

# “LOCAL DATA” IN EUROPEAN CHOICE OF LAW: A TROJAN HORSE FROM ACROSS THE ATLANTIC?

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## I. INTRODUCTION

A transatlantic dichotomy runs through conflicts law. The difference between the European and American approaches to “justice” in the resolution of international private law cases has been discussed extensively.<sup>1</sup> While this divide has grown smaller throughout the twentieth century, differences still abound. One of these differences has been handled more pragmatically than doctrinally: the consideration of “local data.” In European doctrine in particular, this issue still provides a cause for debate.

Where does local data come from? The concept of “datum” was first introduced by Brainerd Currie in 1958,<sup>2</sup> and was further developed less than a decade later by Albert Ehrenzweig in his theory of local and moral data.<sup>3</sup> For moral data, application of the *lex fori* (the law of the forum) is mandatory, notwithstanding the existence of foreign elements that would otherwise suggest the application of foreign law.<sup>4</sup> These are cases where justice or equity require a reliance on the law of the forum—hence, *moral datum*.<sup>5</sup> Local data calls for precisely the opposite, it provides for an “automatic reference to foreign rules.”<sup>6</sup> There is no rejection of foreign law; on the contrary, foreign law is openly admitted. In this sense, local data mainly concerns local rules of administration and security with regard to individual activities.<sup>7</sup> Under the Rome II Regulation, these norms are called “rules of safety and conduct.”<sup>8</sup> In the United States, a codified version of

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<sup>1</sup> See, e.g., Gerhard Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 91 (1964-II); Gerhard Kegel, *Wandel auf dünnem Eis*, in ZUM WANDEL DES INTERNATIONALEN PRIVATRECHTS 35–44 (Friedrich K. Juenger ed., 1974); see also GERHARD KEGEL & KLAUS SCHURIG, INTERNATIONALES PRIVATRECHT § 2, 128–61 (9th ed. 2004). For the more recent development of a “rapprochement” of European and U.S. tort conflicts law, see Jan Kropholler & Jan von Hein, *From Approach to Rule-Oriented in American Tort Conflicts?*, in LAW AND JUSTICE IN A MULTISTATE WORLD – ESSAYS IN HONOR OF ARTHUR T. VON MEHREN (James A.R. Nafziger & Symeon C. Symeonides eds., 2002).

<sup>2</sup> Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958).

<sup>3</sup> Albert A Ehrenzweig, *Local and Moral Data in the Conflict of Laws: Terra Incognita*, 16 BUFF. L. REV. 55 (1966).

<sup>4</sup> *Id.* at 56.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 55.

<sup>7</sup> See 2 ERNST RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 245 (1960).

<sup>8</sup> Regulation (EC) No. 867/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), art. 17, 2007 O.J. (L 199), 40, 46 [hereinafter Rome II].

choice of law with an express rule on “standards of conduct and safety” exists in the Louisiana Civil Code.<sup>9</sup> At the international level, earlier examples can be found in the Hague Conventions on the Law Applicable to Traffic Accidents (1971)<sup>10</sup> and on the Law Applicable to Products Liability (1973).<sup>11</sup>

What is the theory about? Whenever the *lex causae* (the law determined by choice-of-law rules) is not the law of the place of conduct, the question arises of whether to give consideration to rules of safety and conduct. This is the case if conduct and injury diverge and the law at the place of injury (*lex loci damni*) applies. It may also be the case if the law of the parties’ common domicile or common residence jurisdiction (*lex domicilii communis*) or a law determined under an escape clause is applied.<sup>12</sup> An oft-enunciated hypothetical situation is a traffic accident between two French tourists in England. While the French *lex domicilii communis* may be applied with respect to the liability of the tortfeasor, the English rule of driving on the left side of the street—hence, “local data”—provides for the standard of conduct. The rationale is as simple as it is convincing: consideration of this rule is mandatory when assessing the tortfeasor’s negligence at the time and place of accident causation. The tortfeasor cannot claim that he was acting in accordance with French traffic laws while driving his car in England.

What is the problem? At first glance, there seems to be no room for debate. In fact, the consideration of local data is often described as a matter

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<sup>9</sup> LA CIV. CODE ANN. art. 3543 (1992). The article concerns “Issues of conduct and safety,” and provides:

Issues pertaining to standards of conduct and safety are governed by the law of the state in which the conduct that caused the injury occurred, if the injury occurred in that state or in another state whose law did not provide for a higher standard of conduct.

In all other cases, those issues are governed by the law of the state in which the injury occurred, provided that the person whose conduct caused the injury should have foreseen its occurrence in that state.

The preceding paragraph does not apply to cases in which the conduct that caused the injury occurred in this state and was caused by a person who was domiciled in, or had another significant connection with, this state. These cases are governed by the law of this state.

*Id.*

<sup>10</sup> Convention on the Law Applicable to Traffic Accidents art. 7, May 4, 1971, 965 U.N.T.S. 416.

<sup>11</sup> Convention on the Law Applicable to Products Liability art. 9, Oct. 2, 1973, 1056 U.N.T.S. 196.

<sup>12</sup> See, e.g., Rome II, *supra* note 8, art. 4(3).

of logical necessity.<sup>13</sup> At least on paper, there is agreement that considering local data also accommodates lawmakers' interest in controlling local socioeconomic transacting.<sup>14</sup> This agreement, however, does not signal a change of direction in European doctrine, which is still formal and hardly policy oriented. As we will see, local data is at the center of a doctrinal battle between proponents of traditional jurisdiction selection and those who advocate for a more content-oriented choice of law.

A deeper analysis requires exploring a number of aspects: first, we must shed some light on the actual status of European choice-of-law doctrine vis-à-vis the U.S. approach. This shows that giving regard to substantive policies and underlying state interests is no longer completely anathema to continental choice of law. Decisionmakers are no longer confined to considering aspects of conflicts justice alone. Yet substantive policy is still neglected when it comes to implementing the theory of local data in practice. Second, as a doctrinal reconceptualization reveals, a reconsideration of party expectations and a change of directions with respect to substantive law policies and state interests will play out beneficially in cases where conventional European wisdom cannot provide for a solution. In this regard, the consideration of local data may truly open the door to substantivist wisdom from across the Atlantic. Finally, looking at the bigger picture, we can conclude that local data is a field where different legal orders converge. What Ehrenzweig once termed a *terra incognita*, and what has since remained a stepchild of European doctrine, may actually serve as a condensation point for a more modernized and globalized conflicts law.

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<sup>13</sup> For examples of pre-Rome conflicts law in Europe, particularly in Germany and Switzerland, see Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 23, 1971, 57 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] [Federal Court of Civil Matters] 265 (268), 1971 (Ger.); BOTSCHAFT ZUM BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT (IPR-GESETZ) VOM 10. NOVEMBER 1982 [BUNDESRAT], BBl. 1983, 263, 431 (284.4) (Switz.); Anton Heini, *art. 142*, in ZÜRCHER KOMMENTAR ZUM BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT (IPRG) VOM 18. DEZEMBER 1987, paras. 15–16 (Daniel Girsberger et al. eds., 2d ed. 2004); Robert P. Umbricht & Nicole Zeller, *art. 142*, in BASLER KOMMENTAR, INTERNATIONALES PRIVATRECHT para. 14 (Heinrich Honsell et al. ed., 2007).

<sup>14</sup> Ehrenzweig, *supra* note 3, at 55–57; Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 23, 1971, 57 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] [Federal Court of Civil Matters] 265 (268), 1971 (Ger.); HANS STOLL, *Zum Problem der Vorfrage im Internationalen Deliktsrecht*, in MULTUM NON MULTA, FESTSCHRIFT FÜR KURT LIPSTEIN AUS ANLASS SEINES 70. GEBURTSTAGES 259, 261 (Peter Feuerstein ed., 1980); Abbo Junker, *art. 17 Rom II-VO*, in MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH: BGB para. 1 (Roland Rixecker & Franz J. Säcker eds., 5th ed. 2010).

## II. THE STATUS QUO

Differences between the traditional European doctrine, which still principally tends to disregard underlying policy considerations, and the once-deemed revolutionary U.S. approach, which embodies a trend of considering such interests in lieu of applying formalistic schemata, have been debated extensively. Much ink has been spilled on the issue of how, if at all, to give regard to substantive policies and state interests beyond the Savignian paradigm of a mostly *private* international law. Over the decades, modern European choice of law may have become more policy oriented. Yet many aspects remain untouched by this trend of modernization. One such aspect is the European doctrine’s aversion to case-by-case analyses and, accordingly, to *dépeçage*.

### A. *The Eternal Struggle: Conflicts vs. Substantive Justice*

The divergence between the European and U.S. approaches is still fittingly emblemized by the theories put forth by two key scholars: Gerhard Kegel and David Cavers. In defense of the European tradition, Kegel advocated a disregard for the content of the relevant laws when determining the applicable regime. Choice of law, he explained, aims to find not the “objectively best law” but the “spatially best law.” Accordingly, “conflicts justice takes functional precedence over substantive justice.”<sup>15</sup> In defense of U.S. doctrine, Cavers concluded that in conflicts law, “[t]he court is not idly choosing a law; it is determining a controversy. How can it choose wisely without considering how that choice will affect that controversy?”<sup>16</sup>

Of course, this battle has lost much of its fervor and, today, things are not as black and white as they used to be. Europe has, at least in part, forsworn the once strictly-followed concept of content-neutral jurisdiction selection. Tort conflicts is representative: a number of provisions of the Rome II Regulation actually give regard to substance, as can be seen in the

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<sup>15</sup> KEGEL & SCHURIG, *supra* note 1, § 2, 131 (“Deswegen ist die internationalprivatrechtliche Gerechtigkeit der materiell-privatrechtlichen funktionell vorgeordnet.” (literally: “Therefore, conflicts justice takes functional precedence over substantive justice.”)); *see also* Gerhard Kegel, *Begriffs- und Interessenjurisprudenz im Internationalen Privatrecht*, in Festschrift Hans Lewald 259, 270 (Max Gerwig et al. eds., 1978).

