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Interest Analysis Meets the Jury Function in an Alienation of Affections Action

David E. Seidelson*

Hollywood moguls were quick to learn that if Lassie did well at the box office and Lassie, Come Home did even better, there just had to be The Return of Lassie. And if Frankenstein and Dracula each meant big business, Frankenstein Meets Dracula would be boffo. Had he been consulted, Sam Goldwyn would have known that, given the widespread judicial acceptance of interest analysis as a method of resolving choice-of-law problems, the enticing complexities of a jury trial and the sex appeal of an action for alienation of affections and criminal conversation, Marra v. Bushee was a natural.

The action was brought in the United States District Court for the District of Vermont, with jurisdiction based on diversity of citizenship. The plaintiff-wife was domiciled in New York; defendant was domiciled in Vermont. According to the district court's opinion, defendant's alleged improper conduct with plaintiff's husband had occurred in Vermont. New York was the state of marital domicile. A choice-of-law problem arose because New York had abolished such actions, and Vermont had not. Recognizing its obligation under Klaxon v. Stentor

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1. . . . [C]ourts or legislatures in at least 23 states and the District of Columbia have rejected the place-of-wrong rule in some context. Rejection has usually been in the form of a court decision revealing general acceptance of the premises of state-interest analysis. The influence of the new thinking has also been felt in federal courts choosing state law in non-diversity cases, and in England.


2. 447 F.2d 1282 (2d Cir. 1971).


Electric Manufacturing Co., the district court looked to the opinions of the highest appellate court of Vermont for guidance in resolving the choice-of-law problem. The court discovered that the Supreme Court of Vermont had never resolved that conflicts issue. In fact, the district court determined that it was uncertain whether the Supreme Court of Vermont would attempt such resolution through the application of lex loci delicti or the more modern interest analysis approach. The district court, following the lead of a much earlier opinion by Judge Wyzanski in Gordon v. Parker, who had found himself confronted with a similar problem in an analogous legal setting, utilized, alternatively, lex loci delicti and interest analysis and concluded (happily) that both approaches led to the same conclusion: application of Vermont law. The critical interest of Vermont which led to that conclusion through interest analysis was that state’s legitimate concern with regulating such conduct within its borders, the court having decided that such conduct regulation (through deterrence) was a primary reason for the Vermont law permitting such legal actions. So far, so good, and, incidentally, wholly consistent with Judge Wyzanski’s opinion in Gordon. Then, from an adverse judgment in the amount of $9,000, defendant appealed to the Second Circuit, and that court reversed and remanded for a new trial. The reason? The court of appeals concluded that the district court had usurped a portion of the jury’s fact-finding function.

The opinion of the Second Circuit raises questions touching the procedural aspects of a jury determination intimately related to a choice-of-law decision and the most rational manner of resolving an extraordinarily difficult conflicts problem. First, the complexity of the jury trial.

5. 313 U.S. 487 (1941).
6. After the Second Circuit’s opinion in Marra, a federal district court, sitting in Vermont and exercising diversity jurisdiction, found itself confronted with a choice-of-law determination; the court concluded that the Supreme Court of Vermont would abandon lex loci delicti in tort cases and “adopt the concept of principal contacts as the dominant consideration.” LeBlanc v. Stuart, 342 F. Supp. 775, 774 (D. Vt 1972). In LeBlanc, the court ruled that the interspousal tort bar of the state of marital domicile (Rhode Island) precluded wife from suing deceased husband’s personal representative for injuries sustained as a result of husband’s allegedly negligent driving in Vermont.
7. 83 F. Supp. 40 (D. Mass.), aff’d on other grounds, 178 F.2d 888 (1st Cir. 1949). In Gordon, the action was brought in the federal district court in Massachusetts with jurisdiction based on diversity. Pennsylvania, the marital domicile, had abolished alienation of affections actions, Massachusetts, the situs of defendant’s conduct, permitted such actions. The Pennsylvania statute, unlike that of New York, did not eliminate actions for criminal conversation. Baldridge v. Matthews, 378 Pa. 566, 106 A.2d 809 (1954); PA. STAT. ANN. tit. 48, § 170 (1935).
According to the Second Circuit, there had been conflicting evidence at trial as to where the defendant's alleged wrongful conduct had occurred, Vermont or New York. "Because the plaintiff made a general demand for a jury trial, the defendant was entitled to the jury's consideration of every issue properly triable to it. . . . One such issue was the situs of defendant's conduct, a factual determination upon which the choice of law turned."\(^9\) Since it had assumed "that a factual finding territorializing the defendant's conduct was a jurisdictional matter not within the province of the jury, the district court itself concluded 'that the conduct which constituted the alienation occurred principally in Vermont and the applicable law is Vermont law.' \(^10\) In so doing, the district court violated the defendant's right to a jury determination of that critical issue.

Either counsel for the plaintiff asserted, or the Second Circuit considered sua sponte, that because defendant had not requested an instruction directing the jury to determine the situs of defendant's conduct, she had waived her right to such a jury finding. The district court, however, determined that the failure to request the instruction did not constitute a waiver. How the court arrived at that conclusion is interesting.

"At the close of the plaintiff's case, and again at the conclusion of all the evidence, the defendant moved for a directed verdict . . . ."\(^11\) The motion for directed verdict at the close of the case was based "on the ground that under the applicable conflicts of law rule of the State of Vermont the law of New York governs this cause of action and New York has abolished the cause of action of alienation of affections and criminal conversation."\(^12\) The district court reserved its ruling on defendant's motion and submitted the case to the jury, which ultimately returned the $9,000 verdict for the plaintiff. Defendant then moved for a judgment non obstante veredicto. Subsequently, the court denied that motion and defendant's earlier motion for a directed verdict in a single opinion. That opinion stated, "The gravamen of the motion for a judgment notwithstanding the verdict is the same as the previous motion for a directed verdict."\(^13\) Then the district court stated:

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9. 447 F.2d at 1284 (citations omitted).
10. Id. at 1283.
11. Id.
13. Id.
Defendant’s motion for a judgment notwithstanding the verdict involves several choice of law questions which may be grouped into two basic contentions.

