 326 (7th ed. 2015).

106. No public proceeding in the Ninth Circuit or in the district court ever revealed whether the original plaintiffs in the *AU Optronics* case, AT&T and its subsidiaries, had falsely alleged contacts with California at the pleading stage; the original plaintiffs apparently settled shortly after the Ninth Circuit's ruling. See Pan Chih-yi & Ann Chen, *AUO Says Price-Fixing Lawsuit Fully Settled with AT&T*, FOCUS TAIWAN (Feb. 18, 2013, 5:04 PM), <http://focustaiwan.tw/news/aeco/201302180021.aspx>. All known proceedings following the Ninth Circuit's ruling involved state governments and indirect purchaser plaintiffs of LCD panels such as Best Buy, who settled their claims in 2016. See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-01827-SI, 2017 WL 66836, at \*2 (N.D. Cal. Jan. 6, 2017).

107. *Hatfill v. Foster* (*Hatfill I*), 372 F. Supp. 2d 725 (S.D.N.Y. 2005), *rev'd on reconsideration*, *Hatfill v. Foster* (*Hatfill III*), 415 F. Supp. 2d 353 (S.D.N.Y. 2006) (applying Virginia law at pleading); *Hatfill III*, 415 F. Supp. 2d at 359–60 (reversing because “[the] plaintiff and his lawyers pulled a fast one on the Court”).

108. See, e.g., Kilaru, *supra* note 39.

109. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 20 (2010) (arguing that plausibility pleading is “fact pleading by another name”).

and the Maniscalco exploit are caused by different kinds of information asymmetry, and the exploit is likely to be more damaging to its victims. The paradox of pleading refers to the tendency of tort victims to know less about how they were harmed than do the people who harmed them.<sup>110</sup> For instance, someone who suspects wrongful termination might not sue if the reason for the dismissal “is revealed only in documents that the plaintiff has not seen” and are held by the employer, because the complaint would not survive a motion to dismiss.<sup>111</sup> Like victims of the paradox of pleading, victims of the exploit lack information held by tortfeasors that they need to win. The difference is that victims of the paradox know so little about who harmed them, and how, that they cannot survive pleading, but victims of the exploit know enough to survive a motion to dismiss but not enough to win.

This difference is not a mere technicality, because the difference makes the Maniscalco exploit potentially more harmful than the paradox of pleading is. The paradox harms plaintiffs by deterring them from suing or, if they sue despite the deterrence, by getting their claims dismissed at pleading for insufficient plausibility. The harm to the plaintiffs who do not sue would be not being paid damages, whereas the additional harm to those who sue and lose would be the cost of litigating until dismissal at pleading.<sup>112</sup> In contrast to the paradox, the Maniscalco exploit harms plaintiffs by inducing them to bring cases that will survive pleading, but under the law of a state where those cases will be dismissed after discovery for incorrect choice of law. The harm to the victims of the exploit would include not being paid damages and the cost of litigating a case into discovery. Because litigating a case into discovery usually costs much more than litigating into dismissal during pleading,<sup>113</sup> the exploit is likely to be much more harmful than the paradox is.

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110. See, e.g., Kilaru, *supra* note 39.

111. A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 28 (2009).

112. See Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 879 (2010) (“[S]trict pleading will screen some meritorious suits, even ones with a high probability of trial success but a probability that is not evident at the pleading stage before access to discovery.”).

113. See UNITED STATES COURTS, TABLE C-5—U.S. DISTRICT COURTS—CIVIL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY (June 30, 2018), available at <https://www.uscourts.gov/statistics/table/c-5/statistical-tables-federal-judiciary/2018/06/30> (showing that the median time from filing to disposition of a federal civil case during or after pretrial



Moreover, like the scholarship on the paradox of pleading, studies on the various ways to introduce evidence at the motion to dismiss stage neglect the Maniscalco exploit. The exploit can induce plaintiffs to sue under the law of a state where they are guaranteed to lose and litigate that futile case into discovery because, at the time they sue, the plaintiffs have bad information about where the act that harmed them occurred. Hence, a solution to the Maniscalco exploit would be to introduce evidence about where an alleged tortious act occurred at the motion to dismiss stage so that plaintiffs tricked by tortfeasors can cut their losses early and sue under the law of a state that has genuine contacts to the case. However, to my knowledge, existing works bill access to evidence at the motion to dismiss stage as a solution to the paradox of pleading, not to the Maniscalco exploit.<sup>114</sup> In Part II, I propose flashlight discovery limited to the choice of law issue as a solution to the exploit and model how various conditions would affect its implementation.

Finally, this Article identifies a tactical consideration that tortfeasors would make in the course of deceiving courts, which existing works neglect. Recall that, at pleading, tortfeasors like BIC must make two claims: that they did not commit the tort they are accused of, and that any tortious act, if it did occur, would have taken place in a state that lacks genuine contacts with the alleged tort. These claims could raise suspicions that the tortfeasor did commit the tort and is trying to hide the state with the most significant relationship to the tort, akin to how someone accused of murder might be viewed with suspicion if they claimed that they did not kill anyone but, if they did, they must have been drunk. The fact that tortfeasors must deny wrongful conduct while pointing plaintiffs to a dummy state suggests that tortfeasors' legal

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proceedings is 13.1 months); Raúl Rojas, *Offer of Judgment Rules in Puerto Rico and Florida*, 49 REV. DER P.R. 1, 11 (2009) ("From filing to discovery [it] is common to have a couple of years pass by.").

114. See, e.g., Jill Curry & Matthew Ward, *Are Twombly and Iqbal Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH L. REV. 827, 836 (2013) ("[P]laintiffs cannot state a claim because they do not have access to discovery, but they will not have access to discovery until they state a claim."). See generally Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010) (arguing that courts should permit limited discovery at the beginning of litigation because *Twombly* and *Iqbal*'s plausibility pleading standard makes it more difficult for civil rights litigation to survive dismissal).

arguments must strike a fine balance so as to deceive plaintiffs while avoiding punishment for openly deceiving the court.

Section I.B having established the position of the Maniscalco exploit within conflict of laws and civil procedure literature and having justified its study, Section I.C models the effects of the exploit on litigation, using entry deterrence games under one-sided incomplete information.

*C. An Entry-Deterrence Model of Interstate Torts with the Maniscalco Exploit, Under One-Sided Incomplete Information*

This Section adapts the chain-store paradox, which models a chain store selling goods at a loss in the short run to muscle out local stores in the long run,<sup>115</sup> to model a corporate tortfeasor financing futile litigation in the short run to prevent plaintiffs from suing it in the long run. The model used in this Article is different from the chain-store paradox, in that the uncertainty at play is whether the plaintiff is suing under the law of a dummy state; in the chain-store paradox, the uncertainty at play is the strength of the chain store's resolve to put competitors out of business. The two models are similar in that they both simulate a process of entry deterrence, and that the stronger player may willingly take losses in the short run for greater gains in the long run.

I use a formal model to study the Maniscalco exploit for two reasons. First, the exploit is likely to be unobservable in the long run. Section I.A explained that, if tortfeasors use the exploit sufficiently often in the short run to evade paying damages to plaintiffs, tortfeasors may profit from the exploit in the long run without actually using it, because the expectation that tortfeasors will win by draining the plaintiffs' funds would deter plaintiffs from suing. If a credible threat to use the exploit is enough to make the exploit profitable, an empirical study of only observed instances of the exploit would understate the true magnitude of its effect on the litigation process.

Second, formal models grounded in defensible assumptions about reality can concisely simulate complex strategic behavior and reveal valuable insights into its consequences.<sup>116</sup> I find clarity and

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115. See DRANOVE, BESANKO & SHANLEY, *supra* note 52.

116. See Lea Brilmayer & Yunsieg P. Kim, *Model or Muddle? Quantitative Modeling and the Façade of "Modernization" in Law*, 56 WASHBURN L.J. 1, 19 (2017) (criticizing formal models

conciseness to be especially important to a discussion on the consequences of choice of law rules, because unfalsifiable argumentation and disagreements over vital terminology have caused decades of futile debate over which choice of law rule is theoretically superior to another; Part III discusses this persistent malady in detail and advances formal modeling as an aid for logical argumentation in conflicts scholarship. To show how formal models can serve in that capacity, Section I.C models civil litigation as a sequential game in which a tortfeasor and a plaintiff act in turn—commit a tort, respond by filing a complaint, and so on—seeking to maximize payoffs.<sup>117</sup>

I model the Maniscalco exploit using a finite repeated game in which one tortfeasor faces multiple plaintiffs, one plaintiff in each round. Section I.C.1 uses Bayesian updating to explain how the plaintiff in the first round of the repeated game falls victim to the exploit and how plaintiffs in subsequent rounds gradually come to expect the tortfeasor to use the exploit. Section I.C.2 uses an extended game tree to model the behavior of the tortfeasor and the  $n$ th plaintiff ( $n > 1$ ,  $n \in \mathbb{N}$ ), to derive the conditions under which the tortfeasor would use the exploit and those under which the plaintiff would go to trial, settle, or give up on suing the tortfeasor. Section I.C.3 depicts the  $r$ th round ( $r > n$ ,  $r \in \mathbb{N}$ ) and briefly returns to the  $n$ th to show that the tortfeasor has an incentive to use the exploit at a loss in the short run, because the long-term gains may offset them. That is, if the tortfeasor has used the exploit often enough by the  $n$ th round that the  $r$ th plaintiff expects to lose at trial, the tortfeasor could profit thereafter without having to pay the cost of the exploit (protracting trials) because plaintiffs beginning with the  $r$ th would not sue the tortfeasor.

*1. The ME model: Bayesian updating in the early rounds of the game*

**Players.** The ME model features two categories of players: a corporate tortfeasor present in multiple states and individual

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grounded in indefensible assumptions about reality); JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 1 (1994) (“Game theory . . . can tell us what behavior we should expect as a consequence of [formal models].”).

117. Cf. Jeffrey S. Banks & Joel Sobel, *Equilibrium Selection in Signaling Games*, 55 ECONOMETRICA 647, 649 (1987); Robert J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. REV. 193, 214–15 (2007) (modeling civil litigation as a sequential game).

plaintiffs located in states different from that of the tortfeasor.<sup>118</sup> The repeated game assumes that one tortfeasor faces one plaintiff in each round for a finite number of rounds, for simplicity. In reality, tortfeasors may be simultaneously engaged in multiple trials in which the Maniscalco exploit is used. However, regardless of the number of tortfeasors and plaintiffs who face each other simultaneously, the fact remains that there exists a point in time  $t$  in which no plaintiff has ever seen the exploit, and a point  $t + 1$  in which a plaintiff observes the exploit for the first time. As long as points  $t$  and  $t + 1$  exist, the number of litigants in a single round does not affect the model's conclusions, as will be shown shortly.

*Incomplete information in the first round.* Section I.A explained that, in order to use the Maniscalco exploit, the tortfeasor would first misrepresent the origin of a tort as a state that has no genuine contacts with that tort. At the beginning of the first round, when the exploit has never yet been observed at any trial, the plaintiff does not suspect either this misrepresentation or that she has no chance to win at trial because of that misrepresentation. To understand why the first-round plaintiff does not suspect the tortfeasor's misrepresentation, consider the following process through which she assesses the tortfeasor's and her own likelihood of winning at trial. This Bayesian updating process is crucial not only to understanding how the first-round plaintiff forms her mistaken beliefs, but also to understanding how plaintiffs (or plaintiffs' counsel) in subsequent rounds of the repeated game change their beliefs about their own chances of winning.

Assume that the tortfeasor harms the first-round plaintiff and misrepresents the state with genuine contacts to the tort. As explained previously, the plaintiff believes that she has a good chance to win on the merits because she knows exactly how she was harmed; the only mistaken bit of information she has is about the state where the tort originated.<sup>119</sup> Because the first-round plaintiff believes that she has a strong case on the merits, the only remaining factor in her assessment of her chances of winning at trial is how much the legal system inherently advantages tortfeasors. Figure 1

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118. Again, the assumption is that the tortfeasor has successfully induced its victims to sue in a dummy state, which has no genuine contacts to the victims' injury because: (1) the tort did not originate from the dummy state, and (2) the victims do not reside there, meaning that the injury is not felt there. See *supra* note 84 and accompanying text.

119. See *supra* notes 26–29, 76–79, and accompanying text.

shows the three possible states of the world from the plaintiff's perspective, ordered from low to high advantage for tortfeasors: optimal, suboptimal, and broken.

The first-round plaintiff inevitably falls for the Maniscalco exploit because she seriously contemplates the optimal and suboptimal worlds, but not the broken. In the optimal world, the legal system operates as it would ideally: no one commits torts because tortfeasors would always lose at trial and pay more in costs and damages than they would gain from them. The first plaintiff deduces that she is not in the optimal world because she has already been harmed. As for the broken world, in which the legal system favors tortfeasors so much that they always win, the plaintiff does not consider it because she has never seen the exploit before. A plaintiff may consider the broken world as a theoretical exercise, but never seriously: one could exit the top floor of a skyscraper through the elevator or the window, but no non-suicidal person would entertain the second option.<sup>120</sup> However, the first plaintiff is actually in the broken world because the exploit and the tortfeasor's misrepresentation guarantee that she will lose at trial.