<sup>16</sup> David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 189 (1933).

instrument's consumer-protection impulse in product-liability conflicts, the multiple policies accommodated under the rules for international unfair competition conflicts, the express aim of international environmental protection, and the rigid regulation of choice-of-law clauses.<sup>17</sup> Yet with regard to a court's decision making—that is, the actual application of choice-of-law rules—an express content-oriented determination of the applicable law or an ad hoc modification of choice-of-law results will seldom occur. In this regard, the technical and structural formalism has survived all transformative developments toward more substantivist conflicts doctrine.

One might even say that European conflicts law still reflects classical nineteenth-century methodology based on the paradigm of private law substitutability. Carl Friedrich von Savigny, the founder of the discipline in Europe, considered private law a largely “apolitical” affair, and sought only to regulate private relations among free individuals. Accordingly, the state had no direct involvement.<sup>18</sup> Until today, this has been the basis of the assumption that the private laws of different states are almost freely substitutable. And until today, this substitution has been all-encompassing. In other words, when a certain law is found applicable, rather than governing single elements of the case it is expected to govern all issues.

It is this remnant of traditional doctrine that causes trouble in a number of ways, particularly when the *lex causae* is different from the local law at the place of tortfeasor conduct. As further discussed below,<sup>19</sup> the consideration of local data may remedy the shortcomings of the still prevalent all-or-nothing approach in European doctrine. Nevertheless, the persistent half-heartedness of current European doctrine stands in the way of practicality and theoretical consistency.

### *B. Issue-by-Issue Analysis vs. Lex Causae Universalism*

Under modern U.S. conflicts law, different laws may apply to different issues of the same case.<sup>20</sup> Indeed, this is expressly required in order to select

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<sup>17</sup> See Rome II, *supra* note 8, arts. 5, 6, 7, 14; see also *id.* Recitals 20, 21, 25, 31.

<sup>18</sup> See generally KLAUS VOGEL, DER RÄUMLICHE ANWENDUNGSBEREICH DER VERWALTUNGSNORM 215 (1965); CHRISTIAN JOERGES, ZUM FUNKTIONSWANDEL DES KOLLISIONSRECHTS: DIE “GOVERNMENTAL INTEREST ANALYSIS” UND DIE “KRISE DES INTERNATIONALEN PRIVATRECHTS” 6 (1971).

<sup>19</sup> See *infra* Part II.C.

<sup>20</sup> See Peter Hay, *Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Law) and the European Community's “Rome II” Regulation*, 7 EUR. LEGAL FORUM I-137, 141–42 (2007).

the most suitable regime for single issues, since these issues may be subject to different policies and, accordingly, different states’ concerns may play out in the balancing of interests involved.<sup>21</sup> For example, different laws may apply to the standard of safety and conduct on the one hand, and the consequences of a defendant’s violation of that standard (e.g., damages) on the other. The issue of local data would thus not warrant exceptional treatment.

By this means, the U.S. approach allows for flexibility, and, ultimately, more territoriality. The latter characteristic may appear paradoxical at first sight. After all, it was the Currian revolution of interest analysis in the 1950s that virtually swept the governing Bealean territoriality from bookshelves and court dockets. By definition, interest analysis takes a quasi-statutist position: conflict resolution requires choosing between rules of decision, not between legal regimes.<sup>22</sup> This choice is made with specific regard to—and ideally in accordance with—a balancing of substantive policies. At the same time, this means that interest analysis must reject the technical automatism of traditional choice of law, particularly Savignian concepts like the “seat” of a relationship and other jurisdiction-selecting analyses.<sup>23</sup> Accordingly, the U.S. approach has been described as embracing an “antiterritorialist principle.”<sup>24</sup>

Remarkably, however, territoriality has held the fort with respect to local rules of safety and conduct. Concretely, U.S. practice has developed a distinction between “conduct-regulating” and “loss-allocating” rules. While conduct-regulating rules are to be taken from the regime governing at the place of conduct, loss-allocating rules may be treated more flexibly and, hence, be chosen from a different law, such as the parties’ *lex domicilii communis*.<sup>25</sup>

The situation is quite different on the continent. Even though choice of law has become more content-oriented, the Rome II Regulation is still both a product and an instrument of traditional formalist technique. Of course, as in the U.S. approach, in continental choice of law, the *lex causae* may be detached from the place of tortious activity. For example, this is the case if

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<sup>21</sup> *Id.*

<sup>22</sup> See Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, reprinted in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 177, 179 (1963).

<sup>23</sup> Professor Currie summarized his position in his oft-cited verdict: “We would be better off without choice-of-law rules.” *Id.* at 183.

<sup>24</sup> DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 166 (1965).

<sup>25</sup> For a closer analysis of these categories, see *infra* Part III.B.

conduct and injury occur in different states, or if the *lex domicilii communis*, or the law of a “manifestly more closely connected country” applies.<sup>26</sup> Conflicts determination here is straightforward: in principle, the whole case is subject to the single regime of the *lex causae*. Accordingly, rules of safety and conduct at the place of the alleged tortfeasor’s activity are disregarded. This is when the theory of local data comes into play—alas, we must be more careful: *could* come into play. In fact, an express rule on the consideration of local data has been codified in Article 17 of Rome II.<sup>27</sup> Yet, a theoretically consistent and workable application is still hindered by structural, if not cultural, obstacles.

As is commonly explained, the *lex causae* should cover the whole case and apply to all of its issues.<sup>28</sup> There is no issue-by-issue analysis, and a *dépeçage* must be avoided.<sup>29</sup> In this way, choice of law reflects a fundamental characteristic of civil law—the concept of a self-contained code. Common law systems are based on the idea of incremental and ad hoc lawmaking by judges. In civil law, by contrast, the promulgation of law in codified statutes is expected to provide for a coherent collection and arrangement of rules. Each code is conceived of as a mechanical construct where all elements systematically work together to guarantee its functioning.<sup>30</sup> In choice of law, not surprisingly, this conception complicates matters. Since all components of the legal order have their well-defined and strictly determined functions, they must not be dissolved or separated from the system as a whole. It is thus virtually impossible to substitute or exchange single elements of the system with a corresponding element of a

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<sup>26</sup> See Rome II, *supra* note 8, art. 4(1)–(3).

<sup>27</sup> *Id.* art. 17.

<sup>28</sup> See, e.g., *id.* art. 15 (providing for this type of universality for non-contractual obligations).

<sup>29</sup> See generally, e.g., Helmut Koziol, *Verhaltensrechtslehre und Deliktsstatut*, in Festschrift Beitzke 577, 582–83 (Otto Sandrock ed., 1979); Hans Stoll, *Die Behandlung von Verhaltensnormen und Sicherheitsvorschriften*, in Vorschläge und Gutachten zur Reform des Deutschen Internationalen Privatrechts der Außervertraglichen Schuldverhältnisse 160, 172–73 (Ernst von Caemmerer ed., 1983); Heini, *supra* note 13, paras. 1, 11. Of course, Rome II contains certain provisions that may offer a possibility of *dépeçage*. See, e.g., Rome II, *supra* note 8, arts. 8(2), 14, 16, 18–20. But the regulation does not expressly allow for, or even encourage, such a technique. See Symeon C. Symeonides, *Rome II and Tort Conflicts: A Missed Opportunity*, 56 AM. J. COMP. L. 173, 185 (2008).

<sup>30</sup> For an example of the civil and common law divide in terms of codes and codification, see JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* ch. 5 (3d ed. 2007).

different legal order.<sup>31</sup> If any substitution occurs at all, it must be of the whole system. Accordingly, with respect to the category of rules that concern “safety and conduct,” there is general agreement that its number must be kept small in order to keep the system from fraying.<sup>32</sup> This requirement of *lex causae* universalism explains the traditional European inflexibility with respect to choice-of-law determination.

### C. *The Contortion of Current Doctrine*

We have already alluded to the fact that the provision on local rules of safety and conduct contained in Article 17 of Rome II appears to provide a convenient entry point for the reconciliation of substantive policies without necessarily neglecting concerns of conflicts justice.<sup>33</sup> Yet the traditional European *dépeçage*-phobia and an antiterritorial misconception of local data still stand in the way. The focus on private parties’ interests may sometimes point toward the application of local rules on safety and conduct. However, quite often this focus leaves the decision maker without guidance. In these cases, European choice of law not only tends to shortchange parties’ concerns but also misinterprets their expectations.

#### 1. *From Bootstrap to Conundrum: Blind Trust in Party Expectations*

Of course, giving regard to substantive policies by means of local-data consideration is nothing new. This idea was actually suggested prior to the communitarization of European choice of law. For instance, in 1971, the German Bundesgerichtshof (Federal Court of Justice) expressly referred to lawmakers’ interest in regulating the local safety as a justification for considering local data at the place of conduct. The interest to be considered

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<sup>31</sup> For traditional choice of law, see PAUL HEINRICH NEUHAUS, *DIE GRUNDBEGRIFFE DES INTERNATIONALEN PRIVATRECHTS* § 16, at 83 (1962). For an interesting critique of traditional doctrine and a new conception of local data on the basis of a datum-oriented modification of the *lex causae*, see Marc-Philippe Weller, *Das Individuum und die Datumtheorie: Die “Personne Plurielle” der Postmoderne als Herausforderung des binären IPR*, in *DIE PERSON IM IPR* (M. Gebauer et al. eds. (forthcoming 2016)).