First, the defendant maintains that under the traditional *lex loci delecti* [sic] test the court must look to the law of the place of the injury which, according to the defendant, is New York.

Second, the defendant contends that the modern *significant relationship* test adopted by the Vermont Supreme Court for application to contractual choice of law problems should also be used in the case of an intentional tort; and, that New York is the state with the most significant relationship to the present causes of action.\(^{14}\)

The Second Circuit concluded that defendant’s never-made request for a charge that the jury assign a situs to defendant’s conduct “immediately after the trial court had reserved decision on defendant’s motion to dismiss, which framed squarely the choice of law issue, would have been a duplication of procedural effort.”\(^{15}\) Therefore, defendant was “not . . . precluded from raising this error on appeal.”\(^{16}\) Now that’s puzzling. Neither of the “two basic contentions” underlying defendant’s motions for a directed verdict and a judgment non obstante veredicto would seem to be the equivalent of a requested instruction that the jury assign a situs to defendant’s conduct. The first assertion is simply *lex loci delicti* with the conclusion that plaintiff’s injury was sustained within the state of marital domicile, New York. The second rests upon the assumed superior interest of New York as the state of marital domicile. Both exist wholly separate and apart from where defendant’s conduct occurred; in fact, each subsists even assuming that the totality of that conduct occurred in Vermont.

If one were willing to engage in speculation, it would become possible to conjure up a basis for defendant’s motion for directed verdict in addition to the two set forth above in the district court’s opinion. Defendant could have determined that the evidence required a finding that her conduct had occurred solely in New York, thus eliminating the Vermont interest resting on conduct regulation, and requested a directed verdict on the ground that Vermont had no other legitimate interest in the issue, therefore New York’s law, abolishing the cause of action, should be applied. But clearly that basis for the motion would not have been tantamount to a request that the jury be instructed to territorialize defendant’s conduct. On the contrary, that

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\(^{14}\) *Id.*

\(^{15}\) 447 F.2d at 1284-85.

\(^{16}\) *Id.* at 1285.
assertion would have removed from the jury's consideration the situs of the conduct, and, presumably, would have been just as inappropriate as the district court's elimination of that function, in light of the conflicting evidence on the point found to exist in the record by the court of appeals.

It's difficult to imagine a basis for defendant's motion for a directed verdict or for a judgment non obstante veredicto which would have required a jury determination of where defendant's conduct occurred. Indeed, the thrust of both motions would be to negate any such jury function, since such motions generally rest on the assumption that jury deliberation is not appropriate. If the Second Circuit was wrong in reading defendant's motion for directed verdict as a "substitute" for a requested instruction that the jury ascribe a situs to defendant's conduct, it was wrong in concluding that defendant had not waived such a jury determination by failing to request it, simply because of the motion for directed verdict. The only other rationale for the court's finding that the defendant was free to raise the issue on appeal would be "the so-called 'plain error' rule." Conceivably, defendant was denied her seventh amendment right to a jury trial because of counsel's failure to request the appropriate jury determination. There are two potential obstacles to use of the "plain error" rule in this context. First, though "The 'plain error' rule is applicable in civil cases... it seems to be rarely used" in non-criminal cases. And second, the appellate court in its opinion never alluded to the rule. However, it had potential applicability, so why not accept it as a satisfactory (albeit tacit) basis for the court's finding? Still, for counsel in future cases involving a choice-of-law determination requiring a jury finding, this message should be clear: don't neglect to request a specific instruction that the jury make the appropriate factual determination.

More basic (and more troubling) than the ratio decidendi for the conclusion that defendant had not waived her right to a particular jury determination is the Second Circuit's conclusion that resolution of the choice-of-law problem depends on the jury's determination of where defendant's conduct principally occurred. That conclusion creates problems going, in intimately related ways, to the jury function in

17. J. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 120 (2d ed. 1972) [hereinafter cited as McCormick].
18. In Suits at Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .
U.S. Const. amend. VII.
practice, and, ultimately, to the basic conflicts problem. Perhaps the most appropriate manner of testing the feasibility of the proposed jury function is to see how it would work at retrial.\textsuperscript{20}

The Second Circuit's opinion requires that the choice-of-law problem be resolved by the jury's determination of where defendant's alleged conduct principally occurred. If the conduct principally occurred in New York, presumably the verdict must be for the defendant; if in Vermont, the verdict may be for the plaintiff. Suppose that, after receiving such an instruction, the jury returns to advise the trial court that it has found that 60 per cent of the defendant's conduct occurred in New York and 40 per cent in Vermont, and to ask the court for further guidance. What should the court do? The trial judge, already reversed once in the case, probably would be uniquely sensitive to the possibility of a second reversal. Permitting a verdict for the plaintiff on a finding that less than half of defendant's conduct occurred in Vermont might not be wholly consistent with the appellate court's conclusion that where defendant's conduct principally occurred would be "determinative of the choice of law principles."\textsuperscript{21} Does that mean that the trial judge, confronted with a sixty-forty division of defendant's conduct "favoring" New York, should instruct the jury that its verdict must be for the defendant? Perhaps not. The sixty-forty split may be the result of quantitative analysis only, without regard for the relative alienating effect of each portion of the defendant's conduct. And, while the Second Circuit did refer to where defendant's conduct "principally"\textsuperscript{22} occurred, it alluded also to the situs of the "alluring"\textsuperscript{23} conduct and the "decisive"\textsuperscript{24} conduct, although, admittedly, it did say that the court should "employ the law of the state in which the defendant's conduct \textit{primarily} occurred."\textsuperscript{25} What's a poor trial judge to do, especially one still smarting from the sting of reversal in the same case?