**Figure 1: Three Possible States of the World,  
First-Round Plaintiff's Perspective**

Type	Characteristics
<i>Optimal</i>	No one ever commits torts because tortfeasors would always lose
<i>Suboptimal</i>	Corporate tortfeasors sometimes win, due to the corporate-individual asymmetry in funds and legal representation
<i>Broken</i>	Tortfeasors practically always win, by using the Maniscalco exploit

In the only remaining state of the world (suboptimal), injured plaintiffs win sometimes, but not always. Although injured plaintiffs would always win in an ideal world, plaintiffs in the

120. See John Mueller, *The Obsolescence of Major War*, in *THE USE OF FORCE: MILITARY POWER AND INTERNATIONAL POLITICS* 427, 436 (Robert J. Art & Kenneth N. Waltz eds., 1999) ("Consider a man who is on the fifth floor of a building and is musing over two methods for reaching the ground floor: walking down the stairs (slow) or jumping out the window (fast). . . . [T]he decision is not a terribly difficult one to be 'rational' about.").

suboptimal world do not because their funds and attorneys are outmatched by those of corporate tortfeasors. However, plaintiffs are not entirely without hope because the substance of the law still favors them over those who injured them. Because the tortfeasor has injured the plaintiff and she does not think that the broken world is possible, the first-round plaintiff believes that the world is suboptimal, and that she has a chance to win. Her mistaken belief is strengthened by the fact that the suboptimal and broken worlds are outwardly indistinguishable from one another: in both worlds, corporations would often be better funded than individual plaintiffs would.<sup>121</sup> Because of her mistaken belief that the world is suboptimal, the first-round plaintiff sues, observes the Maniscalco exploit at trial, and spends years' worth of resources only to lose.

**Bayesian updating after the first round.** I have shown so far that the first-round plaintiff in the ME model loses at trial because she has never seen the Maniscalco exploit before and hence does not expect it. However, although keeping the exploit secret from plaintiffs virtually ensures that tortfeasors will win at trial, tortfeasors actually have an incentive to make the exploit known to as many plaintiffs as possible. If plaintiffs expect to face the exploit at trial, they may not sue at all because they expect to lose, allowing tortfeasors to reap the benefits from harming plaintiffs without expending the cost of using the exploit (the cost of protracting a futile case for years). Plaintiffs also have an incentive to anticipate whether the tortfeasor will use the exploit at trial, even if they cannot defeat it: if a tortfeasor will use the exploit, the plaintiff would be better off by anticipating it and giving up on suing, than by remaining ignorant of it and going to trial.

By the  $n$ th round ( $n > 1$ ,  $n \in \mathbb{N}$ ), the plaintiff expects the tortfeasor to use the Maniscalco exploit because the tortfeasor forces a critical mass of plaintiffs to waste money on futile cases in rounds 1 to  $n - 1$ , such that the  $n$ th plaintiff knows that the previous plaintiffs lost because of the exploit. I do not assume that the plaintiffs acquire this information directly from one another. Instead, I assume that the plaintiffs are represented by the same

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121. Cf. Angela Gilmore, *Self-Inflicted Wounds: The Duty to Disclose Damaging Legal Authority*, 43 CLEV. STATE L. REV. 303, 316 (1995) ("Cases are filed every[]day in which the plaintiff is an individual of average means, while the defendant corporation, for example, comes laden with deep pockets, easily able to pay far more for legal representation than the plaintiff.").

group of local attorneys, and that they advise their clients against suing after seeing enough cases in which the exploit is used.<sup>122</sup> The common practice of plaintiffs' attorneys paying clients' litigation costs upfront<sup>123</sup> would make the exploit's deterrent effect even stronger than if plaintiffs financed their own litigation: the chances of an attorney financing cases that she deems to be futile are likely even lower than the chances of a plaintiff taking a futile case to trial against counsel's advice.<sup>124</sup>

Now consider the Bayesian updating process through which the  $n$ th-round plaintiff comes to expect tortfeasors to use the exploit. Denote a plaintiff's perceived likelihood that a tortfeasor will use the Maniscalco exploit as  $x$ ; the first plaintiff's perceived likelihood that the exploit will be used is zero ( $x_1 = 0$ ) because she has never seen it before. However, as more plaintiffs suffer through futile lawsuits, successive plaintiffs suspect more strongly that the world is "broken"—that the litigation process may be rigged against them. Assume that the second plaintiff believes that there is a ten-percent chance that the world is broken ( $x_2 = 0.1$ ), after seeing the first-round plaintiff lose because of the exploit. Further assume that a plaintiff's perceived likelihood of winning at trial solely on the merits (the likelihood of winning at trial if the exploit were not used) is eighty percent ( $q = 0.8$ ). After seeing the second plaintiff lose at trial, the third plaintiff updates her perception of the likelihood that the world is broken according to Bayes' Rule<sup>125</sup>:

122. See, e.g., Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 868 (2012) ("[A] plaintiff may have trouble finding an attorney to take her case if . . . there is a small likelihood of prevailing.").

123. See Cara Van Dorn, *When Joining Means Enforcing: Giving Consumer Protection Agencies Authority to Ban the Use of Class Action Waivers*, 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 245, 258–59 (2017) ("Plaintiffs' attorneys typically work on a contingency fee basis, which means that the attorney pays for the costs of litigation upfront and only receives payment from the client if the case succeeds, as a percentage of the damages.").

124. Cf. *Moua v. Pittullo, Howington, Barker, Abernathy, LLP*, 174 Cal. Rptr. 3d 662 (Cal. App. 2014) (a case in which a plaintiff rejected a settlement offer against counsel's advice only to receive nothing from a jury); William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 735 (2016) ("Plaintiffs' attorneys will screen cases for plausible merit . . .").

125. See WILLIAM M. BOLSTAD & JAMES M. CURRAN, INTRODUCTION TO BAYESIAN STATISTICS 67–69 (3d ed. 2017).

$$x_2 = P(\text{Broken}) = 0.1; \quad P(\text{Loss} | \text{Broken}) = 1; \quad P(A | B) = \frac{P(B | A)P(A)}{P(B)}$$

$$x_3 = P(\text{Broken} | \text{Loss}) = \frac{P(\text{Loss} | \text{Broken}) * P(\text{Broken})}{P(\text{Loss})}$$

$$x_3 = P(\text{Broken} | \text{Loss}) = \frac{1 * \frac{1}{10}}{\left(\frac{9}{10} * \frac{1}{5}\right) + \left(\frac{1}{10} * 1\right)} = \frac{5}{14} \approx \mathbf{0.3572}$$

The third plaintiff's perception of the likelihood that the world is broken has increased by more than twenty-five percent, compared to the second plaintiff's perception.

## 2. The ME model: The repeated game, $n$ th round

Section I.C.1 showed that the first-round plaintiff in the ME model falls for the Maniscalco exploit because she does not expect it, but that each successive plaintiff expects it more strongly because tortfeasors have an incentive to make the exploit seen by as many plaintiffs as possible: if plaintiffs give up on suing because they expect tortfeasors to win at trial by using the exploit, tortfeasors would reap the benefits of using the Maniscalco exploit without paying for its costs. However, even though the exploit is a winning strategy, tortfeasors may not be able to use the exploit in every case. For example, if the gains from harming a plaintiff are smaller than the time and money needed to protract a trial to full discovery, the exploit would not be cost-justified.

To put the previous paragraph in game theory terms, neither party in the  $n$ th round of the ME model has a pure dominant strategy. Whether a plaintiff sues depends most significantly on how much she expects the tortfeasor to use the Maniscalco exploit; whether the tortfeasor uses it depends on, among others, whether the plaintiff sues and whether it is cost-justified. However, although both parties lack pure dominant strategies, each can adopt a mixed strategy that makes the other party indifferent among their strategies.<sup>126</sup> For example, plaintiffs must switch between suing and

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126. Cf. Rui Zhao, Gareth Neighbour, Michael McGuire & Pauline Deutz, *A Software Based Simulation for Cleaner Production: A Game Between Manufacturers and Government*, 26 J. LOSS PREVENTION PROCESS INDUS. 59, 63 (2013) ("Game scenario two suggests that . . .



giving up often enough to make the tortfeasor indifferent between using the exploit and not using it. The logic underlying a mixed strategy is that of a penalty kicker, who must kick in different directions often enough to prevent the goalie from predicting where the ball will go.<sup>127</sup> Thinking of the model in terms of mixed strategies also enables comparative statics, which allow closer examinations of the conditions that make litigants choose one strategy over another.

*Game tree and sequence of play.* Figure 2 shows the game tree depicting the  $n$ th round of the ME model, which consists of two stages. In the first, the tortfeasor ( $\tau$ ) decides whether to harm the plaintiff ( $\pi$ ) and, if so, whether to misrepresent the state with genuine contacts with the tort. If the tortfeasor does not harm the plaintiff (*abstain*), the game ends. If the tortfeasor harms the plaintiff, the tortfeasor decides whether to commit the tort in a dummy state (*misrepresent*) or not ( $\sim$ *misrepresent*). Depicting the commission of a tort as a conscious decision is a stylization of reality because some tortfeasors cause harm unintentionally: for example, through negligence.<sup>128</sup> However, I argue that this is a defensible stylization because, even in unintentional tort cases, the act that ultimately results in a plaintiff's injury is often caused intentionally, and tortfeasors who are found liable are assumed to have been aware of the risk of causing the injury. For example, a principal who causes an unlicensed agent to drive is held liable for any resulting accident.<sup>129</sup>

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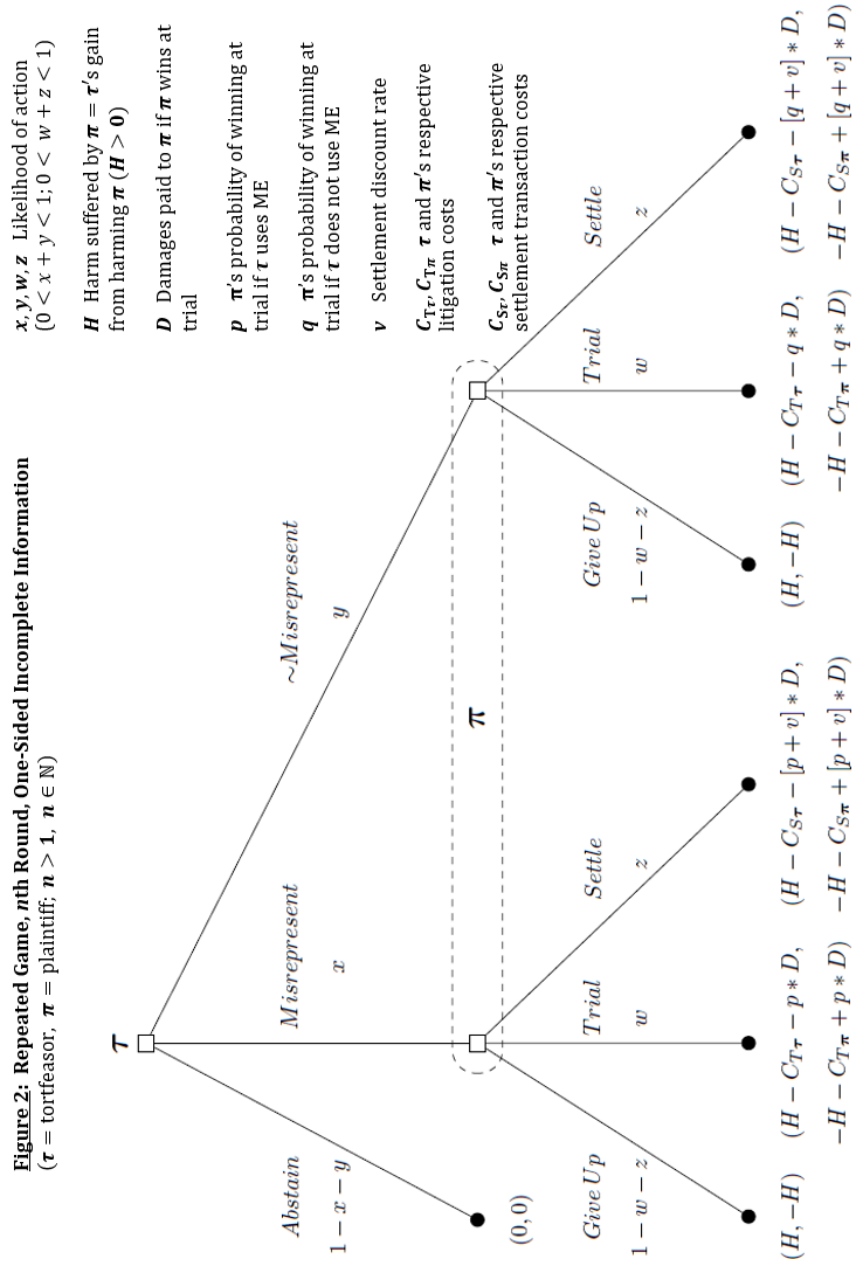
there is no dominant strategy in the game. Thus, a 'mixed-strategy' game scenario needs to be generated to establish the corresponding Nash Equilibrium.").

127. See, e.g., Pierre-André Chiappori, Steven D. Levitt & Timothy Groseclose, *Testing Mixed-Strategy Equilibria When Players Are Heterogeneous: The Case of Penalty Kicks in Soccer*, 92 AM. ECON. REV. 1138, 1142 (2002) ("[Under] the logic of mixed-strategy equilibria . . . the kicker's probability of kicking to the center must make the *goalie* indifferent between jumping or staying . . .").

128. See, e.g., *Borg-Warner Corp. v. Avco Corp.*, 850 P.2d 628, 633 (Alaska 1993) ("all unintentional tortfeasors, whether negligent, grossly negligent or wil[l]ful and wanton").

129. See *Mundy v. Pirie-Slaughter Motor Co.*, 206 S.W.2d 587, 588, 590 (Tex. 1947).

**Figure 2: Repeated Game,  $n$ th Round, One-Sided Incomplete Information**  
 ( $\tau$  = tortfeasor,  $\pi$  = plaintiff;  $n > 1$ ,  $n \in \mathbb{N}$ )



If the tortfeasor harms the plaintiff in the first stage, the plaintiff decides in the second stage whether to sue the tortfeasor, settle, or give up on a remedy. The dashed rounded rectangle connecting the plaintiff's two decision nodes reflects the fact that this model, without the policy solution to the Maniscalco exploit presented in Part II, is a *one-sided incomplete information game*. That is, the plaintiff does not know whether the tort occurred in a dummy state, such that the plaintiff cannot know for sure whether the tortfeasor will use the exploit at trial until it is actually used; in terms of Figure 1, the plaintiff does not know whether the world is suboptimal or broken. The plaintiff does, however, know the *likelihood* that the tortfeasor will misrepresent, indicated by  $x$  and  $y$ , because of the Bayesian updating process shown in Section I.C.1. As for the tortfeasor, it knows the plaintiff's likelihood of suing, settling, or giving up, indicated by  $w$  and  $z$ .