<sup>32</sup> See JEAN LOUIS DELACHAUX, *DIE ANKNÜPFUNG DER OBLIGATIONEN AUS DELIKT UND QUASIDELIKT IM INTERNATIONALEN PRIVATRECHT* 197 (1960); VERENA TRUTMANN, *DAS INTERNATIONALE PRIVATRECHT DER DELIKTSOBLIGATIONEN* 100 (1973); Stoll, *supra* note 29, at 172–73. For more recent evidence, see, e.g., UMBRICH & ZELLER, *supra* note 13, para. 3.

<sup>33</sup> See *supra* note 27 and accompanying text (noting that Article 17 provides an express rule on the consideration of local data, but that a consistent application is not yet realized).

was a *substantive* policy.<sup>34</sup> In the same vein, modern scholarly commentary contends that tort law policies could not be effectively enforced if choice of law did not give regard to local regulation by means of considering local data.<sup>35</sup> However, the interplay between substantive policies and concerns of traditional conflicts justice has yet to be explained in detail. Two scenarios, explored below, illustrate the current approach. Both examples prove the existing misconception.

The first scenario relates to torts where conduct and injury occur in the same state. By and large, the local law will apply as the *lex loci delicti commissi*. Under the conditions of Article 4(2) or (3) of Rome II, however, the *lex causae* may differ from the local regime. The tortfeasor may then face a dilemma insofar as the local regime might require a standard of conduct that is different from the standard under the regime that ultimately determines his liability. For many cases, of course, the parties' expectations may converge and point toward the application of the *local* standard of safety and conduct. Then, Article 17 of the Rome II Regulation will truly alleviate the dilemma regarding the predictability of the applicable law. If the tortfeasor cannot be expected to foresee the ultimately applicable regime, he can at least refer to the local rules of conduct under the rubric of local data.<sup>36</sup> Similarly, the victim's expectations are protected to the extent that he can reasonably trust only in the application of the protective regime at the place where his rights and entitlements are located when the tort strikes.<sup>37</sup> In most cases, therefore, if conduct and injury coincide, local law applies—as expected by all parties involved.

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<sup>34</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 23, 1971, 57 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] [Federal Court of Civil Matters] 265 (268), 1971 (Ger.). See also Stoll, *supra* note 29, at 176.

<sup>35</sup> See, e.g., Gerhard Wagner, *Die neue Rom II-Verordnung*, 28 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS (IPRAX) 1, 5 (2008); Junker, *supra* note 14, para. 1; UMBRICH & ZELLER, *supra* note 13, para. 14. See also OTTO KAHN-FREUND, DELICTUAL LIABILITY AND THE CONFLICT OF LAWS, 124 RECUEIL DES COURS 1, 95 (1968).

<sup>36</sup> Rome II, *supra* note 8, Recital. 34; *Commission Proposal for a Regulation on the Law Applicable to Non-contractual Obligations (Rome II)*, at 25, COM (2003) 427 final (July 22, 2003) [hereinafter *Rome II Proposal*]; Jan von Hein, *Die Behandlung von Sicherheits- und Verhaltensregeln nach Art. 17 der Rom II-Verordnung*, in GRENZEN ÜBERWINDEN - PRINZIPIEN BEWAHREN: Festschrift für Bernd von Hoffmann zum 70. Geburtstag 139 (Herbert Kronke & Karsten Thorn eds., 2011).

<sup>37</sup> Helmut Koziol & Thomas Thiede, *Kritische Bemerkungen zum derzeitigen Stand des Entwurfs einer Rom II-Verordnung*, 106 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT (ZVGLRWISS) 235, 241 (2007).

However, as argued in current theory and embodied in current practice, there are cases where party expectations seem to point toward a regime other than the law at the *locus delicti*. In these cases, the existence or nonexistence of a pre-tort relationship between the parties is deemed crucial.<sup>38</sup> For example:

Two parties who share the same habitual residence are traveling abroad by car. If the driver negligently causes an accident that injures her fellow passenger, the question arises regarding what rules of safety and conduct to apply in order to determine driver-tortfeasor liability.<sup>39</sup>

The example and its solution under current doctrine exemplify a paradox: for traffic laws in particular, commentary and practice distinguish between rules that are “strictly territorial” and rules that are deemed to allow for a more “flexible” application. An exact demarcation, it is openly admitted, is hard to draw.<sup>40</sup>

Nevertheless, some categories are considered self-evident.<sup>41</sup> Strictly territorial rules, for instance, are those concerning the correct side of the road to use. Such rules are supposed to apply regardless of the situation.<sup>42</sup> In comparison, flexible rules include, *inter alia*, obligations to use a seatbelt or regulations on alcohol limits. These rules are supposed to be more adaptable insofar as individuals from the same country should be able to “carry” their *lex communis* with them into a foreign jurisdiction. The local law is then

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<sup>38</sup> Strictly speaking, two variants must be distinguished. Yet the second is less relevant for this analysis: arguably, the *lex domicilii communis* may apply to parties hailing from the same state who lack a pre-tort relationship. See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 8, 1985, 93 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] [Federal Court of Civil Matters] 214, 1985 (Ger.); Abbo Junker, *Das Internationale Privatrecht der Straßenverkehrsunfälle nach der Rom-II-Verordnung*, JURISTENZEITUNG (JZ) 169, 174 (2008); see also CAVERS, *supra* note 24, at 139. In these cases, it is difficult to imagine how either the tortfeasor or victim could expect the parties’ *lex communis* to be applied. Usually, neither their tortious encounter nor their common residence can be foreseen. Such cases are better subjected to the *lex loci damni*. See Rome II, *supra* note 8, art. 4(3).

<sup>39</sup> Other examples of this class of cases include international torts between husband and wife, between worker and patron, and between colleagues or other primarily social actors (e.g., fellow members of an expedition).

<sup>40</sup> See, e.g., Stoll, *supra* note 29, at 177.

<sup>41</sup> For an extensive overview, see ROBERT SIEGHÖRTNER, INTERNATIONALES STRABENVERKEHRSUNFALLRECHT 437–50 (2002).

<sup>42</sup> von Hein, *supra* note 36, at 145.

disregarded.<sup>43</sup> With respect to alcohol limits, for instance, courts have found a more liberal *lex communis* to prevail over a stricter regime at the place of conduct.<sup>44</sup> Further, it has been argued that the judge should take account of the common-domicile rules, even if the law of the place of conduct is less strict.<sup>45</sup>

A real-world example in this respect is a car accident in France involving a German couple. One member of the couple, the passenger, was sleeping in the car's front seat without having buckled up. The driver had failed to ensure that the passenger had fastened her seatbelt. According to the court, France's potentially more liberal seatbelt regulations were irrelevant; the violation of a duty under German law was deemed sufficient to hold the driver liable.<sup>46</sup>

Upon first look, it is questionable whether such a "transplant" of the parties' home regime to a different jurisdiction is warranted. From the perspective of party expectations, it must be doubted whether a shared habitual residence somewhere else trumps the local foundation of tortious activities at the place of conduct. This is unmistakably expressed in the saying "When in Rome, do as the Romans do."<sup>47</sup> Traffic accidents are particularly illustrative: foreign parties sharing the same habitual residence may travel alone in a single car and thus appear somewhat secluded from the public. Yet any car ride on public streets implies contact with third parties. Shouldn't the tortfeasor thus be expected to comply with local traffic rules? Similarly, shouldn't the victim be entitled to share an expectation that people

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<sup>43</sup> Koziol, *supra* note 29, at 585; Hans Stoll, *Zur Flexibilisierung des europäischen internationalen Deliktsrechts: Vermittelnde Kritik aus Amerika an der "Rom-II-VO,"* in *HAFTUNG UND VERSICHERUNG: FESTSCHRIFT FÜR RUDOLF REISCHAUER* 389, 408 (Peter Japonegg et al. eds., 2010).

<sup>44</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 21, 1978, *VERSICHERUNGSRECHT* (VERS) 541 (542), 1978 (Ger.).

<sup>45</sup> Stoll, *supra* note 29, at 175; von Hein, *supra* note 36.

<sup>46</sup> Oberlandesgericht Karlsruhe [OLG] [Circuit Court of Karlsruhe] Oct. 3, 1984, *RECHT UND SCHADEN* (R+S) 171 (172), 1985 (Ger.); *see also* Kammergericht Berlin [KG] [Circuit Court of Berlin], Nov. 30, 1981, *VERSICHERUNGSRECHT* (VERS) 1199, 1982 (Ger.).

<sup>47</sup> For a succinct overview, see LEO RAAPE, *INTERNATIONALES PRIVATRECHT* 537 (4th ed. 1955). *See also* Tim W. Dornis, "When in Rome, do as the Romans do?" *A Defense of the Lex Domicilii Communis in the Rome-II-Regulation*, 4 *EUR. LEGAL FORUM* 152 (2007). *But see* Stoll, *supra* note 29, at 178 ("Besteht zwischen den an dem Unfall Beteiligten ein besonderes Verhältnis . . . so betrifft der Schädigungsvorgang hauptsächlich dieses Verhältnis, wohingegen die Verhältnisse am Unfallort für diesen Vorgang mehr oder weniger irrelevant sind . . .") ["If the parties to a tort have a preexisting relationship . . . the tort primarily concerns this relationship; the circumstances at the place of conduct will then be less relevant."].

on the road will obey local traffic rules? Moreover, a problem exists with respect to logical consistency: if an issue-by-issue analysis or a *dépeçage* is so distortive for the self-contained mechanics of private law, as civil law doctrine holds,<sup>48</sup> why must there be an additional subcategorization within the sector of local data? By this means, the systematic consistency of traditional choice-of-law technique is further eroded.