Perhaps the first step would be to assure that the jury's determination of situs was the product of qualitative, as well as quantitative, analysis. The trial judge, mindful of the Second Circuit's adjectival inconstancy (and still eager to avoid a second reversal) might be wise to utilize

\textsuperscript{20} Plaintiff has determined not to pursue the case, therefore no retrial will occur. Telephone conversations with Ralph Foote, Esq., counsel for the plaintiff, Feb. 20 & July 3, 1973.
\textsuperscript{21} 447 F.2d at 1285.
\textsuperscript{22} \textit{Id.} at 1283.
\textsuperscript{23} \textit{Id.} at 1284.
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{Id.} at 1288 (emphasis added).
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"alluring" and "decisive" in describing the alleged wrongful conduct of the defendant in his charge to the jury and to instruct them (assuming they find such conduct to have occurred) to determine where such "alluring," "decisive" conduct "principally," that is to say, "primarily," occurred. Suppose he does, and suppose, too, that the jury returns to advise the court that it has determined that 60 per cent of the defendant's alluring, decisive conduct occurred in New York and 40 per cent in Vermont, and asks the court for additional guidance. Now what? Is the jury's finding that 60 per cent of defendant's alluring, decisive conduct occurred in New York equivalent to a finding that defendant's "legally significant" (let's see the Second Circuit top that) conduct occurred primarily and principally in New York? If so, of course, the trial judge should advise the jury that, given the factual determination stated, its verdict should be for the defendant. But the trial judge might be wise to avoid that. After all, how can he be certain (short of a second appellate review) that 60 per cent is the primary and principal part of the defendant's total alluring, decisive conduct, in the sense that the court of appeals referred to the principal and primary part of that conduct? The safest course for the trial court would seem to be to reinstruct the jury that, assuming it finds alluring, decisive conduct by the defendant, it must determine where that conduct principally and primarily occurred, New York or Vermont. If it finds that the conduct principally and primarily occurred in New York, its verdict must be for defendant. If it finds that such conduct principally and primarily occurred in Vermont, its verdict may be for the plaintiff. Parenthetically and silently, the trial judge might very well append, "And please, folks, no percentage splits."

With such additional guidance, the jury might return with its verdict for either party depending, in critical part, upon its determination of where defendant's alluring, decisive conduct principally and primarily occurred, assuming a finding that it occurred at all. To assure that the jury properly "territorialized" defendant's conduct, and did not react improperly to either the evidence or the court's instructions, counsel and the court could prepare and submit special interrogatories to the jury requiring special verdicts as to whether or not defendant had alienated the affections of plaintiff's husband, and, if so, whether the alluring, decisive conduct occurred principally and primarily in New York or Vermont. If the jury answers the first interrogatory "Yes" and the second "Vermont," the general verdict would be for the plain-
tiff. If the first answer were "Yes" and the second "New York," the general verdict would have to be for the defendant. That, presumably, would meet with the approval of the Second Circuit. And that, in turn, raises a question as to the propriety of the Second Circuit's opinion as to the basic conflicts issue.

The foundation of Vermont's interest is the occurrence of defendant's (alleged) conduct in that state. Assuming that a significant portion of that conduct did occur in Vermont, that state's interest is a rather intense one. As Vermont views such conduct, it is intentionally wrongful. That characterization of the conduct creates two legally significant consequences: (1) the relative degree of culpability of the conduct is very high, compared, for example, with merely negligent conduct, and (2) it is uniquely susceptible to deterrence, compared, for example, with mere momentary inadvertence. That high degree of culpability and unique susceptibility to deterrence combine to enhance rather dramatically Vermont's interest in regulating such conduct within its borders. Under the Second Circuit's mandate, a jury could determine that, although a significant portion of defendant's conduct occurred in Vermont, the principal and primary portion occurred in New York. Given such a finding and the court's mandate, the verdict would have to be for the defendant. That, of course, would frustrate Vermont's interest in conduct regulation through the deterrent sting of civil damages. The critical question then becomes: Has New York any interests sufficiently significant to justify the frustration of Vermont's keen interest?

The original New York statute abolishing actions for alienation of affections contained its own statement of public policy:

The remedies heretofore provided by law for the enforcement of actions based upon alleged [alleged] alienation of affections, criminal conversation, seduction and breach of contract to marry, having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies.
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Consequently, in the public interest, the necessity for the enactment of this article is hereby declared as a matter of legislative determination.26

Although that section is no longer a part of the New York statute abolishing such actions, its statement of public policy could be treated as having continuing viability, for two reasons. First, the last section of the existing statute expressly refers to the public policy stated in the statute.27 Since the original policy statement was never supplanted by a different one in statutory form, the reference could be read as one going to the original. Second, the policy considerations set forth in the original statute tend to coincide with the reasons generally offered for the enactment of the so-called “Heart Balm” statutes in the 1930’s.28

26. Wawrzin v. Rosenberg, 12 F. Supp. 548 (E.D.N.Y. 1935). The court offers this citation to the original statute:

Section 61-a of the Civil Practice Act of the State of New York, in chapter 263 of the Laws of 1935 ....

Id.

27. Id.

This article shall be liberally construed to to effectuate its objects and purposes and the public policy of the state as hereby declared ....


28. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 267 (1968) states:

A recognition that the suit for alienation of affections produces serious abuses and is open to many policy objections has led to the enactment of “Heart Balm” statutes abolishing the action in eleven states. One other state, Pennsylvania, has abolished the action as against strangers. Louisiana has refused to recognize the action by judicial decision.

For all these reasons the abolishing statutes reflect a sound public policy and ought to be enacted more widely than they are.