Before describing the payoff terms of the game, a qualification is in order about how settlements work in the model. The model simplifies settlement negotiations by assuming that a plaintiff who wants to settle always offers the minimum payment acceptable to the tortfeasor, which the plaintiff knows in advance. In reality, parties to a civil case often settle only after a lengthy back-and-forth that informs them as to what each party is willing to accept and abort negotiations if they fail to agree on that amount.<sup>130</sup> One may argue that a more realistic model would let the tortfeasor make an offer, let the plaintiff accept or reject, and resume trial if she rejects. However, the game abstracts away the process by which each party informs itself of the other's preferences because the model's goal is to study the workings and consequences of the Maniscalco exploit, not to faithfully represent settlement negotiations in all their glory.

**Payoffs.** The  $n$ th round begins with the tortfeasor deciding whether to harm the plaintiff. If the tortfeasor abstains, neither party is affected, resulting in a payoff of  $(0, 0)$ . If the tortfeasor harms the plaintiff and the plaintiff gives up, the tortfeasor gains in the value of the harm caused by the tort, and the plaintiff takes a loss in that same amount  $(H, -H)$ , regardless of whether the tortfeasor misrepresented the origin of the tort or not.  $H$  is always

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130. See Beverly J. Hodgson & Robert A. Fuller, *Summary Jury Trials in Connecticut Courts*, 67 CONN. BAR J. 181, 193 (1993) ("[S]ettlement negotiations break down because the plaintiff will not accept less than one amount, and the defendant will not make an offer above a lesser amount.").

positive ( $H > 0$ ), because no tortfeasor would intentionally commit a tort that creates no gain or somehow harms itself. In Part I, I assume that damages are compensatory (damages are equal to the harm inflicted by the tort,  $D = H$ ).<sup>131</sup> Part II introduces punitive damages as part of the solution to the Maniscalco exploit.

If the tortfeasor commits a tort from a dummy state and the plaintiff sues (*misrepresent-trial*), the tortfeasor uses the Maniscalco exploit at trial. Hence, the tortfeasor's payoff is the gain from the tort offset by litigation costs and the expected value of damages ( $H - C_{T\tau} - p * D$ ), whereas the plaintiff's payoff is the expected damages offset by the harm suffered and costs ( $-H - C_{T\pi} + p * D$ ). Without the solution given in Part II, the plaintiff cannot win at trial if the tortfeasor uses the exploit ( $p = 0$ ); the payoff from (*misrepresent-trial*) is ( $H - C_{T\tau}, -H - C_{T\pi}$ ). If the tortfeasor does not misrepresent and the plaintiff sues ( $\sim$ *misrepresent-trial*), the payoffs are identical to those in (*misrepresent-trial*), save for the fact that  $p$  is replaced by  $q$ : ( $H - C_{T\tau} - q * D, -H - C_{T\pi} + q * D$ ). Because the tortfeasor does not use the exploit and the plaintiff would survive a motion to dismiss,<sup>132</sup> the plaintiff has a chance to win ( $0 < q \leq 1$ ) at trial in ( $\sim$ *misrepresent-trial*). The model assigns different costs to the parties ( $C_{T\tau}, C_{T\pi}$ ) because legal representation is often cheaper for corporate tortfeasors than it is for individual plaintiffs.<sup>133</sup>

If the tortfeasor misrepresents and the parties settle (*misrepresent-settle*), the tortfeasor's payoff is the gain from the tort offset by transaction costs and the settlement ( $H - C_{S\tau} - [p + v] * D$ ), whereas the plaintiff's payoff is the settlement payment offset by the harm from the tort and costs ( $-H - C_{S\pi} + [p + v] * D$ ). I depict the settlement as some fraction of the damages that would be paid if the plaintiff won at trial ( $[p + v] * D$ ), for three reasons. First, "the strength of a litigator's bargaining position is at least partially a function of his or her willingness to try the case if settlement

131. "Compensatory damages are '[d]amages sufficient in amount to indemnify the injured person for the loss suffered.'" *Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351, 357 (4th Cir. 2011).

132. See *supra* note 14 and accompanying text.

133. See Gilmore, *supra* note 121. Corporations can also reduce their legal costs through outsourcing, which is unavailable to individual plaintiffs. See H. Ward Classen, *Recession's Impact on In-House Counsel*, 43 MD. BAR J. 42, 44 (2010) ("Many legal services . . . are conducive to outsourcing. Off-shore outsourcing of these functions allows corporations to significantly lower their legal costs . . .").

negotiations break down”;<sup>134</sup> in *misrepresent*, that resolve is denoted by  $p$ , the plaintiff’s likelihood of winning at trial. Second, acceptable settlements are often calculated as a fraction of damages.<sup>135</sup> Third, settlements can reflect the cost savings from avoiding a trial, even if it is based on frivolous claims.<sup>136</sup> Hence, even if the plaintiff cannot win at trial because of the exploit ( $p = 0$ ), the parties may still settle (for example,  $v = 0.05$ ). If the tortfeasor does not misrepresent and the parties settle ( $\sim$ *misrepresent-settle*), the payoffs are identical to those in *misrepresent*, save for replacing  $p$  with  $q$  ( $H - C_{S\tau} - [q + v] * D, -H - C_{S\pi} + [q + v] * D$ ).

**Figure 3:** Payoffs for All Possible Outcomes in the ME Model ( $\tau$  = tortfeasor,  $\pi$  = plaintiff)

		$\pi$		
		Give up ( $1 - w - z$ )	Trial ( $w$ )	Settle ( $z$ )
$\tau$	Abstain ( $1 - x - y$ )	(0, 0)	(0, 0)	(0, 0)
	Misrepresent ( $x$ )	( $H, -H$ )	( $H - C_{T\tau} - p * D,$ $-H - C_{T\pi} + p * D$ )	( $H - C_{S\tau} - [p + v] * D,$ $-H - C_{S\pi} + [p + v] * D$ )
	$\sim$ Misrepresent ( $y$ )	( $H, -H$ )	( $H - C_{T\tau} - q * D,$ $-H - C_{T\pi} + q * D$ )	( $H - C_{S\tau} - [q + v] * D,$ $-H - C_{S\pi} + [q + v] * D$ )

***Tortfeasor’s equilibrium strategy and plaintiff’s comparative statics.***

Having presented the game and its payoff terms, I now derive the equilibrium mixed strategies for both players, beginning with the tortfeasor. Recall that each player’s mixed strategy must make the other player indifferent among their pure strategies.<sup>137</sup> Therefore, the tortfeasor’s mixed strategy must make the plaintiff’s expected payoffs from each of her pure strategies equal. Figure 3 shows the two parties’ payoffs under every possible outcome, with the

134. Tracy Walters McCormack & Christopher Bodnar, *Honesty Is the Best Policy: It’s Time to Disclose Lack of Jury Trial Experience*, 78 TEX. BAR J. 210, 213 (2015).

135. See Gregory Todd Jones & Douglas H. Yarn, *Evaluative Dispute Resolution Under Uncertainty: An Empirical Look at Bayes’ Theorem and the Expected Value of Perfect Information*, 2003 J. DISP. RESOL. 427, 447.

136. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 503 n.10 (1991) (citing studies positing that “settlements of frivolous suits occur” because settlement is cheaper than going to trial); see also Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 58 (2002) (“[T]he cost advantage of settlement relative to adjudication will decrease the longer negotiations proceed.”).

137. See Chiappori, Levitt & Groseclose, *supra* note 127.

likelihood of each action being taken by each party listed alongside the action: for example, the likelihood of the plaintiff giving up on a remedy is  $(1 - w - z)$ . The tortfeasor's equilibrium mixed strategy is to use each of its pure strategies according to the values of  $x$  and  $y$  that satisfy the following:

$$\begin{aligned} \pi's \text{ expected payoff from Give up} &= \pi's \text{ expected payoff from Trial} \\ &= \pi's \text{ expected payoff from Settle} \\ -xH - yH &= x(-H - C_{T\pi} + p * D) + y(-H - C_{T\pi} + q * D) \\ &= x(-H - C_{S\pi} + [p + v] * D) + y(-H - C_{S\pi} + [q + v] * D) \end{aligned}$$

**$\pi$ 's preference for trial over giving up.** Because the tortfeasor's mixed strategy shows the conditions in which the plaintiff is indifferent between all of her pure strategies, it can be used to examine the conditions in which the plaintiff is guaranteed to choose one strategy over another. Knowing those conditions can help predict how the parties will use and react to the Maniscalco exploit and design a policy solution to it. The  $n$ th plaintiff prefers going to trial to giving up if:

$$\begin{aligned} \pi's \text{ expected payoff from Give up} &< \pi's \text{ expected payoff from Trial} \\ -xH - yH &< x(-H - C_{T\pi} + p * D) + y(-H - C_{T\pi} + q * D) \\ (x + y)C_{T\pi} &< D(xp + yq) \end{aligned}$$

In words, the plaintiff goes to trial instead of giving up on a remedy if her expected damages to be won under (*misrepresent*) and (*~misrepresent*) exceed her expected litigation costs.

**$\pi$ 's preference for trial over settling.** The plaintiff prefers going to trial to settling if:

$$\begin{aligned} x(-H - C_{T\pi} + p * D) + y(-H - C_{T\pi} + q * D) \\ > x(-H - C_{S\pi} + [p + v] * D) + y(-H - C_{S\pi} + [q + v] * D) \\ -vD &> C_{T\pi} - C_{S\pi} \end{aligned}$$

In words, the plaintiff goes to trial instead of settling if the difference between the expected damages to be won at trial and the settlement payment ( $-vD$ ) is larger than the plaintiff's cost savings from avoiding a trial ( $C_{T\pi} - C_{S\pi}$ ). For example, assume that  $D = 20$ ,  $C_{T\pi} = 8$ , and  $C_{S\pi} = 5$ . Further assume that the plaintiff is

offered a settlement payment that is 20 percent smaller than the damages that she would get if she won at trial ( $v = -0.2$ ). Then, the plaintiff would go to trial because the discount she must accept to her expected revenue is larger than the cost savings from accepting that discount ( $4 > 3$ ).

**$\pi$ 's preference for settling over giving up.** The plaintiff prefers settling to giving up if:

$$\begin{aligned} -xH - yH &< x(-H - C_{S\pi} + [p + v] * D) + y(-H - C_{S\pi} + [q + v] * D) \\ (x + y)C_{S\pi} &< (x * [p + v] + y * [q + v]) * D \end{aligned}$$

In words, the plaintiff prefers settling to giving up if the transaction cost for settling is lower than the combined expected gain from settling under both *misrepresent* and *~misrepresent*.

**Plaintiff's equilibrium strategy and tortfeasor's comparative statics.** The  $n$ th-round plaintiff's equilibrium mixed strategy requires her to use each of her pure strategies according to the values of  $w$  and  $z$  that satisfy the following equation:

$$\begin{aligned} \tau's \text{ expected payoff from } Abstain \\ &= \tau's \text{ expected payoff from } Misrepresent \\ &= \tau's \text{ expected payoff from } \sim Misrepresent \end{aligned}$$

$$\begin{aligned} 0 &= (1 - w - z) * H + w(H - C_{T\tau} - p * D) + z(H - C_{S\tau} - [p + v] * D) \\ &= (1 - w - z) * H + w(H - C_{T\tau} - q * D) + z(H - C_{S\tau} - [q + v] * D) \end{aligned}$$

**$\tau$ 's preference for *~misrepresent* over *misrepresent*.** The  $n$ th-round plaintiff's equilibrium mixed strategy enables comparative statics that reveal the conditions under which the tortfeasor is guaranteed to choose one pure strategy over another in the  $n$ th round. The tortfeasor prefers not misrepresenting to misrepresenting if:

$$\begin{aligned} \tau's \text{ expected payoff from } Misrepresent \\ &< \tau's \text{ expected payoff from } \sim Misrepresent \end{aligned}$$

$$\begin{aligned} (1 - w - z) * H + w(H - C_{T\tau} - p * D) + z(H - C_{S\tau} - [p + v] * D) \\ &< (1 - w - z) * H + w(H - C_{T\tau} - q * D) + z(H - C_{S\tau} - [q + v] * D) \end{aligned}$$

$$p > q$$

In words, the tortfeasor will avoid misrepresenting in the  $n$ th round if the plaintiff's likelihood of winning at trial when the tortfeasor misrepresents is higher than the plaintiff's likelihood of winning at trial if the tortfeasor does not misrepresent.

**$\tau$ 's preference for abstain over misrepresent.** The tortfeasor prefers abstaining to misrepresenting in the  $n$ th round if:

$$\begin{aligned} 0 &> (1 - w - z) * H + w(H - C_{T\tau} - p * D) \\ &\quad + z(H - C_{S\tau} - [p + v] * D) \\ H &< w(C_{T\tau} + p * D) + z(C_{S\tau} + [p + v] * D) \end{aligned}$$

In words, the tortfeasor will abstain instead of misrepresenting if the expected gain from a tort is smaller than the combined costs of going to trial and settling when the tortfeasor misrepresents.

**$\tau$ 's preference for abstain over  $\sim$ misrepresent.** The tortfeasor prefers abstaining to not misrepresenting in the  $n$ th round if:

$$\begin{aligned} 0 &> (1 - w - z) * H + w(H - C_{T\tau} - q * D) \\ &\quad + z(H - C_{S\tau} - [q + v] * D) \\ H &< w(C_{T\tau} + q * D) + z(C_{S\tau} + [q + v] * D) \end{aligned}$$

In words, the tortfeasor will abstain instead of not misrepresenting in the  $n$ th round if the expected gain from a tort is smaller than the combined expected cost of going to trial and settling when the tortfeasor does not misrepresent.