The second scenario where the application of local-data theory is complicated is when the decision maker is not only bootstrapped by an assumption of overly flexible expectations, as just explained, but is also left to his own devices when these expectations are irreconcilable. It is usually in cases where the tortfeasor’s conduct takes place in a state different from where the injury occurs that this problem emerges. In such cases, application of the general rule of tort conflicts in many choice-of-law regimes, notably under Article 4(1) of Rome II, leads to a divergence between the *lex loci damni* as *lex causae* and the local law accounting for the rules of safety and conduct.<sup>49</sup> A scenario often found in U.S. casebooks is that of blasting activities near state lines.<sup>50</sup> This scenario has two variations:

Variation 1: State A imposes negligence liability on all blasting activities within its borders. Neighboring state B has established strict liability. If the defendant undertakes blasting activities in state A near the border with state B and damages the plaintiff’s property in B without acting negligently, the question is whether he can rely on his home regime to avoid liability.

Variation 2: State A imposes strict liability on all blasting activities within its borders. Neighboring state B requires proof of negligence. The defendant undertakes blasting activities in state A near the border with state B and damages the plaintiff’s property in B—without proof of negligence.

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<sup>48</sup> See *supra* Part II.C.2.

<sup>49</sup> This also is the case under alternative approaches, such as the “most significant relationship” test of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971), or the “last event” rule under the RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934).

<sup>50</sup> One example is *Dallas v. Whitney*, where a West Virginia court applied Ohio’s absolute liability rule to the claim of an Ohio plaintiff whose property situated in Ohio was damaged by the defendant’s blasting activities in Virginia. See *Dallas v. Whitney*, 118 W. Va. 106, 188 S.E. 766 (1936); see also CAVERS, *supra* note 24, at 161. More recently, these examples have been used by Symeon C. Symeonides, *supra* note 29, at 187.

Here, the question arises whether he should be strictly liable as provided for under the law of state A.

Under Article 4(1) of Rome II, the *lex loci damni* applies to both variations.<sup>51</sup> Following the plain letter of the code, the rules of safety and conduct at the place of acting will not *apply*. These rules may be *considered* only insofar as they are local data.

Under the first variation, if the rules of safety and conduct are stricter under the *lex loci damni* than under the *lex loci actus*, Article 17 of Rome II seems to fulfill its intended purpose to balance the parties' interests. Unless the tortfeasor had to expect the injury to occur in a different jurisdiction, he will be allowed to rely on local law.<sup>52</sup> This also seems to be the obvious conclusion to draw from Recital 34, which provides that local law theory is the counterbalance to Article 4(1), which generally prefers the victim over the tortfeasor.<sup>53</sup> However, a critical conundrum arises upon closer inspection: if Article 17 allows for the disregard of the general rule, will the tortfeasor not ultimately be disproportionately preferred over the victim?<sup>54</sup> In the end, Article 17 may go beyond merely counterbalancing the victim's interests.

Things become even more dubious in the second variation. If the rules of safety and conduct are stricter under the *lex loci actus* than under the *lex loci damni*, giving regard to local standards cannot work in favor of the tortfeasor. The dominant opinion on Article 17 contends that the provision should remain unapplied, and the tortfeasor should not be held liable under the rules at the place of conduct. This is said to account for the provision's narrow aim to eliminate unfair surprise to the defendant. After all, expectations of the victim that go beyond the standard of safety and conduct in the state where the injury occurs are "not worthy of protection."<sup>55</sup> This, however, is not the only possible interpretation. As Cavers has explained, the conduct in such cases is "just as bad when the victim is an outsider as an

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<sup>51</sup> Rome II, *supra* note 8, art. 4(1).

<sup>52</sup> See Symeonides, *supra* note 29, at 213–14; see also CAVERS, *supra* note 24, at 139; RAAPE, *supra* note 47, at 537.

<sup>53</sup> von Hein, *supra* note 36, at 140.

<sup>54</sup> See Rome II, *supra* note 8, art. 17 (allowing consideration of rules of safety and conduct in force at the place where the tortious activity occurred).

<sup>55</sup> Ivo Bach, *Art. 17, Rome II*, in *ROME II REGULATION: POCKET COMMENTARY*, para. 11 (Peter Huber ed., 2011); see also Wagner, *supra* note 35, at 6; Helmut Koziol, *Einige Fragen des internationalen Schadenersatzrechts*, 25 *ZEITSCHRIFT FÜR VERKEHRSRECHT (ZVR)* 1, 4 (1980).

insider,” and an extension of the stricter local regime will—at least if the injury in another state was foreseeable for the tortfeasor—rarely be objectionable.<sup>56</sup>

As this overview makes clear, European doctrine has not yet formulated a consistent theory of local data. Not only may a balancing of expectations end in a paradoxically deterritorialized norm differentiation, but it is often simply impossible to formulate a workable basis for the relevant expectations.

## 2. A Terminological Masquerade: “Taking Account of” vs. Application

To complete this overview of the status quo and bolster the idea that it is high time for reorientation, it is necessary to shed some light on legal terminology. Under the dominant approach, local rules of safety and conduct are not “applied” as law but merely taken account of “as a matter of fact.” The violation of a foreign rule will thus be taken as a given by the trier of fact when applying the *lex causae* to the dispute at bar.<sup>57</sup> In the words of the European Commission:

Taking account of foreign law is not the same thing as applying it: the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact.<sup>58</sup>

William Reppy has fittingly called this approach an “eclectic *dépeçage*” and has characterized the “taking account of” local law (instead of applying it) as “bizarre.”<sup>59</sup> Indeed, if we look at a central axiom of international law and choice of law, we can see that “taking account of” local law is a misnomer. If a legal regime is valid only within its respective jurisdiction,

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<sup>56</sup> CAVERS, *supra* note 24, at 160; *see also* Symeonides, *supra* note 29, at 192, 214.

<sup>57</sup> *See* Stoll, *supra* note 29, at 174–75; Bernd von Hoffmann, *art 40*, in J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH: STAUDINGER BGB – EGBGB/IPR VORBEM ZU EGBGB para. 58 (2001).

<sup>58</sup> *See Rome II Proposal*, *supra* note 36, at 25. Accordingly, under the Rome II Regulation, foreign rules are treated as law only with respect to the standard of proof. ANDREW DICKINSON, *THE ROME II REGULATION: THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS* para. 15.33 (2008); JAMES FAWCETT ET AL., *PRIVATE INTERNATIONAL LAW* 855 (14th ed. 2008).

<sup>59</sup> William A. Reppy, Jr., *Eclecticism in Methods for Resolving Tort and Contract Conflict of Laws: The United States and the European Union*, 82 *TUL. L. REV.* 2053, 2086–87 (2008).

the regime may not be extended across national borders. Therefore, a national norm on local conduct should not be applied to factual scenarios taking place abroad.

To take a concrete example, French traffic regulations cannot be violated by driving a car in England. Conversely, however, in order to determine whether a foreign law has been violated, its norms must be literally “applied.” There is no other way to promulgate the relevant “data”—that is, to ascertain that a foreign legal norm has actually been violated.<sup>60</sup> In essence, therefore, “taking account of” local data means actually enforcing policies other than those underlying the *lex causae*.<sup>61</sup> Consequently, the current dogma of nonapplication is a doctrinal and technical workaround designed to conceal what courts are actually doing when considering local rules of safety and conduct.

In sum, European doctrine suffers from a number of defects. Its traditional *dépeçage*-phobia and its overemphasis on conflicts justice, particularly party expectations, stand in the way of a new beginning.

### III. RECONCEPTUALIZATION

When we look at the understanding of tort law underlying the Rome II Regulation, it becomes clear that the existing problems in conflicts doctrine are not just a remnant of European choice-of-law history, but also the product of a certain myopia regarding substantive policies. A new perspective is needed. Extending the focus to all relevant tort law functions helps to reconceptualize the interplay between concerns for substantive policy and conflicts justice; and, it ultimately allows us to formulate a consistent and workable model for the consideration of local data.

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<sup>60</sup> See Heinrich Dörner, *Neue Entwicklungen im Internationalen Verkehrsunfallrecht*, JURISTISCHE RUNDSCHAU (JR) 6, 9 (1994).

<sup>61</sup> Of course, one must not forget that this perspective is difficult to uphold in light of European lawmakers’ choice of words. See Rome II, *supra* note 8, art. 17 (“account shall be taken, as a matter of fact”); *id.* Recital 34 (“account must be taken, as a matter of fact”). Nonetheless, the contrary opinion is more consistent in demanding a direct and unconcealed “application” of local law “as law.” See Heinrich Dörner, *Alte und neue Probleme des Internationalen Deliktsrechts*, in Festschrift für Hans Stoll zum 75. Geburtstag (Gerhard Hohloch et al. eds., 2001); Dörner, *supra* note 60, at 9–10; Thomas Pfeiffer, *Datumtheorie und “local data” in der Rom II-VO – am Beispiel von Straßenverkehrsunfällen*, in LIBER AMICORUM KLAUS SCHURIG 229, 234 (R. Michaels et al. eds., 2012).

