CHOICE OF LAW IN TERRORISM CASES

*John F. Coyle**

When an Iranian-backed terrorist group operating out of Lebanon detonates a bomb in Israel that kills a U.S. citizen domiciled in Texas, what law governs civil claims brought against Iran in the District of Columbia? Some version of this choice-of-law question has been presented to U.S. courts many times over the past two decades. Their answers have been frustratingly inconsistent. In some cases, courts have applied the law of the place of the attack. In others, they have applied the law of the plaintiff's domicile. In still others, they have applied the law of the forum where the plaintiff brings the claim. The end result is a mishmash of inconsistent decisions.

These varied outcomes offer a unique opportunity to evaluate how U.S. courts think about choice-of-law rules in the twenty-first century. After undertaking a comprehensive survey of the relevant decisions, this Article advances four claims. First, it contends that the courts consistently seek to achieve systemwide "conflicts justice" at the expense of individualized "material justice" in terrorism cases. Second, it argues that complex multi-factor balancing tests tend to ossify into simpler choice-of-law rules over time. Third, it suggests that applying the law of the District of Columbia to claims with no meaningful connection to the District raises serious due process issues. Finally, it questions whether courts should even undertake a choice-of-law inquiry in cases where state sponsors of terrorism fail altogether to enter an appearance.

* Reef C. Ivey II Distinguished Professor of Law, University of North Carolina at Chapel Hill. Thanks to Bill Dodge, Symeon Symeonides, Mark Weidemaier, Chris Whytock, the faculty of the Florida State University College of Law, the faculty of the University of North Carolina School of Law, and participants in the Foreign Relations Colloquium at Georgetown Law School for their comments on an earlier version of this paper. Thanks to Kimberly Bernard and the librarians at the UNC Law Library for their research assistance.

INTRODUCTION

In 1995, Seth Klein Ben Haim was a passenger on a bus in Israel when a suicide bomber drove a van filled with explosives into the bus.[1] Seth was badly injured. Seven years later, Seth, his father, and his brother filed a lawsuit against Iran in the U.S. District Court for the District of Columbia (DDC).[2] They alleged that Iran had provided material support to the terrorist group responsible for the bombing.[3] As a threshold question, the court had to decide what law should be applied to govern the plaintiffs' claims for assault, battery, and intentional infliction of emotional distress.[4] Applying the choice-of-law rules for the District of Columbia, it concluded that the claims were governed by the laws of the District of Columbia.[5]

1 Haim v. Islamic Republic of Iran, 425 F. Supp. 2d 56, 60 (D.D.C. 2006).
2 *See* Complaint at 1, *Haim*, 425 F. Supp. 2d 56 (No. 02-1811).
3 *See Haim*, 425 F. Supp. 2d at 59.
4 *See id.* at 69.
5 *See id.* at 68.

In 1997, Yael Botvin was killed when suicide bombers attacked a pedestrian mall in Israel.[6] Nine years later, her estate and surviving family members filed a lawsuit against Iran in the DDC.[7] They alleged that Iran had provided material support to the terrorist group responsible for the bombing.[8] The court had to decide what law should be applied to govern the plaintiffs' claims for wrongful death and intentional infliction of emotional distress.[9] After applying the choice-of-law rules for the District of Columbia, it concluded that the claims were governed by the laws of Israel.[10]

In 2001, Judith Greenbaum was killed by a suicide bomber at a restaurant in downtown Jerusalem.[11] One year later, her husband filed a lawsuit against Iran in the DDC.[12] He alleged that Iran had provided material support to the terrorist group responsible for the bombing.[13] The court had to decide what law should be applied to govern the plaintiff's claims for wrongful death and intentional infliction of emotional distress.[14] After applying the choice-of-law rules for the District of Columbia, the court concluded that the claims were governed by the laws of New Jersey.[15]

* * *

Three terrorist attacks. Three lawsuits. Three different choice-of-law determinations. Notwithstanding the similarities among the cases, and the fact that the same choice-of-law rules were applied in each one, the court held that the claims in the first case were governed by the laws of the District of Columbia, the claims in the second case were governed by the laws of Israel, and the claims in the third case were governed by the laws of New Jersey. These incongruous outcomes explain why Justice Cardozo once described conflict of laws as "one of the most baffling subjects of legal science."[16]

These cases are, moreover, just the tip of the iceberg. Over the past twenty years, dozens of suits against state sponsors of terror have been filed in the DDC.[17] These cases consistently present thorny

---

6 *See* Est. of Botvin *ex rel.* Ellis v. Islamic Republic of Iran, 684 F. Supp. 2d 34, 36 (D.D.C. 2010).