**Discussion.** The foregoing exercise highlights two significant predictions. First, consider the prediction that the  $n$ th plaintiff would sue instead of giving up if her expected damages to be won under *misrepresent* and  *$\sim$ misrepresent* exceed her combined expected litigation costs ( $((x + y)C_{T\pi} < D(xp + yq))$ ). Assume, for example, that  $C_{T\pi} = 10$  and  $D = 20$ . Then, the plaintiff would sue if, for example,  $p > 0.5$  and  $q > 0.5$ . Assuming that litigation costs stay constant but the amount of damages to be paid increases because the state awards punitive damages (for example,  $D = 3H$ ),<sup>138</sup> the plaintiff would sue as long as  $p > 1/6$  and  $q > 1/6$ . This prediction comports with claims that, other things being equal, plaintiffs will be more likely to sue under the laws of states that

138. See, e.g., MASS. GEN. LAWS ANN. ch. 149, § 150 (West 2020) (“[A]n employee so aggrieved who prevails in such an action shall be awarded treble damages . . .”).



award punitive damages.<sup>139</sup> Plaintiffs would also be more likely to sue if they arrange representation under a contingency fee agreement, such that they do not directly bear the cost of litigating cases in which the exploit is used ( $C_{T\pi} \approx 0$ ).<sup>140</sup>

Second, consider the prediction that, for the tortfeasor to commit a tort and misrepresent instead of abstaining in the  $n$ th round, the gain from a tort must exceed the combined expected cost of going to trial and settling when the tortfeasor misrepresents ( $H > w(C_{T\tau} + p * D) + z(C_{S\tau} + [p + v] * D)$ ). This may make the Maniscalco exploit seem unprofitable for many kinds of torts, because a profitable use requires the gain from a tort to be fairly large. Given the rather high cost required to justify using the exploit, the reader may wonder whether the  $n$ th round of the ME model accurately depicts what happened in *Maniscalco*. That is, the  $n$ th round of the model may seem to be arguing that the defendant in *Maniscalco* ate the cost of protracting a futile trial for years just to get away with selling defective printers to a handful of plaintiffs.

However, that perception would be inaccurate because it is based only on what happens in the ME model in the short run. As stated in Section I.C, the ME model is an application of the chain-store paradox, which depicts a chain store selling goods at a loss in the short run in order to muscle out local stores in the long run.<sup>141</sup> The early stages and the  $n$ th round of the ME model ( $n > 1$ ,  $n \in \mathbb{N}$ ) are equivalent to the short run in the conventional chain-store paradox. The tortfeasor's long-run gains in the ME model can make up for its short-run losses because the plaintiffs who expect to lose at trial because of the Maniscalco exploit stop suing the tortfeasor in the long run—just as the chain store in the chain-store paradox recoups its short-run losses by selling at monopoly prices after its competitors have gone out of business. Section I.C.3 elaborates on this process, through the  $r$ th ( $r > n > 1$ ,  $r, n \in \mathbb{N}$ ) and  $n$ th rounds of the model.

139. See, e.g., King Fung Tsang, *China's Rule of Law from a Private International Law Perspective*, 47 GA. J. INT'L & COMP. L. 93, 106 (2018) (“[D]ue to the favorable civil procedure rules to the plaintiff, such as . . . punitive damages . . . the United States has long been a magnet to international civil disputes.”); *Smith Kline & French Laboratories Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 733 (Eng. C.A. 1982) (“As a moth drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune . . . [American juries] are prone to award[ing] fabulous damages.”).

140. See Van Dorn, *supra* note 123.

141. See DRANOVE, BESANKO & SHANLEY, *supra* note 52.

### 3. The ME model: The repeated game, $r$ th and $n$ th rounds

As explained in Section I.C.2, the tortfeasor in the ME model can recoup the losses incurred from using the Maniscalco exploit in the short run because plaintiffs may not sue the tortfeasor in the long run. This, in turn, allows the tortfeasor in the long run to reap the gains from the exploit without paying for the cost of using it. As for why plaintiffs with meritorious claims may decide not to sue, they may come to expect in the long run that the tortfeasor's likelihood of using the exploit is too high to justify suing. Without the solution to the exploit given in Part II, plaintiffs may think that going to trial will consume years' worth of resources only to end in defeat.

The process through which plaintiffs acquire this expectation can be shown by using the Bayesian updating process presented in Section I.C.1 and the plaintiff's comparative statics presented in Section I.C.2.

**Plaintiffs' rational decision to give up.** Recall that the plaintiff in Figure 2 prefers to give up on a remedy to suing the tortfeasor if the following inequality is satisfied:

$$-xH - yH > x(-H - C_{T\pi} + p * D) + y(-H - C_{T\pi} + q * D)$$

In this inequality,  $x$  denotes the likelihood that the tortfeasor will misrepresent the origin of a tort in order to use the Maniscalco exploit, and  $y$  denotes the likelihood that the tortfeasor will not misrepresent. In other words, this inequality indicates that there may exist some  $x$  that forces a rational plaintiff to give up because the likelihood that the tortfeasor will use the exploit at trial is too high to justify litigating. Assume, for illustration, that  $D = H = 20$ ,  $p = 0$ ,  $q = 0.8$ , and  $C_{T\pi} = 10$ . As explained in Section I.C.2,  $p = 0$  because the plaintiff loses if the tortfeasor misrepresents, and  $q = 0.8$  because the plaintiff has a good chance to win on the merits, if not for the misrepresentation and the exploit. Plugging these values into the inequality returns:

$$\begin{aligned} -20x - 20y &> x(-20 - 10) + y(-20 - 10 + 16) \\ x &> 0.6y \end{aligned}$$

Under the previously stated values for  $D$ ,  $H$ ,  $p$ ,  $q$ , and  $C_{T\pi}$ ,  $x = 0.4$  and  $y = 0.5$ , to pick one example, guarantee that plaintiffs will give up on suing the tortfeasor in the ME model.

This exercise returns two important predictions about the long-term behavior of litigants in the ME model. First, plaintiffs need not believe that tortfeasors will *always* use the Maniscalco exploit ( $x = 1$ ) in order to give up on suing the tortfeasor. The previous paragraph showed that, assuming  $D = H = 20$ ,  $p = 0$ ,  $q = 0.8$ , and  $C_{T\pi} = 10$ ,  $x = 0.4$  and  $y = 0.5$  are sufficient to force plaintiffs to resign. Section I.C.1 already showed how Bayesian updating can increase the value of  $x$  from 0.1 to 0.3572 in one round, assuming that  $p = 0$  and  $q = 0.8$ . Once  $x$  becomes high enough to force plaintiffs to resign, tortfeasors would reap the gains from the Maniscalco exploit's deterrent effect without paying for its costs. These gains, in turn, could make up for any losses incurred from the cost of the exploit in the short run.

Second, a tortfeasor may be able to predict when plaintiffs will give up on suing. Assume that  $x^*$  is the minimum value of  $x$  that makes a plaintiff's payoff from giving up larger than that from suing, and that  $b^*$  is the number of trials it takes for  $x$  to reach  $x^*$ . Assuming knowledge of the other traits relevant to the plaintiff's resolve to pursue a remedy, the tortfeasor could derive the values of  $b^*$  and  $x^*$  in advance of harming the plaintiff. The growth rate of  $x$  would differ for each plaintiff, depending on things such as her level of trust in the legal system: the greater a plaintiff's trust in the law to protect victims with meritorious claims, the slower she would be to catch onto the fact that the tortfeasor has already circumvented that system.

*Tortfeasors' long-run gains from plaintiffs' decision to give up.* Having explained that tortfeasors may use the Maniscalco exploit at a loss in the short run to reap greater gains in the long run, I now proceed to explain how that calculation precisely works in the ME model. Recall that, in the  $n$ th round, the tortfeasor would abstain from harming the plaintiff instead of harming the plaintiff and misrepresenting the origin of that tort if:

$$H < w(C_{T\tau} + p * D) + z(C_{S\tau} + [p + v] * D)$$

Put differently, the right side of this inequality is the cost of setting up the necessary conditions for using the Maniscalco

exploit, and the left side is the gain from doing so. Because the right side of the inequality includes the expected cost of litigating a trial in which the exploit is used and the expected cost of a settlement, the Maniscalco exploit may appear to be too expensive to be profitable for many kinds of torts. However, this inequality states only the costs and gains that occur from the Maniscalco exploit in the  $n$ th round. If a plaintiff decides not to sue the tortfeasor in future rounds, the gain from each future round would be  $H$  and the cost would be  $0$ . Taking those gains into consideration, the tortfeasor may use the exploit at a loss in the  $n$ th round.

To see how the tortfeasor incorporates expected future gains into its cost-benefit analysis, let us return to Figure 2. Assume that the parties are in the third round, the tortfeasor expects to gain from the Maniscalco exploit without using it beginning in the fourth round for ten rounds, and the discount rate is  $g$ . The future payoffs can be discounted to their present value using the formula for calculating the present value of an annuity<sup>142</sup>: denote the present value of the gains in the ten upcoming rounds as  $H_F$ . Because the gain from each of the ten future rounds is  $H$ , the present value of this “annuity” is:

$$\begin{aligned} H_F &= \frac{H}{1+g} + \frac{H}{(1+g)^2} + \cdots + \frac{H}{(1+g)^{10}} \\ &= H \left[ \frac{1 - (1+g)^{-10}}{g} \right] \end{aligned}$$

Assuming  $g = 0.03$ ,  $H_F \approx 8.53H$ . Now, compare the conditions required for the tortfeasor to misrepresent instead of abstaining in the third round with and without expected future gains:

With future gains:  $9.53H > w(C_{Tr} + p * D) + z(C_{Sr} + [p + v] * D)$

Without future gains:  $H > w(C_{Tr} + p * D) + z(C_{Sr} + [p + v] * D)$

When future gains are expected, the tortfeasor would be able to tolerate a higher cost of setting up the necessary conditions to use

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142. See WAI-SUM CHAN & YIU-KUEN TSE, FINANCIAL MATHEMATICS FOR ACTUARIES 41 (2017) (calculating the present value of an annuity that is paid immediately).

the Maniscalco exploit and still make a profit, to a limit of  $8.53H$ . Moreover, how tortfeasors use the exploit at high costs in the short run in view of greater gains in the long run could be generalized to rounds  $n$  and  $r$ , where  $r > n$ ,  $r, n \in \mathbb{N}$ .

Part I identified the legal basis of the Maniscalco exploit, presented the value of studying it, and modeled its consequences upon litigants' strategic behavior. Part II proceeds to advance a solution—the so-called flashlight discovery ordered at the motion to dismiss stage,<sup>143</sup> but limited to the choice of law issue—and models the potential consequences of implementing this solution.

## II. FLASHLIGHT DISCOVERY ON THE CHOICE OF LAW AS A SOLUTION TO THE MANISCALCO EXPLOIT

Part I established that a prerequisite for using the Maniscalco exploit profitably is to induce plaintiffs to sue under the law of a dummy state, under which their claims would survive plausibility pleading but be dismissed for incorrect choice of law. Then, a solution to the exploit would be to conduct discovery on the choice of law issue—for example, on whether Brother's allegedly tortious conduct emanated from New Jersey or Japan—at the motion to dismiss stage, so that plaintiffs would learn early on whether their case is futile. To minimize the likelihood of discovery abuse, the court would order discovery on the choice of law only for cases plausible enough to survive 12(b)(6) motions to dismiss.<sup>144</sup> If early discovery reveals that the plaintiff has sued under the law of a dummy state, she could seek a court order for voluntary dismissal under Rule 41(a)(2)<sup>145</sup> and sue under the law of a state that has genuine contacts with the alleged tort. Compared to dismissing a case after discovery, dismissing a case at the motion to dismiss stage is less likely to have drained a plaintiff's funds so severely that the plaintiff cannot sue again.

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143. See Miller, *supra* note 109, at 107 n.414 (describing the "considerable support" for conducting discovery pending a motion to dismiss at a limited scope).

144. Cf. Singh v. Google, Inc., No. 16-cv-03734-BLF, 2016 WL 10807598, at \*1-2 (N.D. Cal. Nov. 4, 2016) ("[A district court's] discretion extends to staying discovery upon a showing of 'good cause,' [under Rule 26(c)(1)(A)] . . . Good cause for staying discovery may exist when the district court is 'convinced that the plaintiff will be unable to state a claim for relief.'" (quoting Wenger v. Monroe, 282 F.3d 1068, 1077 (9th Cir. 2002))).

145. See Fed. R. Civ. P. 41(a)(2) (describing the process for voluntary dismissal after a defendant takes court action).

Compared to the problem to which it is addressed, the solution of flashlight discovery on the choice of law is straightforward – so much so that some federal courts have already used it. In *Aon PLC v. Heffernan*, for example, “[d]ue to the significance of the choice-of-law determination as a threshold issue, the parties proceeded with discovery . . . on the choice-of-law question before any preliminary injunction hearing or other proceedings on the merits.”<sup>146</sup> It should not be surprising that federal courts grant discovery on the choice of law issue during pleading; courts wield “wide discretion in controlling discovery”<sup>147</sup> under Rule 26, which states that “methods of discovery may be used in any sequence” absent stipulations or court orders to the contrary.<sup>148</sup>

If flashlight discovery on the choice of law question seems quaint, it is likely because courts and scholars have largely failed to notice the problem to which it is addressed, not because the solution is legally impracticable. Federal courts predominantly address motions to dismiss and then conduct discovery before resolving choice of law issues,<sup>149</sup> or resolve choice of law issues using factual allegations in the complaint,<sup>150</sup> both of which leave plaintiffs vulnerable to the Maniscalco exploit by letting futile litigation drag on long enough to drain their funds. As for the academy, legal scholars discuss discovery at the pleading stage as an aid for plaintiffs who lack the facts they need to make claims that would survive plausibility pleading.<sup>151</sup> These plaintiffs are distinct

146. *Aon PLC v. Heffernan*, No. 16-cv-01924, 2017 WL 478270, at \*2 (N.D. Ill. Feb. 6, 2017), *reconsideration denied*, *motion to certify appeal granted*, 2017 WL 1430616 (N.D. Ill. Apr. 20, 2017).