A. *The Interplay of Tort Policies and Party Expectations*

European lawmakers’ explanation of substantive policies highlights the problem. The European Commission’s understanding of tort policies appears as straightforward as it is convincing. It emphasizes victims’ concerns. As the Commission explains, the general rule of the *lex loci damni* in Article 4(1) of Rome II:

establishes an objective link between the damage and the applicable law [and] further reflects the modern concept of the law of civil liability which is no longer, as it was in the first half of the last century, oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates . . . .<sup>62</sup>

This focus reflects a traditional perspective of tort policies, and seems to suggest the prioritization of compensation over prevention and deterrence.<sup>63</sup> Yet this view inaccurately describes the economic foundations and the state of modern tort doctrine. In fact, unlike what the European Commission seems to have in mind, modern tort law no longer primarily serves to compensate for the victim’s injury; it also aims to regulate conduct and activity. Of course, compensation may still be a purpose of tort law; but the focus no longer is on the *ex post* reparation of injuries. On the contrary, compensation is the precondition for an *ex ante* function of tort law. The existence of a tort liability system regulates individuals’ conduct within a community.<sup>64</sup> Compensation *and* prevention are inseparable functions in the mechanics of any tort regime.<sup>65</sup>

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<sup>62</sup> *Rome II Proposal*, *supra* note 36, at 12.

<sup>63</sup> For the traditional argument that compensation is the only relevant concern and deterrence or prevention are of secondary concern see Stoll, *supra* note 29, at 173.

<sup>64</sup> See, e.g., ROBERT B. COOTER JR. & THOMAS ULEN, *LAW AND ECONOMICS* 175–219 (6th ed. 2014); HEIN KÖTZ & GERHARD WAGNER, *DELIKTSRECHT* 29–44 (12th ed. 2013). For examples of conflicts, see Hans-Bernd Schäfer & Katrin Lantermann, *Choice of Law from an Economic Perspective*, in *AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW* 87, 114 (Jürgen Basedow & Toshiyuki Kono eds. 2006).

<sup>65</sup> For the U.S. perspective, PROSSER AND KEETON ON THE LAW OF TORTS § 3, at 15, § 4, at 20 (W. Page Keeton ed., 5th ed. 2004). For the European perspective see, e.g., GERT BRÜGGEMEIER, *PRINZIPIEN DES HAFTUNGSRECHTS – EINE SYSTEMATISCHE DARSTELLUNG AUF RECHTSVERGLEICHENDER GRUNDLAGE* 3 (1999); Gerhard Wagner, *Grundstrukturen des Europäischen Deliktsrechts*, in *GRUNDSTRUKTUREN DES EUROPÄISCHEN DELIKTSRECHTS* 189, 331–32 (Reinhard Zimmermann ed., 2003); KÖTZ & WAGNER, *supra* note 64, at 29–44.

Seen in this light, tort law establishes the right incentives for private individuals to act with the appropriate level of care within their community. By this means, the rules of liability do more than establish a metric for assessing and judging human activities in hindsight—they also have an important forward-looking function. Roscoe Pound alluded to this distinction between an *ex post* and an *ex ante* analysis in 1922 when he argued that the “ultimate thing in the theory of liability is justifiable reliance under the conditions of civilized society.”<sup>66</sup> The same idea was later expressed by Friedrich Hayek in more familiar terms: the legal order’s rules of just conduct not only prohibit or command a certain conduct, but more importantly, “tell people which expectations they can count on and which not.”<sup>67</sup>

Of course, civil liability need not be, and usually is not, the only regulatory instrument employed by modern lawmakers. The state has always provided for public and criminal law sanctions in order to deter detrimental activity. Yet even though civil liability is not the only—and probably not even the most effective—way to regulate human conduct, it does contribute to the overall policy mix of prevention and deterrence.<sup>68</sup>

This correlation between substantive policies and party expectations must also determine choice of law. Here as well, party expectations serve as an instrument of transmission for the underlying regulatory purposes. In a well-balanced system of conflicts law, the behavioral aims of tort liability will directly effectuate the actual choice of law even though this is not always clearly expressed. A few examples, discussed below, illustrate this correlation.

Generally, it is the *local* law that applies to *local* conduct. At least in cases where all elements of a tort occur within a single jurisdiction’s territory, the corresponding “territorialization” of tort rules and expectations guarantees that all individuals—potential tortfeasors and victims alike—can adapt their activities to the local standard of liability. This provides for sound results under the lens of efficiency analysis, and explains why the *lex*

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<sup>66</sup> ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 190 (1922).

<sup>67</sup> 1 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY 102 (1973); *see also* Max Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 22 (1944).

<sup>68</sup> JAN V. HEIN, DAS GÜNSTIGKEITSPRINZIP IM INTERNATIONALEN DELIKTSRECHT 32 (1999).

*loci delicti*—understood as the law of the place of conduct *and* injury—is the basic rule in many choice-of-law regimes.<sup>69</sup>

The situation is different, however, in cases where the applicable law is not the *lex loci actus* (the law at the place of conduct); notably, in scenarios of conduct/injury divergence under the rule of the *lex loci damni*,<sup>70</sup> or in cases where the *lex domicilii communis* or an escape clause provide for application of a legal regime different from the place of conduct or injury.<sup>71</sup> In these cases, the basis for party expectations may be dubious or even absent altogether. Since the parties are then unable to adapt their conduct to the ultimately governing standards, choice of law is an inefficient system of meta-regulation.<sup>72</sup> Thus, in some scenarios, the unmodified application of the *lex causae* under a formalistic choice-of-law system may distort the intended correlation between tort policies and party expectations.

To take a concrete example, this problem arises where two co-resident parties have an accident in a foreign jurisdiction. If they shared no prior relationship and if the tortious encounter was not foreseeable, application of the parties’ *lex domicilii communis* under, for example Article 4(2) of Rome II, can thwart each side’s reasonable and justified expectation that an accident will be adjudicated primarily under the *local* law at the place of conduct. Another example is a case where conduct and injury occur in different jurisdictions. Allowing the tortfeasor to rely on the law at the place of conduct may lead to a comparable distortion, particularly with respect to the victim’s expectations. And conversely, requiring the tortfeasor to adapt his activities to the standard of liability at the place of injury—though potentially providing for economically sound results<sup>73</sup>—would still require the foreign consequences of such activity to be foreseeable. In all of these examples, the conduct-regulating incentives under the substantive regime are at least in part suspended by a content-neutral choice of law.

In order to avoid such distortion in conflicts cases, the liability/conduct correlation in substantive law requires an accordant effectuation in choice of law. Only by a consistent transmission of tort policies through the

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<sup>69</sup> See Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1179, 1217 (2000); Gerhard Wagner, *Ehrenschaft und Pressefreiheit im europäischen Zivilverfahrens- und Internationalen Privatrecht*, 62 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (RABELSZ) 243, 255 (1998); GISELA RÜHL, STATUT UND EFFIZIENZ 637–58 (2011).

<sup>70</sup> See, e.g., Rome II, *supra* note 8, art. 4(1).

<sup>71</sup> See *id.* arts. 4(2)–(3).

<sup>72</sup> Schäfer & Lantermann, *supra* note 64, at 116; RÜHL, *supra* note 69, at 649–50.

<sup>73</sup> Schäfer & Lantermann, *supra* note 64, at 117.

instrument of party expectations can the regulatory function of substantive law be upheld. Ultimately, parties' expectations are what determine the choice of the applicable tort regime. This, as we will see in an instant, is the domain of local-data consideration. First, however, we must understand the major defect of the theory of local data and why it cannot be cured.

*B. Caveat: The Vertical Inseparability of Policies*

The correlation between substantive tort policies and choice of law also stands at the center of U.S. tort conflicts law. But even though this approach, unlike traditional European doctrine, has made a first step in the right direction by explicitly projecting the regulatory function of tort law to the conflicts level, it still suffers from an inherent defect.

The distinction between “conduct-regulating” and “loss-allocating” norms has been described as “one of the few breakthroughs in modern American conflicts law.”<sup>74</sup> It was first developed by New York courts,<sup>75</sup> and was later incorporated into statutory conflicts law—notably, in the Louisiana choice-of-law code.<sup>76</sup> The distinction seems to offer a straightforward rule: conduct-regulating norms aim primarily at deterrence, while loss-distributing norms concern the reparation of losses.<sup>77</sup> The first category comprises not only of, for example, rules of the road (e.g., speed limits and traffic-light rules), but also of the attendant rules on civil sanctions and presumptions and inferences attached to such violations.<sup>78</sup> As the leading U.S. conflicts treatise explains, “conduct-regulating rules are territorially oriented, whereas loss-distribution rules are *usually* not territorially oriented.”<sup>79</sup>

Not surprisingly, U.S. commentators have also suggested that local-data theory and Article 17 of Rome II be interpreted to reflect the same

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<sup>74</sup> Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 705 (1992).

<sup>75</sup> See, e.g., *Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189 (1985).

<sup>76</sup> LA. CIV. CODE ANN., arts. 3542–44 (2015).

<sup>77</sup> In the same vein, albeit without further elaboration, single voices in German commentary have suggested that the dividing line more clearly demarcates the categories of *Haftungstatbestand* and *Haftungsausfüllung*. See, e.g., Wagner, *supra* note 35, at 5; see also Christian von Bar, *Grundfragen des Internationalen Deliktsrechts*, 21 JURISTENZEITUNG (JZ) 961, 968 (1985); ERWIN WAGNER, STATUTENWECHSEL UND DÉPEÇAGE IM INTERNATIONALEN DELIKTSRECHT UNTER BESONDERER BERÜCKSICHTIGUNG DER DATUMTHEORIE 147, 188–89 (1988).

<sup>78</sup> See Symeonides, *supra* note 29, at 189; PETER HAY ET AL., CONFLICT OF LAWS § 17.36 (5th ed. 2010).