A. Jacobs & J. Goebel, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 495-96 (4th. ed. 1961) states:

At the time of the first spate of Heart Balm statutes, the impulse to legislate appears to have emanated from writing in legal and other periodicals. The conclusion that alienation was a species of blackmail action was never supported by statistics, but rather by inferences drawn from cases where the damages awarded were on their face excessive. Whatever may be the criticisms levelled at the action, there always inhered in it a social purpose, viz., a sanction against one who subverts the marital relation, the preservation of which is a concern of the state. Since 1941 a profound change has taken place in the pattern of American life with the dispersion of humans far from their domiciles, particularly in military service. This has resulted in a factual separation of spouses in circumstances that make difficult or impossible the husband’s fulfillment of the role of protector of the marital relation. Where the alienation remedy has not been abolished, justice to such persons requires that it be not so hedged with restrictions that the remedy is made useless to them. There have been enough cases involving military personnel in recent appellate reports to indicate that their plight is at least as worthy of consideration as the discouragement of legal blackmail.

Given the divergent views expressed in those two excerpts (see text at note 29), it becomes interesting to speculate how a court willing to consider the “better rule of law” as a “choice influencing consideration” would react to the choice-of-law problem presented. Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Cipolla v. Shaposka, 439 Pa. 563, 573, 267 A.2d 854, 859 (1970) (dissenting opinion); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968); Leflar, Conflicts Law: More on Choice Influencing Considerations, 54 CALIF. L. REV. 1584, 1587 (1966); Leflar, Choice Influencing Considerations in Conflicts
Professor Clark offers perhaps the most perceptive and succinct statement of those reasons:

The reasons underlying abolition of alienation of affections are many and persuasive. One is the opportunities for blackmail which the action provides, since the mere bringing of the action can ruin the defendant's reputation. Another is that lack of any reasonably definite standards for assessing damages and the possibility of punitive damages makes excessive verdicts likely. Still another is the peculiar light which the whole proceeding throws on the nature of marriage, leaving one with the conviction that the successful plaintiff has engaged in something which looks very much like a forced sale of his spouse's affections. Most significantly of all, the action for alienation is based upon psychological assumptions that are contrary to fact. As has been indicated, viable, contented marriages are not broken up by the vile seducer of the Nineteenth Century melodrama, although this is what the suit for alienation assumes. In fact, the break-up is the product of many influences. It is therefore misleading and futile to suppose that the threat of a damage suit can protect the marital relationship. For all these reasons the abolishing statutes reflect a sound public policy and ought to be enacted more widely than they are.

The fear that an action for alienation of affections lends itself to blackmail, simply by the threat of initiation, and the fear of excessive verdicts, when litigation is actually initiated and terminated, would seem to be concerns focused primarily upon a misuse of the judicial system and an imposition on the courts. While those may be rather acute concerns on the part of New York and other states having en-

Law, 41 N.Y.U.L. Rev. 267, 296 (1966). With a direct, abrasive and seemingly irreconcilable conflict between the interests of the state having abolished the action and the state having retained it, would the forum be tempted to label one of those laws “better” as a method of resolving the conflict? And would the temptation be enhanced if the forum were one of the interested states? If the forum were the state with a “Heart Balm” statute, one can almost imagine the emphasis the court would place on the evils intended to be eliminated by the legislative enactment and on the enlightened view expressed by the statute. If the forum were the state which permitted the action, it is as easy to imagine the judicial emphasis on the numerical majority of the states which continue to permit the action and on the relative absence of legislative activity aimed at abolishing the action since “the first spate of ‘Heart Balm’ statutes.” For adverse reaction to consideration of the better rule of law as a legitimate choice influencing factor, see Seidelson, Interest Analysis: For Those Who Like It and Those Who Don't, 11 DuQ. L. Rev. 283, 307-08 (1973); Seidelson, Comment on Cipolla v. Shaposka, 9 DuQ. L. Rev. 423 (1971).

As to the efficacy and wisdom of the action for alienation of affections, the views of this author coincide with those stated by Professor Clark in this text at note 29; however, an effort has been made by the author to prevent those views from intruding into the suggested resolution of the choice-of-law problem dealt with in this article, since it is felt that those personal views neither enhance nor diminish the interests of the competing states.

acted “Heart Balm” statutes, they tend not to be convertible into significant interests on the part of New York in \textit{Marra}, since the action was brought against a Vermont defendant in a federal district court in Vermont.\footnote{In \textit{Wawrzin v. Rosenberg}, 12 F. Supp. 548 (E.D.N.Y. 1935), the court permitted an alienation of affections action in a federal district court sitting in New York, where the defendant's acts occurred in New Jersey, notwithstanding New York's “Heart Balm” statute. New York courts themselves have demonstrated a laudable recognition of their constitutional obligation under the full faith and credit clause and an appropriate sensitivity to the concept of comity. In \textit{Parker v. Hoefer}, 2 N.Y.2d 612, 142 N.E.2d 194, 162 N.Y.S.2d 13, \textit{cert. denied}, 355 U.S. 833 (1957), full faith and credit was extended to a Vermont judgment arising out of an action for alienation of affections and criminal conversation. See \textit{Seidelson, Full Faith and Credit: A Modest Proposal . . . Or Two}, 31 \textit{Geo. Wash. L. Rev.} 462 (1962). In \textit{Neporany v. Kir}, 5 App. Div. 2d 438, 173 N.Y.S.2d 146 (1958), comity was extended to a Canadian judgment arising out of an action for seduction and criminal conversation.} Similarly, concern over a “forced sale” of the affections of plaintiff’s spouse would seem to be a concern focused primarily upon an imposition on the court involved in the transaction, and, likewise, not convertible into a significant New York interest in \textit{Marra}. Frankly, the remaining reasons set forth by Professor Clark seem not to be reflected in the New York statutory statement of public policy. Therefore, looking only to that statutory recitation of legislative determination, one could assert that New York has no significant interest in having its law applied in \textit{Marra}. Consequently, the frustration of Vermont’s keen interest resting comfortably on the commission of a significant, though less than principal, portion of defendant's conduct there, would be wholly without justification. But that may be too hasty and just a bit unfair to New York. Conceivably, that early statement of public policy may not have been reenacted by the New York legislature precisely because it was deemed not adequately inclusive. In which case, it could be asserted, the present reference in the last section of the statute to the public policy expressed by the statute should be read as a reference to the broadest public policy one can discern in the existing statute. That construction would be consistent with that section’s injunction to apply the statute liberally.\footnote{N.Y. Civ. Rights Law § 84 (McKinney Supp. 1972).} And, that, in turn, would encompass as reasons for the statute all those offered by Professor Clark and as many more as the mind of man can rationally conceive.