147. *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988).

148. Fed. R. Civ. P. 26(d)(3)(A).

149. See, e.g., *Harper v. LG Elecs. USA, Inc.*, 595 F.Supp.2d 486, 491 (D.N.J. 2009) (“[T]he Court will defer its choice-of-law decision until the parties present a factual record full enough to permit this Court to undertake the second step of the ‘governmental interest’ analysis.”).

150. See, e.g., *Carton v. Gen. Motor Acceptance Corp.*, 611 F.3d 451, 454–55 (8th Cir. 2010); *Cooper v. Samsung Elecs. Am., Inc.*, 374 Fed. Appx. 250, 257 n.5 (3d Cir. 2010).

151. See, e.g., *Miller*, *supra* note 109, at 107 (“Contained discovery before the motion’s resolution could provide a fruitful middle ground for evaluating challenges to cases that lie between the traditional Rule 12(b)(6) motion based on the complaint’s legal or notice-giving insufficiency and a motion based on the complaint’s failure to meet the factual plausibility precepts of *Twombly* and *Iqbal*.”); Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss Is Pending*, 47 WAKE FOREST L. REV. 71, 83 (2012) (“I do not believe that judges are required to interpret *Iqbal* so broadly that it require automatic stays upon the filing of motions to dismiss.”).

from victims of the exploit, who have the facts they need to make plausible claims that would survive motions to dismiss, but do not know that their cases will be thrown out after full discovery for relying on the law of a state with no real contacts to the tort at issue.

However, flashlight discovery may not necessarily work upon implementation. If judges are too cautious to grant flashlight discovery for fear of adding to the already massive backlog of civil cases,<sup>152</sup> the exploit would operate as if no solution had been implemented. The solution may fail also because plaintiffs who do not know that they are suing under the law of a dummy state do not move for discovery at the pleading stage. Conversely, if a judge is overly lenient as to grant discovery for cases that would not survive pleading or for cases in which the tortfeasor is not misrepresenting the origin of a tort, discovery at pleading would add to the case backlog and deter plaintiffs from suing by increasing litigation costs, thereby achieving materially identical results to those of the Maniscalco exploit in the long run. For want of a controlled experiment in which randomly selected judges grant early discovery, Section II.A instead models the potential outcomes, successful and not, of using flashlight discovery to address the Maniscalco exploit.

Before proceeding to Section II.A, however, a qualification is in order about the flashlight discovery advanced by this Article. I am not proposing the pre-suit discovery that some scholars do, which would allow plaintiffs to conduct discovery before they file a complaint.<sup>153</sup> The discovery I advocate would be limited to confirming the plaintiff's existing choice of law allegations, and judges would grant such discovery only to plaintiffs whose claims have a nontrivial likelihood of surviving a 12(b)(6) motion to dismiss. Compared to pre-suit discovery meant to let plaintiffs gather whichever facts necessary to form a complaint, flashlight

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152. See, e.g., Jessica K. Phillips, *Not All Pro Se Litigants Are Created Equally: Examining the Need for New Pro Se Litigant Classifications Through the Lens of the Sovereign Citizen Movement*, 29 GEO. J. LEGAL ETHICS 1221, 1228 (2016) (“[w]ith more than 330,000 civil cases in the federal court backlog in 2015”).

153. See, e.g., Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 46 (2010) (“This Article explores the role that state presuit discovery could play in rectifying the information imbalance caused by *Twombly* and *Iqbal* . . . [T]he presuit discovery mechanisms can be implemented before any substantive claims are filed in a complaint.”).

discovery limited to the choice of law issue is more feasible legally<sup>154</sup> and is less likely to cause discovery abuse by plaintiffs.<sup>155</sup>

*A. The Effects of Flashlight Discovery on the Choice of Law Issue  
upon the Maniscalco Exploit*

The success of flashlight discovery as a solution to the Maniscalco exploit depends most heavily on two factors: whether flashlight discovery successfully changes plaintiffs' incorrect perception of the world (that the world is suboptimal), and whether the additional litigation costs created by flashlight discovery deter plaintiffs from suing. If flashlight discovery fails to inform plaintiffs as to whether the tortfeasor is misrepresenting the origin of the tortious act, tortfeasors would continue to win. If flashlight discovery works as intended but creates additional litigation costs that are so large as to dwarf the damages that would be paid, plaintiffs would be deterred from suing, even if they know that flashlight discovery will identify the true origin of the tort. Section II.A describes how these variables operate and how their adverse effects could be contained.

*Consequences of a successful use of flashlight discovery.* As demonstrated in Section I.C, plaintiffs in the ME model may believe that they are in the suboptimal world (the first-round plaintiff), or suspect that they may be in the broken world (any plaintiff after the first). Both types of plaintiffs are vulnerable to the Maniscalco exploit: the first plaintiff will sue and lose, and any plaintiff after the first would either sue as the  $n$ th plaintiff does in Figure 2, or give up because they fear the exploit as the  $r$ th plaintiff does – both of which would prevent plaintiffs from being compensated. A successful use of flashlight discovery would prevent plaintiffs from wasting money on futile litigation and from giving up on suing, by creating two expectations: that tortfeasors may misrepresent the origin of the tort and that, if they did misrepresent, they will be exposed early on by discovery. In short, flashlight discovery aims

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154. See, e.g., Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 227 (2007) (explaining that courts have found “nearly unanimously” that presuit discovery under Rule 27 does not allow plaintiffs to obtain facts needed to survive a motion to dismiss).

155. Cf. *In re PrairieSmarts LLC*, 421 S.W.3d 296, 305 (Tex. App. 2014) (“[C]ourts must strictly limit and carefully supervise presuit discovery to prevent abuse of the rule.”).



to change the repeated-game plaintiffs' perception of the world from "suboptimal" or "broken" to "patched" (see Figure 4).

Now consider the effect of flashlight discovery on litigation results. Assume that judges correctly identify claims brought under the law of a dummy state that would survive a motion to dismiss and grant flashlight discovery only for those claims. In this situation, the fact that judges order more discovery at the pleading stage than they used to would not increase the total amount of resources spent on litigation, and therefore would not add to the case backlog. If anything, flashlight discovery would be more likely to reduce the backlog by preventing plaintiffs from spending the years' worth of time and money that they would have otherwise spent on futile litigation. Because discovery has informed the plaintiff about where the tortious conduct really happened, the plaintiff now sues under the law of a state where her claims will not be thrown out because of the choice of law issue. Because the plaintiff's claims were already plausible enough to survive a motion to dismiss, both parties now know that she has a good chance to win at trial.

<b>Figure 4: Four Possible States of the World, After a Solution to ME Is Implemented</b>	
<b>Type</b>	<b>Characteristics</b>
<i>Optimal</i>	No one ever commits torts because tortfeasors would always lose
<i>Suboptimal</i>	Corporate tortfeasors sometimes win, due to the corporate-individual asymmetry in funds and legal representation
<i>Broken</i>	Tortfeasors practically always win, by using the Maniscalco exploit
<i>Patched</i>	<b>Tortfeasors try to misrepresent, but are exposed by flashlight discovery</b>

*Causes and effects of underusing flashlight discovery.* Although flashlight discovery when used appropriately would address the exploit, it may be underused for two reasons. First, judges may hesitate to use discovery. Judges may not be able to distinguish claims filed under the law of a dummy state from those filed under the law of a state with genuine contacts to the case without actually using discovery. However, judges may not grant discovery at the

pleading stage because they are wary of adding to the case backlog. In this scenario, the judge is akin to a medical test that never returns false positives (no Type I error) but returns many false negatives (Type II errors).<sup>156</sup> If judges are so cautious as to never use flashlight discovery during pleading, tortfeasors would continue to use the exploit to prevent plaintiffs from being compensated.

Second, flashlight discovery may be underutilized because plaintiffs never ask for it. Recall that the first-round plaintiff never suspects that the tortfeasor will use the Maniscalco exploit because she has never seen it before. Therefore, she may never ask the court to order the discovery that would prevent the tortfeasor from using the exploit — one cannot ask for solutions to problems that she is not aware of. Although some federal courts have ordered discovery *sua sponte*,<sup>157</sup> I find it unlikely that judges would order discovery on the choice of law issue of their own accord during pleading, when the prevailing doctrine appears to be so averse to doing so.<sup>158</sup>

***Causes and effects of overusing flashlight discovery.*** Judges may also overuse flashlight discovery for the same reason that they might underuse it: judges cannot distinguish cases in which the tortfeasor is misrepresenting the origin of a tort from the cases in which the tortfeasor is not misrepresenting. However, instead of not using flashlight discovery for fear of adding to the case backlog, judges might order flashlight discovery in nearly every case they preside over in order to catch misrepresenting tortfeasors. In this scenario, judges never return false negatives (no Type II error) but return many false positives (many Type I errors). This would drive up the per-case cost to litigate ( $C_{\text{TR}} \uparrow$ ) by increasing the amount of time needed to resolve each case, which would ultimately add to the case backlog and deter plaintiffs from suing, even if they are certain that flashlight discovery would expose tortfeasors who misrepresent the origin of a tort.

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156. See JESSICA M. UTTS & ROBERT F. HECKARD, *STATISTICAL IDEAS AND METHODS* 380 (2006).

157. See, e.g., *Hatfill v. Foster (Hatfill III)*, 415 F. Supp. 2d 353, 356 (S.D.N.Y. 2006) (“I *sua sponte* ordered a fifteen[-]day period of jurisdictional discovery and directed additional briefing on the choice of law issue.”).

158. See, e.g., *Snyder v. Farnam Co. Inc.*, 792 F. Supp. 2d 712, 712 (D.N.J. 2011); *Carton v. Gen. Motor Corp.*, 611 F.3d 451, 454–55 (8th Cir. 2010); *Cooper v. Samsung Elec. Am.*, 374 Fed. Appx. 250, 257 n.5 (3d Cir. 2010).

The deterrent effect of increased litigation costs on the plaintiff's willingness to sue can be demonstrated formally. Let us return to the  $n$ th round depicted in Figure 2, but assume that the overuse of flashlight discovery has driven litigation costs up; each party's cost term now has a multiplier ( $\delta > 1$ ). Even if the tortfeasor misrepresents the origin of a tort, it cannot use the exploit because discovery would expose any misrepresentation; this means that  $p = q$  and  $0 < q \leq 1$ , such that the term representing expected damages ( $p * D$ ) in *misrepresent* survives. However, because flashlight discovery must be ordered in every case to expose tortfeasors, each case takes more time to resolve. Assume that  $\delta = 2$ ,  $H = D = 20$ ,  $p = q = 0.8$ ,  $C_{T\pi} = 10$ ,  $x = 0.4$ , and  $y = 0.5$ . Then, the plaintiff is better off giving up than going to trial:

$$\begin{aligned} \pi' \text{'s expected payoff from Give up} &> \pi' \text{'s expected payoff from Trial} \\ -xH - yH &> x(-H - \delta * C_{T\pi} + p * D) + y(-H - \delta * C_{T\pi} + q * D) \\ (x + y)\delta C_{T\pi} &> D(xp + yq) \\ 18 &> 14.4 \end{aligned}$$

Recall that, in the ME model, the settlement paid to a plaintiff is proportional to her likelihood of winning at trial.<sup>159</sup> If flashlight discovery has increased litigation costs to the point that it would be rational for a plaintiff to give up on suing the tortfeasor (for example,  $\delta = 2$ ), the tortfeasor would know that the plaintiff is unwilling to sue. As such, the tortfeasor would not pay a large settlement, and the plaintiff would therefore be better off giving up than settling as well. Assume, for illustration, that  $p = q = 0.8$ ,  $v = -0.6$ ,  $C_{S\pi} = 5$ ,  $x = 0.4$ , and  $y = 0.5$ . Then,

$$\begin{aligned} \pi' \text{'s expected payoff from Give up} &> \pi' \text{'s expected payoff from Settle} \\ -xH - yH &> x(-H - C_{S\pi} + [p + v] * D) + y(-H - C_{S\pi} + [q + v] * D) \\ (x + y)C_{S\pi} &> (x * [p + v] + y * [q + v]) * D \\ 4.5 &> 3.6 \end{aligned}$$

*Solutions to the unintended consequences of flashlight discovery.* The foregoing exercise shows that the greatest obstacle to a successful implementation of flashlight discovery would be the difficulty of getting judges to order discovery at the

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159. See *supra* Section I.C.2.

appropriate rate. If the problem is that judges underuse discovery during pleading, the solution may seem simple: force judges to order discovery more often. This could be accomplished either by amending the Federal Rules of Civil Procedure, or by changing the doctrine governing the practice of choice of law at the pleading stage; recall that the Third Circuit's practice of resolving motions to dismiss and conducting full discovery before addressing choice of law questions stems from case law.<sup>160</sup>

However, forcing judges to use flashlight discovery is more likely to lead to its overuse than an appropriate level of use, because of the catch-22 underlying this solution: judges must be able to identify the cases in which tortfeasors are misrepresenting the origin of a tort in order to grant flashlight discovery, but judges must grant flashlight discovery in order to catch misrepresenting tortfeasors. As demonstrated under the subheading *causes and effects of overusing flashlight discovery*, indiscriminate use of discovery at the pleading stage would increase the per-case cost to litigate by increasing the amount of time needed to dispose of each case. Hence, the solution of flashlight discovery may seem to present two options that both fail to address the exploit: either underuse flashlight discovery and let the exploit be used as is, or overuse discovery so that the worsening federal civil backlog would deter plaintiffs from bringing meritorious claims.