<sup>79</sup> HAY ET AL., *supra* note 78, § 17.36.

categorization.<sup>80</sup> Yet it is questionable whether the concept provides for a workable benchmark at all. This is due to the fact that a clear-cut distinction between substantive policies is problematic, if not infeasible. The viability of the distinction has already been convincingly challenged in U.S. legal debate. In essence, virtually all rules on tort liability are, if not primarily, at least *also*, loss allocating. And since almost all rules on loss allocation create an incentive to avoid injury, practically all tort rules also have a conduct-regulating effect.<sup>81</sup>

The discussion above shows that this critique has an economic basis.<sup>82</sup> It is not only liability’s existence, but also its ultimate extent (i.e., the amount of damages), that determines the optimal level of care and the optimal frequency of activity. Of course, conduct-regulating rules directly determine what is permitted. However, the amount of losses that are (re)allocated also contributes to the regulatory aim. In economic terms, the expectation of liability covers all costs associated with a certain activity.<sup>83</sup>

From this standpoint, it may in fact be impossible to develop a meaningful and workable distinction separating conduct-regulating norms from loss-allocating ones. In the end, all tort norms are relevant for the combined compensatory and preventive function of tort liability rules. Indeed, the category of local norms of safety and conduct seems to be a contradiction in terms.

### C. A Horizontally-Layered Model of Liability Rules

This need not be the end of the exploration. In fact, it must not be. Without giving regard to the interplay of substantive policies and party expectations, as the above examples have illustrated, choice of law can end up spurning the goal of injury prevention. Depending on the scenario, the choice of a regime other than the law at the place of conduct or injury may be drastically distortive of the behavioral justification of a tort-law order. In these cases, the consideration of local data provides the necessary instrument to escape the conundrum of an overly formalistic choice-of-law rule.

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<sup>80</sup> Symeonides, *supra* note 29, at 212.

<sup>81</sup> Wendy C. Perdue, *A Reexamination of the Distinction between “Loss-Allocating” and “Conduct-Regulating Rules,”* 60 LA. L. REV. 1251, 1252 (2000). For an early characterization of such mixed policies, see CAVERS, *supra* note 24, at 144.

<sup>82</sup> See *supra* Part III.A.

<sup>83</sup> See, e.g., COOTER & ULEN, *supra* note 64, at 199–200; Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980). For analysis in the international tort law context see HEIN, *supra* note 68, at 33–34.

However, it must be acknowledged that giving regard to local rules of safety and conduct necessarily remains limited to guaranteeing an approximation of the optimal result at best. After all, there is no clear-cut and fully convincing norm categorization under the theories put forth to date. The Europeans' reading of tea leaves with respect to party expectations in local-data analysis is inconsistent and often unworkable.<sup>84</sup> The U.S. distinction between conduct-regulating and loss-allocating rules is hardly better. It will ultimately get caught in a vicious circle of virtually ubiquitous dual-policy norms. This, as we have seen, reflects the more fundamental problem of the tort system's inability to be segmented according to its economic functions.<sup>85</sup>

Yet the mere existence of Article 17 of Rome II and of comparable doctrines in other jurisdictions indicates that a distinction is important, even if the outcome may not be ideal. While a perfect rule of categorization does not exist, theoretical consistency and practical workability are not beyond reach. Essential for an alternative approach is the precise replication of the policy/expectations correlation and a practically workable determination of the different categories.

### 1. Stratification

As the debate in U.S. doctrine illustrates, the distinction between conduct regulation and loss allocation is not only theoretically dubious, but also particularly hard to handle in practice. However, as a closer look at the fundamentals of tort liability unveils, there still is another way to conceive of the dichotomy. This categorization may still have to accept that any distinction must disregard the fact that an economically consistent result can be achieved only through an all-or-nothing approach—that is, that a *dépeçage* will ultimately lead to an invalidation of tort policies. Nevertheless, it may offer the best escape from the *lex causae*.

The fundamental question in tort law is: is the defendant liable to the plaintiff? This question usually presents an array of closely related yet still largely independent legal tests on different issues. Lawyers are familiar with these schemata; many of these are common sense for laypeople as well. For a negligence claim, for instance, the trier of fact may have to apply rules regarding: (1) conduct (duty/breach), (2) causation, and (3) damages. Some

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<sup>84</sup> See *supra* Part II.C.

<sup>85</sup> See *supra* Part III.B.

of these rules have a direct implication for private individual conduct since they immediately correlate with the question of whether a certain activity is admissible at all. They signal whether the activity at issue is part of the “dos” or “don’ts” of the legal order. However, this is only a part of the domain. There are also rules that must be tested downstream in the analysis—for example, the amount of damages in the case of breach. Such rules are not only content-neutral in the sense that they attach consequences to norm violations without regard to the specific policy underlying the conduct rule that has been violated, but they are also devoid of an immediate signaling function. They simply dock to the upstream finding of, for example, negligent conduct (breach).<sup>86</sup>

Looking at tort liability under this more simplified perspective provides the basis for a differently aligned norm stratification. Certain norms, in both private and public law, provide for an immediate setting and framework in which individual socioeconomic transactions can evolve. These norms determine what is admissible and inadmissible—in this regard, they have the function of signaling the boundaries of legitimate activity. These rules of just conduct, so to speak, are a condition for liability; their violation forms the basis of any tort claim.<sup>87</sup> At the same time, and this is crucial, these first-category rules in their entirety constitute the Magna Carta of freedom of activities. Any activity undertaken in compliance with these primary rules will be free from liability. This bright-line signaling function qualifies these rules as indicators for the relevant party expectations.

This explains the difference between the first and second categories of norms. The second category contains all norms regarding the consequences for when a first-category norm has been violated. In other words, the second category provides sanctions for violations of the first category of norms. Of course, as we have seen above, if second-category norms are substituted with a different law’s provisions through choice of law, the local order may also

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<sup>86</sup> As explained above, this does not mean that the issue of damages is irrelevant for the preventive policies of tort law. See *supra* Part III.A. The issue here rather concerns the immediate function of signaling a “do or don’t” of the legal order.

<sup>87</sup> The distinction between norms of conduct and sanction norms is not new. It is, *inter alia*, the basis of German criminal law doctrine. See K. BINDING, DIE NORMEN UND IHRE ÜBERTRETUNG – VOL I: NORMEN UND STRAFGESETZE 45 (2d ed. 1890) (“[D]ie verbindliche Richtschnur des Handelns, . . . ist das rechtliche Verbot oder Gebot als solches ohne irgend welche Hinweisung des Handelnden auf die Rechtsfolgen, welche an die Handlung als an deren Bedingung geknüpft sind.”) [“The authoritative guideline of conduct . . . is the legal prohibition or order to act as such, without any reference to the legal consequences or sanctions that may be attached to the conduct as a condition.”].

be affected.<sup>88</sup> Yet, with respect to parties' expectations, such a substitution is less intrusive here than it is for the first-category rules. The substitution of a first-category norm directly alters the system of "dos and don'ts" under the local regime. The consequent distortion of policies and expectations is direct, particularly with regard to activities that are admissible in one jurisdiction but not the other. By contrast, the substitution of a second-category norm has only indirect effects. With this modification in mind, Cavers's explanation is a lucid one: the "standard of conduct" or the "basis of liability" is intimately connected to the regulating state and is thus irreplaceable in choice of law. In contrast, a more or less liberal rule on recovery only rarely directly affects the regulating state's policies.<sup>89</sup>

## 2. Categorization

On this basis, a practical categorization suggests itself quite readily. It is not contested—and our horizontal stratification also suggests—that norms providing for sanctions are subject to the *lex causae*. This category is not an issue of local data. Norms within this group concern, for instance, rules on the qualitative and quantitative features of remedies (e.g., injunctive relief or damages). In addition, they determine who holds a claim, and may provide for deduction from (e.g., due to insurance payments) or caps on the amount of damages. They also provide for the rules on statutory limitation.<sup>90</sup>

The first category raises more delicate problems of demarcation. The category of local rules of safety and conduct covers a large variety of norms. Generally speaking, it comprises all rules providing the basis for liability. These norms determine whether the alleged tortfeasor has breached a duty and whether he acted with the necessary state of mind. This is the foundation of negligence and intentional torts. For particularly hazardous activities, the legal system may also decide in favor of liability on the basis of mere risk-creation (e.g., strict liability). Yet under current doctrine, rules

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<sup>88</sup> See *supra* Part III.A.

<sup>89</sup> CAVERS, *supra* note 24, at 143–44.

<sup>90</sup> This is the dominant doctrine in European and Swiss Commentary. See Rome II, *supra* note 8, art. 15; Federal Statute on Private International Law (IPRG), art. 142(1), RS 291, Dec. 18, 1987 (Switz.). See also Karsten Thorn, *art. 15 Rom II-VO*, in BÜRGERLICHES GESETZBUCH para. 1 (Peter Bassenge et al. eds., 73d ed. 2014); Karsten Thorn, *art. 17 Rom II-VO*, in BÜRGERLICHES GESETZBUCH para. 1 (Peter Bassenge et al. eds., 73d ed. 2014); Umbricht & Zeller, *supra* note 13, para. 9; Heini, *supra* note 13, para. 6.

regarding the standard of care are not consistently treated as “rules of safety and conduct.”<sup>91</sup> A closer look at the debate helps rectify a misconception:

As held by German practice, for instance, local law not only governs the issue of breach with respect to rules of conduct but also determines whether the alleged tortfeasor failed to exercise reasonable care. For example, this applies when two people who share the same habitual residence, but who do not have a preexisting relationship, are involved in an accident in another country.<sup>92</sup> The situation is different, however, in “isolated” two-party scenarios. For example, if two people who share the same habitual residence are traveling together in a car in another country, and one of them causes an accident and injures the other, he will be held accountable under the local rules of conduct. However, with respect to the standard of care (negligence), the parties are considered to have “brought” their *lex communis* with them.<sup>93</sup> This rule is another facet of the paradoxical deterritorialization illustrated earlier.<sup>94</sup> In other words, European doctrine contends that there is a difference between the objective rules of conduct and the correlated level of care that an actor must comply with, in the sense of, “[p]lease follow local rules—yet feel free to be as neglectful as you are at home.”<sup>95</sup>

In light of our new horizontal dichotomy, this differentiation invites doubts. In fact, any distinction between rules of plain command or prohibition (i.e., “do or don’t”) and the attendant level of care for which the

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<sup>91</sup> See, e.g., Junker, *supra* note 14, para. 17 (explaining the issues of “fault” and “standard of care” as being part of the *lex causae*).