7 *See id.*

8 *See id.* at 38.

9 *See id.* at 39–42.

10 *See id.* at 39–40.

11 *See* Greenbaum v. Islamic Republic of Iran, 451 F. Supp. 2d 90, 96 (D.D.C. 2006).

12 *See id.* at 94.

13 *Id.*

14 *See id.* at 102.

15 *Id.*

16 BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 67 (1928).

17 These cases are typically filed in the DDC for two reasons. First, venue in the DDC is always proper in suits against foreign states. *See* 28 U.S.C. § 1391(f)(4) (2018). Second,

choice-of-law questions. If Iran provides material support to a terrorist group that launches an attack in Israel, and if that group kills a U.S. citizen domiciled in Texas, what law governs the claims brought by the decedent's estate? Does the answer change if the decedent was domiciled in California? If the decedent was employed by the U.S. government? If the decedent was a foreign national? The answers to these questions are not obvious. Indeed, they are sufficiently obscure that courts looking at similar fact patterns have reached very different conclusions about the governing law.

One reason for the lack of consistency in these cases is the open-ended character of the choice-of-law rules utilized by courts in the District of Columbia.[18] A century ago, every court in the United States would have held that the plaintiff's claims were governed by the law of the place of the attack—Israel.[19] In the 1960s and 1970s, however, this territorial approach to conflict of laws fell out of favor.[20] In its place, many states adopted one of several modern approaches that de-emphasize the place where a particular event occurred.[21] While these new choice-of-law rules have their virtues, they are frequently criticized for being less predictable than the traditional approach.[22] This critique is particularly salient with respect to the choice-of-law rules in the District because they call for the courts to *combine* two of the modern approaches.[23] Courts in the District blend together the "governmental interest" analysis and the "most significant relationship" test.[24] Separately, each of these approaches gives the courts considerable discretion to choose the governing law. Combined, they offer the courts extraordinary flexibility in this endeavor, which helps to explain the divergent outcomes identified above.

The malleability of the choice-of-law rules utilized in the District is not, however, the whole story. It is also necessary to account for the unusual procedural posture of terrorism cases brought in the DDC.

---

courts in the DDC may exercise personal jurisdiction over a foreign state if service of process is properly effectuated under 28 U.S.C. § 1608(a) (2018). *See* Schubarth v. Federal Republic of Germany, 891 F.3d 392, 397 n.1 (D.C. Cir. 2018).

18 *See, e.g.*, Iron Vine Sec., LLC v. Cygnacom Sols., Inc., 274 A.3d 328, 348–49 (D.C. 2022).

19 *See* Linda Silberman, *(American) Conflict of Laws Revolution*, *in* 1 ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 66, 67 (Jürgen Basedow et al. eds., 2017); RESTATEMENT OF CONFLICT OF L. § 377 (A.L.I. 1934).

20 *See* PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS § 2.16–.17 (6th ed. 2018).

21 *See id.*

22 *See* Lea Brilmayer & Daniel B. Listwa, *A Common Law of Choice of Law*, 89 FORDHAM L. REV. 889, 902 (2020).

23 *See* Drs. Groover, Christie & Merritt, P.C. v. Burke, 917 A.2d 1110, 1117 (D.C. 2007).

24 *See id.*

The overwhelming majority of these cases are brought against foreign sovereigns who never appear to defend the suit.[25] The defendant's failure to appear has two important consequences. First, the court typically hears choice-of-law arguments only from the plaintiff's side.[26] Second, judgments entered by the district court are rarely appealed to the U.S. Court of Appeals for the District of Columbia.[27] Presented with a dearth of appellate precedent, the DDC has responded by letting a thousand flowers bloom.[28] In some cases, it applies the law of the plaintiff's domicile. In other cases, it applies the law of the place where the attack took place. In still other cases, it applies the law of the District of Columbia.