Fortunately, the deterrent effect of flashlight discovery on plaintiffs' willingness to sue can be addressed by increasing the expected amount of damages to be won—by stipulating punitive damages. As shown above, flashlight discovery could deter plaintiffs from suing because the litigation costs would dwarf the expected gains from winning at trial. However, assume that the value of  $D$  increases twofold to  $D = 2H = 40$ , because the relevant state law is amended to allow punitive damages. Then, even if the values of all other variables stay constant ( $\delta = 2, H = 20, p = q = 0.8, C_{T\pi} = 10, x = 0.4$ , and  $y = 0.5$ ), the plaintiff's payoff from going to trial would exceed her payoff from giving up.

$$\pi's \text{ expected payoff from Give up} < \pi's \text{ expected payoff from Trial} \\ -xH - yH < x(-H - \delta * C_{T\pi} + p * D) + y(-H - \delta * C_{T\pi} + q * D)$$

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160. See, e.g., *Snyder*, 792 F. Supp. 2d at 712; *Carton*, 611 F.3d at 454–55; *Cooper*, 374 Fed. Appx. at 257 n.5.

$$(x + y)\delta C_{T\pi} < D(xp + yq) \\ 18 < 28.8$$

Because the plaintiff's willingness to go to trial would strengthen her bargaining position, her payoff from settling would also exceed her payoff from giving up. Assume that  $v = -0.6$ . Then,  $D = 2H$  guarantees that the plaintiff will sue, despite higher costs created by flashlight discovery. Assuming again that  $p = q = 0.8$ ,  $C_{S\pi} = 5$ ,  $x = 0.4$ , and  $y = 0.5$  returns:

$$\pi's \text{ expected payoff from Give up} < \pi's \text{ expected payoff from Settle} \\ (x + y)C_{S\pi} < (x * [p + v] + y * [q + v]) * D \\ 4.5 < 7.2$$

*Arguments against the solution of flashlight discovery and punitive damages.* Some may argue against the solution advanced above. First, one may argue that punitive damages would exacerbate the docket overload,<sup>161</sup> which would have already been exacerbated by the overuse of flashlight discovery. However, flashlight discovery and punitive damages combined may in fact reduce the civil docket overload: if tortfeasors expect plaintiffs to sue despite high litigation costs and expect to pay substantial damages, tortfeasors may avoid using the exploit or even abstain from harming the plaintiff altogether. Recall that, in the  $r$ th round of the ME model without flashlight discovery, the plaintiff's expectation that she will lose deters her from suing; the same mechanism could force a tortfeasor who expects to lose and pay through the nose to avoid harming the plaintiff. In other words, the equilibrium effect of flashlight discovery and punitive damages on the docket is an empirical question that is beyond the scope of this Article.

Second, one may argue that flashlight discovery and punitive damages are unnecessary because plaintiffs might develop on their own the ability to identify misrepresenting tortfeasors before filing a complaint; after all, the means to disguise one's physical location while acting through the internet are not foolproof.<sup>162</sup> If plaintiffs or their counsel do develop the ability to catch misrepresenting

161. Cf. Tsang, *supra* note 139 at 106 (arguing that favorable procedural rules, such as punitive damages, induce international plaintiffs to sue in the United States).

162. See Kaminski, *supra* note 37 at 822.

tortfeasors on their own, that would indeed be a welcome development that makes it unnecessary to further complicate our already excessively complicated civil litigation system. However, I argued in Section I.A that, as of now, plaintiffs and plaintiffs' counsel appear to lack the technological sophistication needed to engage in digital forensics and an awareness of the importance of cybersecurity practices.<sup>163</sup>

At any rate, even if it is assumed that flashlight discovery becomes redundant because plaintiffs develop the ability to identify misrepresenting tortfeasors on their own, punitive damages may still be necessary because misrepresentation by tortfeasors could increase plaintiffs' pretrial investigation costs, which would increase litigation costs, which in turn could deter plaintiffs from suing – if not for the expectation of higher damages. Scholars already argue that there exists a “cost asymmetry” among litigants because “[w]hile the plaintiff must expend resources to establish each of the elements of her cause of action, the defendant can concentrate on a single defense.”<sup>164</sup> Adding the need to identify where a tortfeasor committed a tortious act would add to this cost asymmetry. The precise impact of this cost increase would, again, be an empirical question. However, the point remains that, *ceteris paribus*, added costs would deter plaintiffs with meritorious claims from suing, and that punitive damages would offset those costs.

### III. WHY IS CONFLICT OF LAWS SCHOLARSHIP PERCEIVED TO BE IRRELEVANT TO REALITY?

Parts I and II established that conflict of laws scholarship can be practically useful, by showing how tortfeasors can exploit a choice of law loophole to profit from interstate torts. Why, then, is conflicts scholarship considered to be unhelpful to practice and irrelevant to reality? The fact that interjurisdictional transactions have never been more frequent<sup>165</sup> indicates the timeliness of fixing conflict of laws, a discipline born to resolve interstate disputes. However, the fact that conflicts scholars have lamented the discipline's decline for

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163. See *supra* notes 88–89 and accompanying text.

164. Gideon Parchomovsky & Alex Stein, *Empowering Individual Plaintiffs*, 102 CORNELL L. REV. 1319, 1327–28 (2017).

165. See *supra* note 5 and accompanying text.

at least sixty years<sup>166</sup> suggests that a cause may be difficult to identify and a fix may be difficult to implement.

Yet existing works oversimplify the causes of, and solutions to, the decline of conflict of laws scholarship, even as they emphasize the value of reversing that decline.<sup>167</sup> Some exaggerate the role of a single cause of the problem and the efficacy of a single solution: Professor Friedrich Juenger, for example, attributes “[t]he turmoil that currently besets choice of law” to insufficient attention to foreign law.<sup>168</sup> Others misidentify the causes of the discipline’s decline by focusing too much on its symptoms. Professor Earl Maltz, for example, criticizes scholars who have “too great an intellectual investment in modern approaches to be persuaded by any arguments about the superiority of the prior law” and the discipline’s increasing reliance on “abstract arguments, often couched in pseudo-sophisticated jargon.”<sup>169</sup> Although academic complacency and obfuscation should always be criticized, to do so without thoroughly examining why they occur so often in conflict of laws is unlikely to create meaningful change. As such, perhaps it is only natural for Maltz himself to be skeptical that his criticism will change conflicts theory.<sup>170</sup>

Part III identifies two reasons for, and two solutions to, the discipline’s decline. Section III.A argues that scholars’ obsession with comprehensive, ideal choice of law rules at the expense of studying how existing choice of law rules immediately affect individual litigation outcomes has made scholarship unhelpful to practice. I then explain why conflicts scholarship has failed to act on an intuitive solution, to shift focus from macro-theoretical to micro-applied conflict of laws: scholars appear to misunderstand what practitioners want out of conflicts

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166. See *supra* notes 1–2 and accompanying text.

167. See, e.g., Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT’L L. 975, 981–82 (1994) (“At a time when conflict of laws issues . . . arise more frequently in tort cases . . . and rational allocation of government authority over multistate or transnational business has taken on greater importance, conflict of laws theory could hardly be in greater disarray. That disarray leaves many interstate and international problems unresolved . . .”) (citation omitted).

168. See Juenger, *supra* note 47, at 1314.

169. See Maltz, *supra* note 48, at 547.

170. See *id.* (“I am not sufficiently naive to believe that anything said in this Article will lead to a large-scale retreat from modern conflicts theory and a concomitant resurgence in the popularity of the *First Restatement*.”).

scholarship. Scholars' underappreciation of lawyers' demand for advice that will immediately help in the courtroom would explain why, even as the field's reputation for impracticality solidifies, scholars claim that the academy has failed to convince the bar of the true value of theoretical conflicts scholarship,<sup>171</sup> or that creating a better choice of law theory will displace that reputation of impracticality.<sup>172</sup>

Following Section III.A's explanation for why practitioners have abandoned conflict of laws, Section III.B explains why scholars have lost faith in the discipline. Prevailing accounts claim that abstruse analysis and hairsplitting jargon have repelled scholars from the field<sup>173</sup> or that scholars who push certain theories have given the field a bad name.<sup>174</sup> I submit that the first explanation confuses a symptom of the discipline's decline for its cause, and that the second blames a subset of conflicts scholars for a fault shared by the broader field. Section III.B argues that overcomplexity is a symptom of unfalsifiable argumentation. Unfalsifiable argumentation prevents anyone from being proven wrong, which enables scholars to use the kind of "pseudo-sophisticated jargon"<sup>175</sup> that conflicts scholars are accused of using without being contradicted. The fact that no one can be proven wrong enables the same debates to repeat themselves ad nauseam, by allowing anyone to claim that their opponents misunderstand—or, in some cases, deliberately misrepresent<sup>176</sup>—them. I then propose formal modeling as a tool to aid logical argumentation in conflict of laws.

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171. See, e.g., Little, *supra* note 43, at 233–34 ("For teaching, most existing casebooks squander the promise of Conflicts as a tool for broad understanding . . . . If future lawyers and academics do not experience the promise of Conflict of Laws analysis during their formative stages, they are less likely to push the discipline in new directions that accommodate changes in the legal, social, and technological landscapes.").

172. See, e.g., Symeonides, *supra* note 95, at 1904, 1909 (attributing the discipline's reputation for impracticality to "the complexity of the modern choice-of-law approaches" and calling for choice of law rules that accommodate "the conflicting needs of certainty and flexibility").

173. See, e.g., Maltz, *supra* note 48; Little, *supra* note 50.

174. See, e.g., Posnak, *supra* note 98.

175. See Maltz, *supra* note 48, at 547.

176. See, e.g., Posnak, *supra* note 98.



*A. An Obsession with Macro-Level Theory at the Expense of  
Micro-Level Application*

*[I]n Currie's defense . . . Currie put forth the selfish-state analysis . . . to demonstrate how the theory worked. It was not supposed to be a guide to conducting interest analysis in actual cases – though unfortunately it seems to have been taken that way, especially by critics.<sup>177</sup>*

Since Joseph Beale, American conflict of laws has largely been dominated by two groups of scholars vying to replace the prevailing choice of law rule with a superior alternative. The first has called for a new a priori theory that would predict which state's law would apply to any case and would logically justify why. The vested rights approach of the First Restatement was overthrown for using what many saw as arbitrarily chosen factors to reach unforgivingly rigid results.<sup>178</sup> The Second Restatement's most significant relationship rule was attacked for being so pliable that it could justify any result and, hence, lacking uniformity and predictability.<sup>179</sup> Schools of thought such as interest analysis, comparative impairment, and the better rule of law have debated which rule is the superior regime since the 1950s to the present.<sup>180</sup> Meanwhile, the second group argued against any a priori choice of law rule designed to achieve theoretically "correct" results, with recommendations ranging from rules that prioritize predictability

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177. Kermit Roosevelt III, *Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 511 (2014).

178. See, e.g., Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1129 (2010) (arguing that judges came to reject the First Restatement because they "became increasingly unwilling to apply the law of a state with only a single contact with the dispute").

179. See, e.g., Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499, 1513 n.83 (2013) ("[T]he hallmark of the Second Restatement is its flexibility, allowing judges to apply it differently according to personal preference or their sense of the justice of the case.").

180. See *supra* notes 96–97; see also BRILMAYER, *supra* note 51, at 22–42 (summarizing the historical development of schools of thought in American conflict of laws since Joseph Beale).

over logical consistency<sup>181</sup> to having the judge choose whichever state law that would achieve substantively “just” results.<sup>182</sup>

Although these groups make opposite arguments, they unite the vast majority of conflicts scholars in one respect: they both advance theories about how choice of law rules should work at the systemic level, akin to how macroeconomists study the economy as a whole. The discipline’s disproportionate focus on macro-level theory has relegated micro-level application of conflict of laws—studying how existing choice of law rules actually operate at the level of individual trials—into neglect, a fact that practitioners have made clear by complaining for generations that conflicts scholarship consists of abstruse theory<sup>183</sup> that is unhelpful to actual practice.<sup>184</sup> The fact that scholars claim to have been aware of this dissatisfaction and that it has apparently not been resolved<sup>185</sup> prompts two questions. First, does the bar have a legitimate need for scholarship in micro-level application that scholarship on macro-level theory cannot fulfill? Second, if it does, why has the academy failed to pay more attention to micro-level application of conflict of laws?

Practitioners and their clients can have a genuine need for scholarly work that applies abstract theory, even if they do not appreciate the metaphysical beauty of that theory in the same way that theorists do. Take, for example, the Navier-Stokes equations, which describe the motion of viscous fluids and are used to predict the weather.<sup>186</sup> Theorists (mathematicians) might care about the equations because they present an unsolved

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181. See, e.g., Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 750–51 (1924) (“[I]t matters less what the [choice of law] rule is than that it shall be certain and so far as possible uniform . . . . There is no reason . . . our courts should give up [traditional rules] in favor of any *a priori* theory which has no support other than that of the person advocating the same.”).

182. See, e.g., Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 952 (1994) (“[N]o comprehensive choice of law theory, whether consequentialist or rights-based, will or should supersede the judicial inclination to focus on substantive results in the cases before them.”).

183. See, e.g., Austin, *supra* note 9.

184. See, e.g., Rosenberg, *supra* note 7.

185. See *supra* notes 1–2, 10, and accompanying text.

186. See WILLI FREEDEN & MARTIN GUTTING, SPECIAL FUNCTIONS OF MATHEMATICAL (GEO-)PHYSICS 15 (2013).

mathematical problem,<sup>187</sup> not because they are a useful tool. Practitioners (meteorologists) may care about the equations because they can be used to predict when the next natural disaster will come,<sup>188</sup> not because they want to find global solutions to the three-dimensional Navier-Stokes equations. I, a client of the practitioners, want to avoid drowning in a flash flood but do not care whether the weather forecasts come out of a supercomputer or a crystal ball, as long as they are accurate. Just as non-mathematicians can have a genuine need for accurate weather forecasts, lawyers who do not care about theory (as well as their clients) can have a genuine need for conflicts scholarship that will help them in the courtroom.