<sup>92</sup> Bundesgerichtshof [BGH] [Federal Court of Justice], Jan. 23, 1996, NEUE JURISTISCHE WOCHENSCHRIFT-RECHTSPRECHUNGS-REPORT ZIVILRECHT (NJW-RR) 732 (733), 1996 (Ger.); Thomas Pfeiffer, *Die Entwicklung des Internationalen Vertrags-, Schuld- und Sachenrechts in den Jahren 1995/96*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1207, 1215 (1997); Manfred Wandt, *Zum Anwendungsbereich der RAnwV bei im Ausland erlittenen Verkehrsunfällen - Zur Berücksichtigung des Mitverschuldens des deutschen, bei einem Verkehrsunfall in Norwegen Geschädigten*, VERSICHERUNGSRECHT (VERS) 1043 (1998).

<sup>93</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 10, 2009, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1482 (1485), 2009 (Ger.); Oberlandesgericht Hamm [OLG] [Higher Regional Court of Hamm] Nov. 26, 1996, VERSICHERUNGSRECHT (VERS) 1040 (1042), 1998 (Ger.). *But see* Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 21, 1978, VERSICHERUNGSRECHT (VERS) 541, 1978 (Ger.); KAHN-FREUND, *supra* note 35, at 96; SIEGHÖRTNER, *supra* note 41, at 426–27.

<sup>94</sup> See *supra* Part II.C.

<sup>95</sup> In the same vein, it seems to be acknowledged that if the *lex causae* prescribes a standard of strict liability, the tortfeasor’s local conduct and care are irrelevant. Article 17 of Rome II is then deemed to remain without effect. See, e.g., Francisco J. Garcimartín Alférez, *The Rome II Regulation: On the way towards a European Private International Law Code*, 3 EUR. LEGAL FORUM I-77, 90 (2007). For pre-Rome doctrine, see Stoll, *supra* note 29, at 174.

individual is held responsible is questionable, if not impossible. Rules of conduct and level of care are inseparable with respect to the ultimate effect on the regulated activity. For example, conduct regulation may provide for strict liability, in which case, any conduct that causes damage will generally create liability. Policy-makers can, however, also establish a less prohibitive regime of negligence liability. But here they can still choose between different levels of care, with the most rigid level effectively resembling strict liability and the most liberal one providing for liability only in cases of gross or wanton negligence.<sup>96</sup> Depending on the level of protection that policy-makers intend to establish, they may calibrate and fine-tune a sliding scale of regulatory impulses consisting of both objective conduct rules and rules regarding the individual level of care.

Accordingly, for choice of law, a differentiation must be avoided *in toto*. Back to the example of two automobilists who share the same habitual residence and who are visiting a country where the local law provides for strict liability, while their *lex communis* provides for negligence liability only; if these travelers were allowed to rely on the more liberal home standard, they might ultimately engage in riskier behavior than permitted locally. In this case, the local policymakers' preferred legal order would be "substituted" and distorted.

Similarly, it follows that the first category must cover rules regarding whether a victim's conduct eliminates liability (through, for example, the doctrine of contributory negligence).<sup>97</sup> The first category must also address delictual capacity,<sup>98</sup> vicarious liability,<sup>99</sup> and whether the tortfeasor can rely on a justifying cause for his wrong.<sup>100</sup>

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<sup>96</sup> See, e.g., PROSSER & KEETON, *supra* note 65, § 34 (discussing the different possible "degrees of negligence"); see also Dirk Looschelders, Persönlichkeitsschutz in Fällen mit Auslandsberührung, 95 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT (ZVGLRWISS) 48, 70 (1996).

<sup>97</sup> For the inseparability of the issues of negligence and contributory negligence, see *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 848 (7th Cir. 1999). For discussion of Article 17 of the Rome II Regulation and its (reverse) application to contributory negligence, see DICKINSON, *supra* note 58, para. 15.34.

<sup>98</sup> von Bar, *supra* note 77, at 967. *But see* Oberlandesgericht Celle [OLG] [Higher Regional Court of Celle], July 12, 1965, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 302, 1966 (Ger.); Heini, *supra* note 13, at 1583; TRUTMANN, *supra* note 32, at 106 (categorizing the issue of delictual capacity as part of the *lex causae*).

<sup>99</sup> See von Bar, *supra* note 77, at 967. For extensive analyses of the interests involved, see Willis L.M. Reese & Alma Suzin Flesch, *Agency and Vicarious Liability in Conflict of Laws*, 60 COLUM. L. REV. 764, 773, 776 (1960). *But see* Bundesgericht [BGer] [Federal Supreme Court] May 15, 1984, 110(II) ENTSCHIEDUNGEN DES SCHWEIZER BUNDESGERICHTS [BGE] 188,

*D. From Norm Categories to Party Expectations*

The foregoing categorization of norms is the first step in the process. The second step consists of reconciling actually or potentially conflicting party expectations. The decision maker will have to decide which side’s expectations should trump in the analysis. A consistent theory of correlations between norm categories and party expectations allows for a workable solution to the scenarios illustrated above.

*1. Transformation*

Our model of the liability/expectations correlation shows that it is usually local law that applies to local conduct.<sup>101</sup> This territorialization of tort policies implies that—at least in principle—a tortfeasor cannot rely on a standard different from the local law at the place of conduct. Nor may a victim expect the application of a standard other than local law.

In *Spinozzi v. ITT Sheraton Corp.*, Chief Judge Posner ridiculed an alleged divergence of expectations and local safety standards by using the zoological metaphor of a tort victim “carrying his domiciliary law with him, like a turtle’s house, to every foreign country he visit[s].”<sup>102</sup> Posner concluded that “[l]aw is largely territorial, and people have at least a vague intuition of this.”<sup>103</sup>

Yet such a divergence of local standards and expectations is not impossible. On the contrary, it may even be a necessary consequence of the correlation between tort policies and party expectations. In particular, if the tortfeasor’s conduct has international implications, expectations concerning the potentially applicable law or laws must be extended accordingly. Hence, depending on the activity and its possible consequences, it may also be

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193 (Switz.); Reichsgericht [RG] [Federal Court of Justice of the German Reich] July 9, 1892, 29 ENTSCHIEDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN [RGZ] 90 (93) (Ger.); Günther Beitzke, *Kollisionsrechtliches zur Deliktshaftung juristischer Personen*, in INTERNATIONALES RECHT UND WIRTSCHAFTSORDNUNG: FESTSCHRIFT FÜR F. A. MANN ZUM 70. GEBURTSTAG 107, 113–14 (Werner Beck et al. eds., 1977); TRUTMANN, *supra* note 32, at 109.

<sup>100</sup> DELACHAUX, *supra* note 32, at 180–81; STIG STRÖMHOLM, TORTS IN THE CONFLICT OF LAWS 140–41 (1961); Dörner, *supra* note 60, at 11. Here, as well, dominant European doctrine holds a contrary opinion. See, e.g., Heini, *supra* note 13, at 1584; TRUTMANN, *supra* note 32, at 102–03; Junker, *supra* note 14, paras. 17, 24.

<sup>101</sup> See *supra* Part III.A.

<sup>102</sup> *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 846 (7th Cir. 1999).

<sup>103</sup> *Id.*

reasonably expected that a second standard (or multiple standards) could apply.<sup>104</sup>

Again, in terms of our foregoing economic explanation:<sup>105</sup> the preventive and deterrent effect of tort liability would be diminished if the potential tortfeasor was allowed to rely on the *lex loci actus* even though her conduct had foreseeable effects in other jurisdictions.<sup>106</sup> And even though, with respect to the behavioral economics of tort regulation, the parties' expectations should take into account both the rules on safety and conduct and the rules on sanctions,<sup>107</sup> this kind of territorialization concerns primarily the first category of norms.

Here we must recur to the foregoing norm categorization: rules on safety and conduct directly determine individual conduct. These norms are the prime signals for a demarcation of what is admissible in a community's socioeconomic order. In other words, they delineate the domain of activities that are beyond the threat of liability.

Accordingly, private parties' "vague intuition" (to use the words of Judge Posner) of the correlation between law and territory also differs. Sanction norms in our second category are not equipped with a comparable signaling function. Their application and effects are less evident to the parties than those of the first category. Accordingly, the parties are not supposed to be informed about or to accommodate rules in the second category of the *lex loci actus*.

Here, a second look at the example of two people (with the same habitual residence) who are traveling abroad is illustrative. Of course, both tortfeasor and victim will expect an application of the local rules of safety and conduct at the place of the accident—they actually *have to*. In terms of sanctions, however, a more flexible handling is possible. Consider a cap on damages: if the parties' *lex communis*, unlike the local tort law, provides for unlimited liability (or vice versa), this is what the parties will reasonably expect. As we have seen, a norm substitution of this kind will not directly affect the local order. And it is not irrational for the parties to expect the *lex communis* to be applied with regard to the consequences of improper conduct. On the contrary: while an automobilist must rationally inquire about and accommodate the local rules of the road, he may not consider escaping, on the basis of foreign tort norms, a part of his liability vis-à-vis another

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<sup>104</sup> See also Rheinstein, *supra* note 67, at 26.