One reason not explicitly noted by Professor Clark, but earlier referred to by Judge Wyzanski in considering Pennsylvania's “Heart Balm” statute,\footnote{Pa. Stat. Ann. tit. 48, § 170 (1965).} was that state’s concern “with not having Pennsylvania
courts hear this sordid type of controversy." If that concern be read as a reason for the New York statute, it also seems to go directly toward a desire to "shelter" New York courts, both judges and juries, in this instance, from the specifics of the evidence likely to be adduced in such a case. Once more, this is not a legitimate New York interest in a case being tried before a federal judge and a jury sitting in Vermont. Well, back to Professor Clark's reasons.

His elimination of the "vile seducer" as a cause of disruption of a contended marriage and his conclusion that "the threat of a damage suit" cannot "protect the marital relationship" go directly to the essence of the relationship and reflect a very lucid view of it. The view is that an action for alienation of affections is not a meaningful method of preserving marital tranquility. Imputing that same view to New York, and accepting it as a reason for New York's law, can give rise to a legitimate interest on the part of that state in the facts of Marra. After all, New York was the state of marital domicile. Certainly that state should be deemed to have the most acute interest in preserving marriages based there. And apparently New York has concluded that the maintenance of an action for alienation of affections is not an appropriate mode of preserving marriage. Chalk up one legitimate interest for New York.

There is another potential reason for New York's law, reflected neither in that state's explicit "public policy" nor in Professor Clark's statement. It is, however, intimated by language in Judge Wyzanski's opinion in Gordon, in fact, in the same sentence quoted in part above. In its entirety, that sentence reads, "Pennsylvania was concerned with not having Pennsylvania courts hear this sordid type of controversy and not having Pennsylvania citizens and visitors called upon to defend actions which have so often been motivated by spiteful or ulterior purposes." The italicized portion of that language suggests a concern on the part of the state having enacted a "Heart Balm" statute with affording all those within the state, more or less permanently as domiciliaries or just temporarily as visitors, with a certain freedom of action. More precisely, the language indicates an interest in assuring

33. 83 F. Supp. at 43.
34. Id. (emphasis added).
35. Rather strangely, the sentence in Judge Wyzanski's opinion immediately following the sentence quoted in the text at note 34 offers this view of Pennsylvania's statute: "Pennsylvania has spoken qua possible forum and qua possible state of defendant's domicil. . . ." Id. Somewhere between that sentence and the immediately preceding sentence, the court seems to have misplaced Pennsylvania's concern for "visitors" to that state.

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those who act within the state that those actions will not be used ad-
versely against them in a subsequent alienation of affections suit. That
certainly is convertible into a significant New York interest in Marra
as to those acts of the defendant which may have occurred in New York.

So one may identify two New York interests in having New York
law applied in Marra: (1) a determination that a New York domiciled
marriage does not require and will not be abetted by an alienation of
affections action, and (2) a desire to afford those acting within New
York freedom from concern that those acts may result in civil liability
in an alienation of affections action. The chore now is to determine
if either or both of those interests justify frustration of Vermont's in-
terest in conduct regulation if defendant's conduct occurred principally
in New York, albeit significantly in Vermont as well.

First, an examination of New York's determination that marriages
do not require the protective umbrella of potential alienation of affec-
tions actions is necessary. If Vermont's interest were based entirely on
its determination that marital tranquility or stability was enhanced
by the threat of civil action against the "vile seducer," that interest
would be insignificant compared with New York's contrary conclusion.
Since plaintiff's marital domicile was New York, it is that state which
would have the overriding interest in deciding what litigative oppor-
tunities were and were not appropriate to protect and preserve that
marriage. However, Vermont's significant interest is conduct regula-
tion through deterrence, rather than preservation of the marriage. It
may be true that some portion of Vermont's desire to deter such con-
duct within its borders is predicated upon its conclusion that the con-
duct threatens marital tranquility. To the extent that that concern ex-
plains the deterrent aspirations of Vermont, that state's interest in
conduct regulation would seem subservient to the interests of New
York as marital domicile. In effect, New York's law says to Vermont's
wish to preserve the New York marriage by means of an alienation of
affections action: "Thanks, but no thanks." It could be concluded,
however, that Vermont's conduct-regulating purpose goes beyond
preservation of the marriage and is intended to deter conduct which
those in Vermont look upon as unpalatable per se. Indeed, in an
analogous situation, Judge Wyzanski wrote:

To be sure, tort law also always has a compensatory element. But
that is of secondary consequence where, as in the tort of aliena-
tion of affections, the principal reason why the state stamps con-
duct as wrongful is that so many people regard it as sinful, so many regard it as offensive to public morals, and so many are likely to take matters into their own hands if public tribunals are not available.36

After citing with approval the decision in Gordon, the Second Circuit in Marra rephrased that language this way:

Where the compensatory element dominant in negligence actions is supplanted by the punitive interest accompanying the state's attempt to control and deter injurious behavior, the defendant's conduct, and not the domicile of the aggrieved spouse, was considered determinative of the law to be employed.37

So, assuming there is a Vermont interest in conduct regulation which goes beyond preservation of the marital status, Vermont retains a legitimate interest notwithstanding the New York domicile of the marriage. Moreover, that interest in regulation through deterrence would seem to be superior to New York's interest arising out of its conclusion that such civil liability is neither necessary nor appropriate to preserve the marriage. After all, even if New York is correct in its determination that an alienation of affections action will not preserve and should not be utilized as an instrument for attempting to preserve a marriage, how is New York's interest as marital domicile critically frustrated by the application of Vermont law? If it doesn't work, it does not work, and the New York marriage may not be preserved. That, presumably, is what would happen if New York law were applied. Conversely, non-application of Vermont law, or, if the reader prefers, application of New York law, would indeed frustrate Vermont's interest. If the defendant is given immunity from civil liability for that portion of her conduct which occurred in Vermont, she and others may not be dissuaded from engaging in similar conduct in Vermont so long as the marital domicile is in New York (or some other state having a "Heart Balm" statute) and there exists the possibility of a factual determination that the conduct did not occur principally in Vermont.