None of this is to disparage the value of macro-level legal theory. It would undoubtedly be valuable to create an a priori choice of law theory that would predict which state's law would apply to any given case and would logically justify why, because a law becomes more legitimate when people understand and accept why it limits their behavior. For example, people are more likely to justify "severe punishment such as the loss of liberty" for crimes such as murder<sup>189</sup> than for crimes such as "sing[ing] or render[ing] the 'Star Spangled Banner' . . . as dance music."<sup>190</sup> I am merely arguing that, for example, a public defender can have a genuine need for law review articles on how courts handle habeas petitions without caring about constitutional theory, and her client can want to leave prison without caring about how it happens as long as it happens legally.

However, conflict of laws has failed to pay due attention to application because scholars misunderstand what practitioners

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187. See, e.g., Charles L. Fefferman, Existence and Smoothness of the Navier-Stokes Equation 2 (unpublished manuscript), <http://www.claymath.org/sites/default/files/navierstokes.pdf> ("[The existence of solutions in two dimensions] gives no hint about the three-dimensional case, since the main difficulties are absent in two dimensions."). The Clay Mathematics Institute has offered \$1 million for a proof. See *Navier-Stokes Equation*, CLAY MATHEMATICS INSTITUTE (Sept. 28, 2020, 9:36 AM), <http://www.claymath.org/millennium-problems/navier%E2%80%93stokes-equation>.

188. See, e.g., John Schwartz, *25 States Are at Risk of Serious Flooding This Spring*, U.S. *Forecast Says*, N.Y. TIMES (Mar. 21, 2019), <https://www.nytimes.com/2019/03/21/climate/climate-change-flooding.html>.

189. See *United States v. Alton Box Bd. Co.*, No. 76 CR 199, 1977 WL 1374, at \*6 (N.D. Ill. Mar. 4, 1977) (distinguishing *mala in se* crimes from *mala prohibita* crimes).

190. MASS. GEN. LAWS ANN. ch. 264, § 9 (West 2020) (imposing a fine of "not more than one hundred dollars" for the act).

want from scholarship. That is, the academy seems to believe that the bar criticizes scholars for neglecting application because practitioners fail to appreciate the value of theory in the same way that scholars do. For example, many conflicts scholars have assigned a substantial share of the blame for the discipline's reputation among practitioners as "desolate" and "sad" to the practitioners' own failure to understand abstract scholarly theory:

How does one restate gibberish? Anyone who looks at American judicial opinions dealing with choice-of-law issues must conclude that the field is in a desolate state. . . . [J]udicial prose has an Alice-in-Wonderland kind of quality: one reads about "contacts" and "interests" as if these concepts were pretty much the same thing, or perhaps closely related . . . .

Even more depressing, however, at least to those who teach the subject, is the disarming candor with which some judges deplore the "post-revolutionary" conflicts law. . . .

. . . [O]ne cannot help but shudder when thinking about the Supreme Court's taking an active role in this field considering what it has done to the far simpler subject of jurisdiction. And yet, some conflicts scholars have urged the Justices to take a more active role . . . .

. . . .

. . . [C]onflicts law . . . is in a sad and unstateable shape. . . .

. . . .

. . . [O]ne cannot even trust judicial opinions to adhere faithfully to the doctrines they claim to follow.<sup>191</sup>

Juenger and those who agree with him may well be correct that most judges confuse their own errors in application for unintelligible theory. However, even if this claim is correct, blaming the bar for not understanding the law will not help keep conflict of laws on the bar exam. Faulting judges for not understanding high conflicts theory is like faulting mechanical

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191. Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 403-04, 410 (2000) (footnotes omitted); see also KERMIT ROOSEVELT III, CONFLICT OF LAWS 68 (2010) ("[J]udges tend to ignore or misunderstand even quite basic features of most choice-of-law approaches, and the difference between comparative impairment and balancing is likely to escape them entirely."); Little, *supra* note 50, at 927 ("[T]he type of hairsplitting that occurs in conflicts has considerably damaged the reputation of lawyers . . . .").

engineers for not understanding string theory well enough to write a dissertation on it. To avoid cementing the field's reputation as an echo chamber of self-righteous zealots, scholars must focus less on proselytizing their idea of ideal a priori choice of law rules and more on studying how existing rules affect individual litigation outcomes. The need to clarify macro-level theory by showing how it works at the micro-level is especially acute in conflict of laws, because many of the scholars themselves have contributed to muddling the theoretical landscape by apparently misrepresenting the theory.<sup>192</sup>

If Juenger and his camp seem to be an extremely vocal minority, they are not. Granted, not all scholars go so far as to fault judges for deliberately misapplying theory.<sup>193</sup> However, like Juenger and company, many other conflicts scholars also place a large share of the blame for the discipline's reputation for impracticality on the bar's failure to grasp conflict of laws theory—even though practitioners should not be expected to appreciate high theory in the same way that scholars do. Take, for example, Professor Laura Little's claim that conflict of laws is taken to be "irrelevant" because law students and the bar do not appreciate the value of abstract conflicts theory, which in turn is because of the academy's failure to teach the discipline properly:

Conflict of Laws presents opportunities for meaningful reflection on legal regulation and governmental structure. . . . In the course of resolving conflicts issues, legal thinkers can develop a deep understanding of the nature of law itself. . . . [M]any perceive the field as arcane, dry, and possibly even irrelevant. Conflict of Laws is none of these things. . . .

. . . The essay provides raw material for scholars and practicing lawyers, who . . . have the ability to raise the consciousness of others about their contemporary importance. . . .

. . . .

. . . Plain words about the emotional, contemporary, and practical implications of Conflicts doctrine can help hook the

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192. See, e.g., Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 950–51 (1981) (explaining that "Currie's followers deny the validity of invoking a set of external theorems that point a priori to a 'correct' choice of law" but that many of them have "defect[ed] from Currie's no-rules methodology").

193. See, e.g., ROOSEVELT, *supra* note 191.

listener. Yet the profound, abstract questions that comprise Conflicts of Laws are what the discipline make so important. The challenge then is to . . . capture both the practical and theoretical richness in the subject matter.

. . . [M]ost . . . casebooks squander the promise of Conflicts as a tool for broad understanding.<sup>194</sup>

It is only natural for a committed academic to criticize bad teaching, and Little's essay may well be the manual that the field needs to effectively teach abstract conflict of laws theory. However, improved instruction in high theory is unlikely to change the field's reputation of impracticality in the way that Little envisions, because practitioners are unlikely to develop a sudden interest in profound debates on the nature of law if scholars will not provide immediately helpful advice on how to win at trial. If, after decades of complaints that the discipline is unhelpful to practice, the academy still thinks that the practical implications of conflict of laws are there merely to "hook the listener[,]"<sup>195</sup> the bar will continue to believe that scholars care only about proselytizing "a priori theor[ies] which ha[ve] no support other than that of the person advocating the same."<sup>196</sup> Although we are free to teach students whatever theory we want, we must swallow that burning desire when dealing with practicing lawyers and instead write more scholarship on micro-level application; the alternative appears to be to feel self-superior while the discipline withers away in oblivion.

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194. See Little, *supra* note 43, at 231, 233–34 (footnote and citation omitted).

195. *Id.* at 233 (italics removed).

196. See Lorenzen, *supra* note 181, at 751.

*B. Unfalsifiable Argumentation: The Cause of Generations of Fruitless Debates Ad Nauseam*

*The new critics of interest analysis . . . do not fully understand what they criticize[.]*

— Bruce Posnak,<sup>197</sup> 1988

*[T]he best way to get beyond Currie is to debate him one last time in order to put [interest analysis] in perspective.*

— Larry Kramer,<sup>198</sup> 1991

*State courts . . . misunderstand completely what Brainerd Currie meant by a 'state interest[.]'*

— Katherine Florey,<sup>199</sup> 2015

The argument advanced in Section III.A, that conflict of laws scholarship is considered to be impractical because it is concerned excessively with macro-level theory at the expense of micro-level application, explains why the practitioners have lost faith in the field, but not why the theorists also unanimously claim to be sick of it. To a layperson, the fact that conflict of laws scholars are enamored with high theory may suggest that they should have no problem continuing to obsess over “Delphic” wording and “disagree as to what it means but agree that they adore it.”<sup>200</sup> Year after year, however, conflicts scholars in fact lament the demise of conflict of laws theory, even as they continue to produce more of it.<sup>201</sup> As far as I am aware, no other discipline can claim to match the strange phenomenon that we have seen in this one for generations: the academy speaks loudly and unanimously of the value of resurrecting sound conflicts theory<sup>202</sup> but apparently

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197. Bruce Posnak, *Choice of Law: Interest Analysis and Its “New Critics,”* 36 AM. J. COMPAR. L. 681, 727 (1988).

198. Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT’L L.J. 245, 246 (1991).

199. Florey, *supra* note 2, at 686 (footnote omitted).

200. Rosenberg, *supra* note 7, at 460.

201. *See supra* notes 8–10.

202. *See supra* notes 43–46.

agrees that the task is infeasible,<sup>203</sup> while being roundly criticized by the bar for wasting time.<sup>204</sup>

Those familiar with the tortured history of this discipline may explain that the theorists are leaving because they have argued over the identical claims for decades, such as those on the merits of interest analysis cited at the beginning of Section III.B. Many of these interlocutors blame others' misunderstanding of their arguments – willful<sup>205</sup> and otherwise<sup>206</sup> – for the nauseatingly long duration of this debate. However, attributing decades of stasis in conflict of laws to the discipline's most eminent names all simultaneously becoming sinister or witless is plainly implausible. I argue that what many conflicts scholars have called a misunderstanding of choice of law theories is merely a symptom: scholars have left the discipline because of their own reliance on unfalsifiable argumentation, which has enabled endless squabbling over the exact same topics by preventing anyone from being proven wrong, thereby allowing anyone to claim to be misunderstood.

*1. Anyone can claim to be misunderstood when no one can be proven wrong*

Unfalsifiable arguments prevent meaningful debate by allowing the debaters to repeat the same claims without being contradicted. When I say that a claim is unfalsifiable, I mean that it lacks objective and testable parameters.<sup>207</sup> For example, the claim that cats are cuter than dogs is unfalsifiable because there is no objective agreement on what makes a species cuter than another. The claim that “God exists because the Bible says so, and the Bible is true because God says so” is unfalsifiable because it relies on circular logic: the claim that God exists and the claim that the Bible is true rely on each other as evidence, and there is no standalone way to test either claim. Because unfalsifiable arguments cannot be

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203. See, e.g., Juenger, *supra* note 191.

204. See, e.g., Trachtman, *supra* note 167, at 978 (“Conflict of laws is a source of constant embarrassment to lawyers, judges, and scholars.”).

205. See, e.g., Posnak, *supra* note 98, at 1131.

206. See, e.g., Kermit Roosevelt III & Bethan R. Jones, *The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer & Listwa*, 128 YALE L.J. F. 293, 301 (2018) (arguing that Brilmayer and Listwa's critique of the Draft Restatement is based on a “misunderstand[ing]”).

207. See Brilmayer & Kim, *supra* note 116, at 23–29 (discussing how international law scholars have used unfalsifiable argumentation to present value judgments as scientific claims and to avoid being proven wrong).



contradicted, they can protract debates ad infinitum just by being repeated. At the same time, purveyors of unfalsifiable arguments can deflect blame for endless debates by claiming that their opponents misunderstand them. For example, one may dismiss dog lovers as “plainly lacking in intelligence”<sup>208</sup> or non-Christians as not “understanding that they need a savior” because they subscribe to “lies straight from the pit of hell.”<sup>209</sup>

Conflict of laws scholars have too often used unfalsifiable argumentation and accused their opponents of misunderstanding it. Take, for example, the claims made by some followers of governmental interest analysis, the choice of law rule that would apply the law of the state with the greater policy interest in a case and perhaps the most debated school of thought in the field’s modern history.<sup>210</sup> In 1985, Professor Lea Brilmayer famously argued that interest analysis is not the objective method that its proponents present it as because it lacks a value-neutral means for determining “policy interests” underlying a state law. Because there is no agreement on what a state’s interests are, Professor Brilmayer argued, defenders of interest analysis can dress up their own preferences as state interests and present choice of law decisions based on them as unbiased:

Policy has been drained of meaning, perhaps in order to accommodate so many different viewpoints about what ought to be considered. . . .

. . . [Currie’s] methods supposedly . . . attempted to decide as the legislature would have decided had it addressed the issue . . . .

While apparently clear in principle, this methodology is somewhat difficult to apply. Most legal rules have no direct instructions on their intended range of application. . . .

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208. Chris Matyszczyk, *Cat People Are Smarter than Dog People, Study Says*, CNET (June 1, 2014, 1:15 PM), <https://www.cnet.com/news/cat-people-are-smarter-than-dog-people-study-says/>.

209. Matt Pearce, *U.S. Rep. Paul Broun: Evolution a Lie “From the Pit of Hell,”* L.A. TIMES (Oct. 7, 2012, 12:00 AM), <https://www.latimes.com/nation/la-xpm-2012-oct-07-la-na-nn-paul-broun-evolution-hell-20121007-story.html>.

210. See, e.g., Harold P. Southerland, *Conflict of Laws in Florida: The Desirability of Extending the Second Restatement Approach to Cases in Contract*, 21 NOVA L. REV. 777, 805 (1997) (“Though [Currie’s] forum-law solution has not been widely adopted, there is still nothing approaching general agreement about how true conflicts should be resolved. It is the most hotly debated issue in choice-of-law today.”).