<sup>105</sup> See *supra* Part III.A.

<sup>106</sup> Schäfer & Lantermann, *supra* note 64, at 117; RÜHL, *supra* note 69, at 655.

<sup>107</sup> See *supra* Part III.A.

passenger who shares the same habitual residence. In other words, he is supposed to know what to do or not to do in order to avoid liability, but he will usually not calculate the ultimate scope of such liability.

As the following discussion demonstrates, this transformation of the norm stratification into reasonable party expectations as an element of conflicts justice helps resolve the contentious cases illustrated above.

## 2. *Solutions for the Contested Scenarios*

The first contested scenario concerns the allegedly “flexible” territoriality of local rules of safety and conduct—particularly traffic laws on alcohol levels and seatbelt use.<sup>108</sup>

For this scenario, a look at policies and related expectations yields a clear result. First, the territoriality of traffic laws and the underlying policies is evident. After all, the most basic purpose of restricting drunken driving is to secure public safety on local streets. The same applies to seatbelt regulations.<sup>109</sup> Even though no immediate third-party injury will ensue from a person’s failure to buckle up, it is hardly questionable that seatbelt rules, in addition to ensuring self-protection for the obligated individual, foster a public policy. Reducing accident injuries is the most fundamental purpose of tort law<sup>110</sup>—this also is the gist of seatbelt regulations.

In terms of party expectations, the result does not differ. Regulation of local traffic is immediately reflected in actors’ expectations. Drivers will take care not to exceed the intoxication threshold for fear of both criminal sanctions and civil liability under the local regime. Moreover, any party will be aware that violating local seatbelt regulations may result in both administrative sanctions and consequences with respect to driver and passenger tort claims and obligations. Unlike the conventional understanding in European doctrine, all parties must be expected to know that they are “subject to the traffic laws of another state when driving in that state.”<sup>111</sup> Like alcohol limits, seatbelt rules are strictly territorial under a perspective of party expectations.<sup>112</sup>

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<sup>108</sup> See *supra* Part II.C.1.

<sup>109</sup> But see STOLL, *supra* note 14, at 265 (seatbelt regulations follow no policy to protect third parties).

<sup>110</sup> See GUIDO CALABRESI, THE COST OF ACCIDENTS 24–33 (1970).

<sup>111</sup> Johnson v. Ford Motor Co., 2003 WL 22317425, at \*5 (N.D. Ill. Oct. 9, 2003).

<sup>112</sup> See Bonelli v. Giguere, 2004 WL 424089, at \*3 (Conn. Super. Ct. Feb. 18, 2004).

The only exception where sufficient socioeconomic contact with a jurisdiction—and, accordingly, parties' expectations that they will be subjected to local standards—can be denied is in cases where the tort has “occurred in an ‘insulated environment.’”<sup>113</sup> For this exceptional category, however, a cautious analysis is required in order to avoid a rash verdict. A frequently cited example of such “isolation” is liability among members of a travel group.<sup>114</sup> If, for example, one of the travelers is a physician who negligently treats one of his fellow travelers, party expectations are said to allow for reference to their *lex communis*. At first glance, there is no relevant “local contact.” However, the physician's conduct, as in traffic accidents, may often also affect the local public—and this may be foreseeable for all parties involved. If, for instance, the physician overlooks a contagious disease (risking its spread beyond the group), the application of local law corresponds to both local lawmakers' interests and to the parties' justified expectations.<sup>115</sup>

The second problematic scenario concerns cases where conduct and injury occur in different jurisdictions.<sup>116</sup> Variation 1, where the *lex loci actus* provides for a more liberal regime of the local order than the *lex loci damni*, may serve as a starting point: unless the injury is reasonably foreseeable, there is no interest in regulating the conduct at issue on the side of the state where the injury occurs. Tort liability rules can exert their intended effect of prevention and deterrence with respect to a certain activity only if the results of this activity can be foreseen. Absent such foreseeability, individual conduct cannot be influenced by a threat of liability. Therefore, under the lens of preventive policies and their transnational enforcement, conduct with unforeseeable consequences must remain an extraterritorial affair. Consequently, in these cases neither substantive policies nor party expectations require giving regard to a standard of conduct beyond the place of the action.

However, this is not true if the injury is foreseeable. Here, the legal order at the place of injury has a preventive interest. The tortfeasor cannot escape

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<sup>113</sup> See KAHN-FREUND, *supra* note 35, at 81.

<sup>114</sup> See, e.g., Heinz Binder, *Zur Auflockerung des Deliktsstatuts*, 20 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (RABELSZ) 401, 480 (1955).

<sup>115</sup> True, the physician may argue that in the inter-domiciliary relationship no expectation of a better treatment could have been expected even though this would have been the local standard among the profession. Yet, the patient-victim has a justified interest in treatment in accordance with the higher local standard, because the alternative of contracting with a more competent or diligent local doctor would have been possible.

<sup>116</sup> For example, see *supra* Part II.C.1.

his expected liability. Yet a clarification is in order with regard to cases where a certain activity (e.g., libel in the course of a political campaign) is privileged in the state where the conduct occurs, but not under the law of the state where the victim is affected (e.g., in the case of libel, where the victim’s reputation is damaged).<sup>117</sup> It is questionable whether the state where the conduct occurs may demand that its liberal policy be considered in other states. This would extraterritorially (and thus in principle illegitimately) extend its regulatory interests. In any event, the territoriality of expectations suggests the opposite result: nobody can carry his own law abroad.<sup>118</sup> Whether a court in the state of the tortfeasor’s conduct would find the stricter regime in compliance with the local *ordre public* is, of course, a different question.<sup>119</sup>

The transformation is also helpful for the reverse scenario outlined in variation 2. If the standard of conduct is stricter at the place of acting, one may argue in favor of applying the local rules of safety and conduct taken from the *lex loci actus*.<sup>120</sup> An analysis in terms of U.S. doctrine—that is, under the interest-analysis perspective of true and false conflicts—may suffice to explain the result. After all, both jurisdictions have an interest in applying their law; enforcing the stricter policy at the place of conduct will attend to both of their interests.<sup>121</sup>

This result can also be explained in light of transformed party expectations. Of course, it may be argued that the tortfeasor’s activity, even though illegal at the place of conduct, did not violate the standard of conduct at the place of injury. Yet in this case, parties’ expectations are clear. First, the tortfeasor has no *justified* expectations. Once again, Cavers’s verdict comes to mind: the tortfeasor’s conduct is then “just as bad when the victim is an outsider as an insider.”<sup>122</sup> Furthermore, it is not clear why, as is often contended, application of the *lex loci actus* should not comply with the victim’s reasonable expectations and ultimately even exceed his justified

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<sup>117</sup> CAVERS, *supra* note 24, at 142–43.

<sup>118</sup> *Id.*; see also Looschelders, *supra* note 96, at 70–71.

<sup>119</sup> *But see* CAVERS, *supra* note 24, at 143 (“Probably a court in [the state where the conduct occurred] would never reach this principle [i.e., application of the stricter law], finding its own rules applicable ‘by construction and interpretation.’”).

<sup>120</sup> See, e.g., Symeonides, *supra* note 29, at 192, 214. *But see* Bach, *supra* note 55, paras. 10–11.

<sup>121</sup> See, e.g., Symeonides, *supra* note 29, at 214 (noting that there is no true conflict of interests, but a “classic ‘false conflict’” in the terminology of interest analysis).

<sup>122</sup> CAVERS, *supra* note 24, at 160.

prospects.<sup>123</sup> Of course, it is often only with an eye on the victim's immediate environment and the local standard of safety and conduct that he can reasonably expect to be protected. Yet it has never been explained why the victim should always strictly limit his expectations to the jurisdiction of presence or residence and not also be allowed to reasonably expect that foreign-based activities should comply with the respective *foreign* jurisdiction's rules of safety and conduct. Particularly in border areas,<sup>124</sup> a tort victim's reasonable expectations may concern not only protection under the regulatory order of a single state but also protection by foreign states.

#### IV. SUMMARY AND OUTLOOK

At the center of the chasm between European and U.S. conflict law lies an area of the discipline that remains the *terra incognita* Ehrenzweig began to explore more than fifty years ago. In particular, the European approach to local data is still subject to numerous doubts. The European hesitance to implement substantive concerns hampers the development of a consistent theoretical and practical approach. The fear seems to be that the vice of American-style interest analysis could enter through the backdoor of issue-by-issue consideration and *dépeçage*. However, a consistent solution requires exactly that.

To rectify the current conundrum, the instrument of local-data consideration must be reconceptualized. Looking at local data from a perspective of the interplay between substantive and conflicts justice highlights the need for a stringent reterritorialization. What is needed is a horizontal stratification of tort liability norms into two categories. The first category covers rules of just conduct that constitute a basic framework for the legal order and its preventive-deterrent function. These norms are strictly territorial. The second category comprises all sanction-related norms and allows for a more individualized deterritorialization. For traditional European choice of law, this new perspective requires taking off a well-worn blindfold: the theory of local data has never been an instrument of the mere "taking account of" rules of safety and conduct. It is the outright application of such rules.

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<sup>123</sup> *But see* Bach, *supra* note 55, para. 11 (arguing that these expectations would not be "worthy of protection").

<sup>124</sup> For example, the case of blasting activities near state borders. *See supra* note 50 and accompanying text.

All things considered, this new perspective reflects a global development. What was once deemed “private” is no longer an issue of exclusively individual transactions. Tort law in particular has become a field of socioeconomic regulation. International cases are not excluded from this momentum. To the contrary, in virtually all choice-of-law scenarios, substantive policies and state interests are at stake. The theory of local data is thus *pars pro toto* for the transformation toward a more policy-oriented approach.