There is another potential factor to be considered in weighing the competing interests of New York and Vermont. It could be asserted that utilization of Vermont's law permitting the alienation of affections action would jeopardize the New York based marriage because of the nature of the evidence required and the quasi-adverse roles of plaintiff-

36. Id. at 42.
37. 447 F.2d at 1284.
wife and allegedly dalliant husband. If that assertion were accepted, New York's interest in preserving the marital status of its domiciled spouses would be enhanced. Acceptance, however, is difficult. There is nothing in New York law or policy (including the original statutory policy) to indicate that the purpose of the elimination of alienation of affections actions was to preserve marital tranquility. The most that can be said is that New York simply does not consider such an action as an appropriate means of preservation—at least in part because of its refusal to accept the "vile seducer" as a significant cause of marital discord. Moreover, the existence of the action in those states which retain it is explicable, at least in part, by a determination, however well or poorly founded, that the action or the possibility of the action tends to preserve the marital status by dissuading the potential seducer. Whether or not one shares that view, one should be reluctant to conclude that elimination of the action was intended to preserve marriages, absent any indicia in the statute, legislative history, or decisions of the state having eliminated the action.

Ultimately, the essence of the conflict between New York and Vermont comes down to this: New York would have the defendant enjoy immunity from civil liability for her conduct in that state, thus assuring her an enhanced freedom of action in that state, and Vermont would have the defendant susceptible to civil liability for her conduct in that state, thus deterring such conduct. And that really is a direct and abrasive conflict. Rather obviously, each state has the capacity and right to affect such conduct within its borders, whether the intention is to facilitate or deter the conduct. Moreover, each state's right to affect the conduct is complemented by an interest in the consequences of that conduct. New York, as marital domicile, certainly has an appropriate interest in determining that defendant's conduct within that state poses no significant threat to the tranquility of a New York marriage, and Vermont has an appropriate interest in determining that defendant's conduct in that state is so "offensive to public morals" and so likely to stimulate private retaliation that civil liability must be imposed. New York, with legitimate concerns and interests, tells the defendant: "You may act with knowledge that your conduct will not give rise to civil liability." Vermont, with its own legitimate concerns and interests, says: "Thou shalt not." Which interests should prevail when the defendant's conduct occurs principally and primarily in New York but significantly in Vermont?
Conceivably, the defendant could argue that she had relied upon the legal immunity granted by New York law and that, therefore, the imposition of liability would frustrate her reasonable expectations. The argument lacks persuasiveness, however, as to that significant portion of defendant's conduct which occurred in Vermont. As to that portion of her conduct, defendant could constitutionally and reasonably be said to have acted with knowledge of Vermont's liability-imposing law. Apparently the application of either state's law would do no violence to defendant's expectations. There remains that very direct conflict between the laws of the two states: one, through its permissiveness (at least in the sense of immunity from civil liability), attempting to assure freedom of action within its borders; and the other, through the sting of civil liability, attempting to deter such action within its borders.

It could be asserted that the divergent interests of New York and Vermont are affected (and perhaps mitigated) by each state's criminal law. Both states label adultery as criminal conduct. Therefore, at

38. "A person who commits adultery shall be imprisoned not more than five years or fined not more than $1,000.00, or both." VT. STAT. ANN. tit. 13, § 201 (1971). "A married man and an unmarried woman who commit an act which would be adultery if such woman were married shall each be guilty of adultery." Id. § 202.

"A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse. Adultery is a class B misdemeanor." N.Y. PENAL LAW § 255.17 (McKinney 1967). All misdemeanors are classified in New York as "Class A," "Class B" or "Unclassified." Id. § 55.05 A "Class B" misdemeanor is punishable by a term of imprisonment not to exceed three months. Id. § 70.15, or a fine not to exceed $500, Id. § 80.05.

The Temporary Commission on Revision of the Penal Law and Criminal Code recommended that the offense of adultery...be omitted from the revised Penal Law. A majority of the Commission was of the opinion that the basic problem is one of private rather than public morals, and that its inclusion in a criminal code neither protects the public nor acts as a deterrent. It was further noted that proscribing conduct which is almost universally overlooked by law enforcement agencies tends to weaken the fabric of the whole penal law. The Legislature, however, rejected the Commission's recommendation and enacted § 255.17...

Id. § 255.17 (commentary immediately following).