....

All of this talk about willingness to defer to state policy decisions is pure bunk. . . . Interest analysis is *not* a value neutral methodology that simply seeks implementation of the policy preferences of the legislature or common law court. Interest analysts have a very strong set of normative premises which enable them to contradict or belittle the preferences of legislatures and courts if those preferences resemble that "dogma," that "sterile formalism," that "mindless and ruthless machine," the First Restatement of Conflicts. . . . The illustrative examples [used by proponents of interest analysis, including Currie,] simply indicate what interest analysts think that legislatures *ought* to want.<sup>211</sup>

In response, Professor Robert Sedler argued that Professor Brilmayer fails to understand how interest analysis decides whether a state has an interest and which law to apply to a given case:

Professor Brilmayer . . . is not particularly concerned about how interest analysis works in practice or about the results that are produced by the application of that approach. . . .

....

According to Currie, it is rational to make choice of law decisions with reference to the policies reflected in the laws of the involved states, and the interest of each state, in light of those policies, in having its law applied on the point in issue in the particular case. . . .

....

. . . It is only where the application of a state's law cannot be sustained either on the basis of the state's interest in advancing the policy reflected in that law, or on the basis of factual connections between the underlying transaction and the state, that such application is unreasonable . . . .

....

Choice of law decisions . . . should be made with reference to the policies reflected in the laws of the involved states and the

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211. Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO STATE L.J. 459, 459, 464, 469-70 (1985) (footnotes omitted).

interest of each state, in light of those policies, in having its law applied . . . [to a] particular case. The justification for interest analysis is that it is rational to make choice of law decisions on this basis . . . .<sup>212</sup>

Professor Sedler's argument, that interest analysis works because it is rational, is unfalsifiable for the same reason that "cats are cuter than dogs" is unfalsifiable: like the term "cuter," the material word "rational" has no objective definition. Sedler's definition of "unreasonable" as "where the application of a state's law cannot be sustained . . . on the basis of the state's interest" is a tautology because it merely repeats the claim that applying the law of the state with the greater interest in a case is reasonable, without defining what "interest" is. Throughout his entire article, Sedler repeats his claim that "interest analysis . . . works" because it provides "a rational basis for making choice of law decisions" without otherwise defining "rational," while repeating in only cosmetically different ways the claim that Brilmayer misunderstands interest analysis.

Nine years after Professor Brilmayer's attack and Professor Sedler's defense, followers of interest analysis continued to advance unfalsifiable arguments on its behalf. In 1994, Professor Bruce Posnak repeated the claim that Professor Brilmayer misunderstands interest analysis:

Not only does [Professor Brilmayer] continue to refuse to "get it" and abuse Currie's ideas, she has spawned a whole school of misinformed fry-critics . . . [who] have . . . infected both courts and practicing lawyers and adversely affected the law. . . .

. . . .

. . . Whether a state has an "interest" depends solely upon whether it is reasonable to conclude that a policy behind that state's competing law would be advanced if that law were applied. . . .

. . . .

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212. Robert A. Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack,"* 46 OHIO STATE L.J. 483, 483, 485, 488, 490 (1985) (footnotes omitted).

... [I]t is irrational for a state court to apply the law of some state when it is clear that no policy behind that law would be furthered but the policy behind the competing law would be. ...

....

... An "interest" arises if it is reasonable to conclude that one of these policies would be advanced if that law were applied to ... the case before the court.<sup>213</sup>

Professor Posnak's argument is unfalsifiable because its reasoning is circular, like the claim that God exists because the Bible says so, and that the Bible is true because God says so. Consider the last two sentences in the excerpt cited above: according to Posnak, it is irrational for a court to apply a state's law if that state has no interest in having its law apply, and an interest arises if it would be rational to apply that state's law. Because the definitions of "interest" and "rational" rely on each other and Posnak's article does not provide a standalone way to define them, his claim cannot logically be contradicted and can protract futile debate simply by being repeated.

I will not belabor this point by listing more examples of conflict of laws scholars making unfalsifiable arguments, protracting futile debates, and accusing critics of misunderstanding and misrepresenting them, well into the present.<sup>214</sup> The point of this exercise is that conflicts scholars who blame the discipline's reputation for impracticality on other scholars and practitioners who allegedly misunderstand their claims may have no one to blame but themselves: it seems only reasonable to abandon a field whose noticeable advancements are in the number of ad hominem attacks exchanged between scholars, not in the quality of the arguments presented in their works. The alternative to my explanation, that unfalsifiable arguments have caused years of futile debate in conflict of laws, is to accept that its prevailing

213. See Posnak, *supra* note 98, at 1131, 1137, 1149, 1182 (footnotes omitted).

214. See, e.g., Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 295, 297 (1966) (advancing the "better rule of law," which argues for "applying what by the forum's standard is the better of the competing rules of law" without objectively defining "better"); *supra* notes 197-98; Roosevelt & Jones, *supra* note 38 (responding to a critique of the Draft Third Restatement that it "retain[s] ... the least defensible aspects of governmental interest analysis" by arguing that "[t]he Restatement draft does not follow Currie's assumptions about state interests or his conclusions as to the scope of state laws, much less his views on how to resolve conflicts between them").

theories are so genuinely complicated that our most eminent colleagues are all flummoxed by them. If that is the case, it hardly seems proper to fault practitioners for not understanding high theory that conflicts scholars themselves do not.

*2. Formal modeling as an aid for logical debate in conflict of laws*

As shown in Section III.B.1, unfalsifiable argumentation is a fairly simple fallacy to spot. However, the scholars who have argued against unfalsifiable claims in conflict of laws for years have failed to identify them as fallacies, even as they criticized those claims from a substantive perspective. For example, Professor Brilmayer, in over a decade of works criticizing interest analysis, focuses on its failure to clarify the roles of statutory construction and legislative intent in determining whether a state law should apply, as well as its failure to provide constitutional justification.<sup>215</sup> Substantive criticism such as this has failed to close futile debate, because users of unfalsifiable argumentation capitalize on its immunity to contradiction to simply repeat their claims. Had the fallacy of unfalsifiable argumentation been pointed out explicitly, perhaps unproductive theoretical debate in conflict of laws may not have lasted for such a long time.

I submit that formal models would make logically sound debates in conflict of laws more likely by forcing arguments to explicitly state and quantify their underlying assumptions, so that they become resistant to misrepresentation by rhetorical massaging. This Article and the works in defense of interest analysis cited in Section III.B.1 have similar purposes, because they all argue that a choice of law rule will result in certain consequences. I argue that resolving the choice of law issue using plaintiffs' allegations would incentivize tortfeasors to misrepresent the origin of a tort, whereas defenders of interest analysis argue that it would apply to a case the law of a state that has the greater policy interest in having its law apply. A difference between this Article and those in defense of interest analysis is that this Article quantifies and explicitly states the assumptions underlying the

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215. See Brilmayer, *supra* note 211; Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555 (1984); BRILMAYER, *supra* note 51, at 44-47.

argument that tortfeasors would use the Maniscalco exploit, in the form of parameters in Figure 2 such as *H*. I could not rely on fallacies to present a claim that is not supported by my assumptions because anyone could check my work by solving my model.

Although formal models have been used in other fields of legal scholarship<sup>216</sup> and could easily be imported to conflict of laws, as shown by this Article, I wish to qualify my argument in favor of using formal models in conflict of laws in order to preempt any misunderstanding of my intent. First, I am not arguing for the use of formal models in all, or even most, conflict of laws research, because formal models cannot be used to present arguments whose assumptions cannot be quantified. For example, the claim that the Second Restatement returns more just results than interest analysis does, on its own, cannot be presented using a game-theoretic model because the value preferences that lead one to conclude that one choice of law rule is normatively superior to another cannot be quantified. Legal scholars have already been criticized for attempting to lend their value judgments a specious impression of quantitative authority by presenting them using misapplied game theory,<sup>217</sup> a trend that would only further undermine this field's reputation.

Second, I am not arguing that game-theoretic models are inherently superior to any other research methodology. I support any research method that would make logically sound debate in conflict of laws scholarship more likely, and I am arguing that formal modeling is one of them. The social sciences have long been plagued by scholars' dogmatic attachments to particular tools for research, which limit the range of research that scholars will consider, induce scholars to use methods that are inappropriate for a given purpose, and cause rarely used but nevertheless sound methods to be "denied the name of science."<sup>218</sup> I do not intend to contribute to introducing yet another Inquisition to a discipline already populated by "wild-eyed . . . intellectual zealots."<sup>219</sup>

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216. See, e.g., Erik Hovenkamp, *Competition, Inalienability, and the Economic Analysis of Patent Law*, 21 STAN. TECH. L. REV. 33, 71–73 (2018).

217. See Brilmayer & Kim, *supra* note 116, at 30–34.

218. Donald R. Kinder & Thomas R. Palfrey, *On Behalf of an Experimental Political Science*, in EXPERIMENTAL FOUNDATIONS OF POLITICAL SCIENCE 1, 4 (Donald R. Kinder & Thomas R. Palfrey eds., 1993) (quoting ABRAHAM KAPLAN, THE CONDUCT OF INQUIRY 29 (1964)).

219. See BRILMAYER, *supra* note 51.

Finally, I am arguing for more use of formal modeling in conflict of laws because models make it easier to determine whether an argument is logically consistent with its assumptions, not because models necessarily indicate whether the argument and its assumptions accurately portray reality.<sup>220</sup> No model describes reality completely accurately, because to do so would defeat the purpose of using a model: a model abstracts away some of reality's complexities in order to study a particular phenomenon in isolation. However, a model with brazenly false assumptions serves no use because it would model things that do not occur in reality. Yet, too many scholars in other legal disciplines openly argue that a model need not be grounded in accurate assumptions about reality, as long as the model's conclusions tell a plausible story.<sup>221</sup> Presenting formal models in conflict of laws based on false assumptions would not only add to this mess, but also repeat the behavior that has plagued this field for decades: obsessing over theory with no bearing on reality.

#### CONCLUSION

Conflict of laws, despite its notorious past, has a starring role to play in legal practice and academia in the years to come. This Article has shown firsthand how conflicts scholarship could seize such a role by identifying and advancing a solution to a problem that will become only more prevalent and malignant in the age of cybertorts: corporations acting over the internet can exploit a loophole in territorially tethered choice of law rules to profit from interstate torts at the expense of plaintiffs with meritorious claims against them. This Article has also shown that conflict of laws scholarship has become notorious for impracticality not because the discipline is inherently unhelpful to practice, but because

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220. See MORROW, *supra* note 116, at 1 ("Game theory cannot tell us whether certain theories are accurate descriptions of the world, but it can tell us what behavior we should expect as a consequence of those theories.").

221. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 16 (2007) ("Newton's law of falling bodies is unrealistic in its assumption that bodies fall in a vacuum . . . but it is still a useful theory because it predicts with reasonable accuracy the behavior of a wide variety of falling bodies in the real world."); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1706 (1986) ("What's wrong with models that contain 'unrealistic' assumptions? The purpose of any model is to strip away complications, to make intractable problems manageable, to make things simple enough that we can see how particular variations matter.").

scholars misunderstand what the bar wants from the academy and because they have debated one another in a way that obstructs scholarly progress.

Although scholars contributing to their own reputation for unhelpfulness is particularly egregious in conflict of laws, legal scholarship more broadly is also guilty of the same. Scholars engage in a periodical, collective handwringing about the declining relevance of their works to reality,<sup>222</sup> as if that ritualized admission of guilt licenses them to keep on sinning until the next confession. While recognition is the first step to solving any problem, claiming to have found a problem without making any progress serves only to cement suspicions that scholars are failing to address its central cause. Indeed, many point to the law review format as a main cause of legal scholarship's declining relevance,<sup>223</sup> as if to suggest that the unappealing content may become attractive in new clothes. Although law reviews may have a hand in the fall of legal scholarship, I maintain that the central cause of irrelevant content is irrelevant content. Attributing the falling relevance of legal scholarship to its publication format is like refusing to swim in shark-infested waters because of the risk of drowning, while ignoring the much higher risk of being eaten alive.

Fortunately, some legal scholars are defying entrenched perceptions that "[w]hat the academy is doing . . . is largely of no use or interest to people who actually practice law"<sup>224</sup> by producing timely research on some of the most pertinent issues of the day: for example, how the Supreme Court's restrictive interpretations of the

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222. See, e.g., Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1205 (1981) ("[L]egal scholarship lies at the edges of serious intellectual activity . . ."); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 933 (1990) ("[A]midst the morass of law reviews are occasional stabs at candid self-criticism. For example, various observers have noted that supposedly analytical commentaries are predominantly descriptive and mildly plagiaristic[.]").

223. See, e.g., Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936) ("[I]t is in the law reviews that a pennyworth of content is most frequently concealed beneath a pound of so-called style. The average law review writer is peculiarly able to say nothing with an air of great importance. When I used to read law reviews, I used constantly to be reminded of an elephant trying to swat a fly."); Alan Watson, *Legal Education Reform: Modest Suggestions*, 51 J. LEGAL EDUC. 91, 95 (2001) ("[L]egal education would be vastly improved if American law review articles of the typical sort were abolished.").

224. Adam Liptak, *Keep the Briefs Brief, Literary Justices Advise*, N.Y. TIMES (May 20, 2011), <https://www.nytimes.com/2011/05/21/us/politics/21court.html> (quoting Chief Justice John Roberts).



extraterritorial effects of financial regulations can allow transnational corporations to harm any country, while staying beyond the reach of all of them.<sup>225</sup> Conflict of laws, the discipline that governs the application of state laws to interstate activity, must immediately join and eventually lead this effort to redesign our territorial legal system to survive these interjurisdictional times. With everyday life becoming increasingly dependent on the internet, it seems that the deck is stacked in favor of conflict of laws. To win that game, we would only have to play it.

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225. See William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. 1 (2019).