Unlike New York, Oregon has abolished the criminal offense of adultery. ORE. LAWS ch. 743, § 432, repealing ORE. REV. STAT. § 167.005 (1971). However, "'criminal conversation' by act of sexual intercourse with a married woman is still a tort in Oregon." Myers v. Brickwedel, 259 Ore. 457, 467 n.6, 486 P.2d 1286, 1291 n.6 (1971). In Brickwedel, the court was confronted with a jurisdictional problem. Plaintiff-husband, a resident of California, sued defendant, a resident of California, for alienation of affections and criminal conversation. "...[A]ctions for damages for alienation of affections and criminal conversation, although still permitted in Oregon, have been abolished in California. Section 43.5 California Civil Code." Id. at 459, 456 P.2d at 1287. Plaintiff alleged that defendant had criminal conversation with plaintiff's wife in Oregon. Jurisdiction was asserted under Oregon's long-arm statute. ORE. REV. STAT. § 14.095 (1963) ("commission of a tortious act within this state"). Defendant asserted, inter alia, that because plaintiff, like defendant, was a nonresident of Oregon, the court should not assert jurisdiction. The court concluded that the long-arm statute was applicable and that the assertion of jurisdiction was consistent with due process. See Seidelson, Jurisdiction Over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes, 6 Duq. L. Rev. 221 (1968).
least as far as the criminal conversation is concerned, both provide criminal penalties. This could be read as a significant repression of the freedom of action extended by New York's abolition of civil damages for criminal conversation and, by extension, for alienation of affections as well. If a state is prepared to punish conduct criminally, so the assertion would go, it assumes a rather awkward posture by proclaiming simultaneously that it wishes to encourage freedom of action in regard to that same conduct. Still, the assertion is not easily accepted: Whether awkward or not, New York has the sovereign capacity to assume just such a posture, and one should be extremely circumspective about minimizing a state's interest in a choice-of-law context because of one's disagreement with the policy underlying that interest. Moreover, New York can offer a rational explanation for its apparent ambiguity toward the conduct. While criminal prosecution is available and conviction therefore possible, such an ultimate result can occur only after a state-initiated apparatus is stimulated and guilt beyond a reasonable doubt established. Those control devices, lacking in a civil action, provide an assurance adequate (to New York) that the abuses apprehended in such civil litigation will not occur in criminal prosecutions. Thus, the freedom of action and freedom of anxiety of spurious suits intended to be effected by the "Heart Balm" statute will be realized. Conversely, it could be asserted that Vermont's criminal law, imposing penalties for adultery, provides a meaningful deterrent to such conduct in that state, and, therefore, mitigates that state's interest in deterring such conduct by the threat of civil liability. The short answer to the assertion is that Vermont, in its sovereign wisdom, apparently believes otherwise. That belief may be "justified" by Vermont's determination that private actions seeking money damages and not requiring proof beyond a reasonable doubt serve as an effective complementary method of dissuading would-be adulterers. Thus, the competing interests of the states—one attempting to assure freedom of action without fear of civil liability, the other seeking to deter such conduct by the specter of such liability—subsist even after examination of each state's criminal law and are apparently in irreconcilable conflict. New York continues to assure freedom of social intercourse without fear of civil liability and Vermont threatens compensatory and punitive damages for the very same communion. How is the conflict to be resolved?

There are two basic alternatives in addition to the solution offered by the Second Circuit in Marra. The first is to make the difficult deci-
sion as to which state's interest is superior, given 60 per cent of defendant's conduct in New York and 40 per cent in Vermont. Once that decision is made, the law of the state having the superior interest would be applied to the totality of defendant's conduct and the choice-of-law problem is thus resolved. Deciding which state's interest is superior is made agonizing by the knowledge that not only are the competing interests absolutely divergent—New York's legitimate interest in permitting such conduct without fear of civil liability and Vermont's legitimate interest in deterring such conduct by civil liability—but selection of either state's law will necessarily and significantly frustrate the legitimate interest of the other state. If New York's law is applied and the defendant held free from liability, she will have flouted Vermont's law and its keen interest in discouraging such conduct in that state. If Vermont's law is applied and the defendant held liable, she will have imposed upon her civil damages for conduct done in New York which that state specifically desires to be liability-free. Vermont's deterrent interest is hardly diminished simply because less than half of defendant's total conduct may have occurred in that state, so long as a legally significant portion of the conduct occurred there; and certainly New York's "protective" interest is great where more than half of defendant's total conduct occurred there. The choice-of-law problem is uniquely difficult.

Since the defendant's conduct, as viewed by Vermont, is not merely legally inappropriate but intentionally wrongful and intolerable as well, irrespective of its consequences on the "threatened" marriage, that state's interest would seem superior to the interest of New York. Where a state determines that conduct is intentionally wrongful, unpalatable and susceptible to deterrence through the imposition of money damages, the state has expressed its sovereign interest in the strongest manner available short of constitutional mandate or criminal sanction. That expression should not be ignored absent a countervailing state interest of the most urgent significance. While New York may be strongly concerned with affording freedom of action, that concern seems to lack the necessary degree of urgency. New York's permissive view of the conduct involved, admittedly a legitimate and significant interest on the part of that state, falls somewhat short of Vermont's emphatic "Thou shalt not."

In brief, where there is a sharply divergent conflict between the legitimate interests of two states, each concerned with conduct occur-
ring in both, and one state desires to permit the conduct to be free from the possibility of civil liability and the other to deter such (in its view) intentionally wrongful conduct through the sting of civil liability, the admonitory interest should be deemed paramount. Admittedly, that decision is arbitrary, in the sense that, ultimately, every decision becomes arbitrary. Admittedly, too, the decision does frustrate New York's legitimate interest in assuring that such conduct within its borders shall be immune from the inhibiting effect of potential liability. Is there a means of resolving the choice-of-law problem in a rational manner without frustrating that legitimate New York interest and, simultaneously, fulfilling Vermont's deterrent interest?

There seems to be such an alternative resolution. Each state's interest in conduct, whether permissive or prohibitory, is primarily an interest in that conduct which occurred within the state. New York's most urgent interest is in assuring freedom from civil liability to that conduct which occurred in New York. Vermont's concern with deterring such conduct is directed at that conduct which occurred in that state. Given 60 per cent of defendant's conduct in New York and 40 per cent in Vermont, it would make sense to apply the law of each state to that portion of the conduct which occurred within that state. In that manner, each state's most significant interest is served and neither state's policy is significantly frustrated. That result can be achieved in the following manner.

If, during the trial, evidence is adduced which would justify jury determinations that defendant committed the alleged conduct and her conduct occurred in both New York and Vermont, the trial court should instruct the jury that, if it finds that defendant's conduct did occur in New York and Vermont, it must determine what percent of the conduct occurred in each state. Such a percentage determination should be less difficult than might at first appear. After all, in Marra, the Second Circuit would require the jury to decide where the conduct principally and primarily occurred. That decision would seem inherently to lead the jury to a percentage division of the conduct. Indeed, such a percentage division would appear to be more rational than a jury determination assigning an exclusive situs to the principal and primary alluring and decisive conduct, where such conduct occurred in

39. N.Y. Civ. Rights Law § 80-a (McKinney Supp. 1972) provides: "No act done within this state shall operate to give rise, either within or without this state, to any such right of action . . . ." (emphasis added).
two states. How does one go about determining such a single situs of the decisive, alluring conduct? The personal relationships between man and woman may encompass sexual activities, dinners and picnics. They may include everything from the most intimate tête-à-tête to a dos-à-dos of a barn dance. Whatever else those activities may be, they tend to form a continuum with each part affecting the relationship, either cementing it more closely together or threatening its deterioration. In determining in which of two states the decisive, alluring conduct principally and primarily occurred, is the fact finder to count incidents of sexual intercourse, dinners, picnics, quiet evenings, dances, parties, walks, shopping trips, car rides, concerts and movies attended and lounges visited in each of the two states, then determine in which state more of those events occurred and characterize that state as the principal situs? Or is the fact finder, in addition, to attempt to assign to each such event a relative degree of efficacy in cementing or threatening the relationship between husband and defendant, then weigh that qualitative analysis along with the quantitative analysis in determining in which state the alluring conduct principally occurred? And what if the jury, however instructed by the trial court, determines that the alluring conduct occurred evenly in both states? It would seem more reasonable and more in keeping with reality to anticipate that the jury would realize that the relationship between husband and defendant was a continuing one with separate but emotionally related events occurring in both states, and would therefore be better able to assign a percentage division to the totality of events than an exclusive situs of decisiveness to one state. Anticipating such percentage division, the trial court should instruct the jury that, if it determines that plaintiff is entitled to compensatory damages, it should determine the full amount of those damages in accordance with the court's instructions and then reduce that amount in the same degree that defendant's conduct is found to have occurred in New York. Thus, if the full amount of compensatory damages is $20,000 and 60 per cent of defendant's conduct occurred in New York, the jury should award plaintiff as compensatory damages 40 per cent of $20,000, or $8,000. Since the compensatory damages awarded by the jury will represent the dollar

40. The proportional verdict suggested will be familiar to those courts utilizing comparative negligence statutes. See, e.g., the comparative negligence section of the Federal Employers' Liability Act, 45 U.S.C. § 155 (1972):

The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to such employee. . . .
value of the loss of affections suffered by her, care should be taken to avoid inflicting a gratuitous slap in the plaintiff's face by an apparently low verdict. That can be accomplished by requiring the jury to respond to interrogatories in the form of special verdicts which will indicate the totality of compensatory damages suffered by plaintiff, the percentage division of where defendant's conduct occurred and the ultimate percentage reduction of the total compensatory damages. Now, how about punitive damages? The amount of punitive damages should be the amount deemed appropriate to deter defendant and others from engaging in similar conduct in the future in Vermont. The "similar conduct" referred to is that wrongful conduct of the defendant which occurred in Vermont.

The application of the law of each interested state to that portion of defendant's conduct which occurred in that state is a choice-of-law resolution which may not be susceptible to general application. However, it seems particularly appropriate to the facts of *Marra* and other cases which may present a similar set of circumstances. In *Marra* (and perhaps in other cases), the conflicting laws of the competing states were aimed in significant part at conduct regulation, one law immunizing the conduct from civil liability to provide the actor with freedom from such concern, the other amercing the actor as a means of deterring the conduct. The conduct occurred in both states and the totality of the conduct is amendable to a percentage division as to the portion occurring in each state. It should be noted, too, that what is being suggested is not that the forum make an aloof and quasi-equitable determination that, since the laws of the two states are in irreconcilable conflict, the forum should simply "split the difference" and apply a law alien to both states. Rather, the suggestion is that the forum apply the law of each state to that conduct which occurred within that state.

Such a resolution and the resulting verdict would seem to serve the significant interests of both states, while not unduly affecting the interests of the parties to the litigation. New York's interests in permitting such conduct in New York without fear of civil liability would

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41. In Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d 137 (1967), the Supreme Court of Michigan retained lex loci delicti rather than embrace the "heady stuff" of interest analysis, at least in part because of the court's concern that interest analysis "would authorize the trial judge to make discretionary choices, from one or indeed more of several conflicting jurisdictions, of laws he as a matter of discretion deems most equitable for application to the evidentiary proof of the 'complex' case before him." *Id.* at 519, 170 N.W.2d at 141. For adverse comment on *Abendschein*, see Seidelson, *Interest Analysis: For Those Who Like It and Those Who Don't*, 11 Duq. L. Rev. 283 (1973).
be satisfied since the portion of defendant's conduct which occurred in that state would result in no liability being imposed on defendant. Vermont's interest in deterring such conduct in Vermont would be served by the imposition of compensatory damages to the degree that defendant's conduct occurred in that state, and that same conduct would result in the additional sting of punitive damages. The plaintiff would seem to have no legitimate complaint that her recovery was diminished because of New York's permissive law; given the significant interest of New York in the choice-of-law problem presented, such utilization of its law would not be untoward. Similarly, the defendant could not legitimately complain about the imposition of compensatory and punitive damages arising from her intentionally wrongful conduct in Vermont, as Vermont views that conduct. Thus, the solution suggested, while not unduly imposing on either litigant, fulfills the significant interest of each of the competing states in a case in which those interests are in nearly irreconcilable conflict, and that's quite a bit to say about any choice-of-law determination. Maybe not as sensational as *Return to the Valley of the Dolls*, but at least as rational.