This unique combination of factors—a flood of terrorism cases, a malleable set of choice-of-law rules, the failure by most defendants to appear, and the near-absence of binding appellate precedent—offers a rare and valuable chance to test a number of longstanding theories about how U.S. judges grapple with choice-of-law issues. Some scholars argue, for example, that judges engaged in a choice-of-law analysis should apply the law that results in a fair outcome in the case before them (material justice). Others argue that judges should apply the law that promotes consistency and predictability for the system as a whole (conflicts justice). The cases decided by the DDC over the past twenty years provide a unique opportunity to observe what judges actually do when the needs of sympathetic plaintiffs collide with a desire to develop a set of clear and predictable choice-of-law rules.

This Article proceeds in five Parts. Part I provides essential background on how the United States came to allow litigation against state sponsors of terrorism. It first chronicles the changes to the Foreign Sovereign Immunities Act that made these lawsuits possible. It then

25 *See, e.g.*, Maalouf v. Islamic Republic of Iran, 923 F.3d 1095, 1108 (D.C. Cir. 2019) ("Iran has failed to enter an appearance or submit a filing at any stage of these cases, let alone timely raise the terrorism exception's statute of limitations. . . . [W]e agree with the Appointed Amicus that Iran's complete absence here deprives us of any record or basis upon which to reliably determine that it has intentionally relinquished or abandoned a defense.").

26 *See* Flanagan v. Islamic Republic of Iran, 87 F. Supp. 3d 93, 96 n.3 (D.D.C. 2015) (observing that "taking judicial notice of facts in these 'one-sided' FSIA default judgment proceedings accords the noticed facts no 'preclusive effect,' and courts must 'endeavor to make . . . additional findings in each case' as needed to render judgment" (alteration in original) (quoting Harrison v. Republic of Sudan, 882 F. Supp. 2d 23, 31 (D.D.C. 2012))).

27 When appeals are taken to the D.C. Circuit, they are typically taken by plaintiffs in response to the district court's denying their motion for a default judgment. *See, e.g.*, Borochov v. Islamic Republic of Iran, 94 F.4th 1053, 1057 (D.C. Cir. 2024).

28 For an insightful account of the mischief that can result when district courts cite to other district court opinions, see Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1637–70 (2020).

describes the choice-of-law rules used by local courts in the District of Columbia.

Part II discusses how the DDC analyzed choice-of-law issues in terrorism cases filed between 2004 and 2008. While the courts usually applied the tort law of the plaintiff's domicile, there were also cases where they applied the law of the forum or the law of the place of the injury.

Part III discusses how the DDC analyzed choice-of-law issues in terrorism cases filed between 2009 and 2024. In these cases, the courts most commonly applied the law of the District of Columbia. There were, however, cases where they applied the law of the place of the injury or the law of the plaintiff's domicile.

Part IV draws upon the cases examined in the previous Parts to examine how U.S. judges think about conflict of laws in the twenty-first century. It argues the DDC typically does not consider whether applying a particular jurisdiction's law will favor the plaintiff or the defendant in cases brought against state sponsors of terrorism. The cases suggest that that court is more committed to the systemic virtues of "conflicts justice" than to the individualized virtues of "material justice." The Part then points out that although the DDC is ostensibly applying a modern choice-of-law framework to decide these cases, many of its decisions eschew the complexity demanded by that framework. In its place, the courts have developed simple, easy-to-follow rules that are reminiscent of the traditional approach to choice of law utilized by U.S. courts in the first half of the twentieth century. The Part concludes by questioning whether applying the law of the District of Columbia to cases brought by foreign plaintiffs against foreign defendants relating to terrorist attacks in foreign nations is permitted under the Due Process Clause of the Fifth Amendment.

Part V argues that much of the choice-of-law jurisprudence developed by the DDC over the years is based on a flawed premise. U.S. courts have long recognized that choice-of-law is a waivable issue in non-terrorism cases. It follows that when state sponsors of terror do not appear to defend themselves, there is no need to perform a choice-of-law analysis; the defendant has waived its right to request that the law of another jurisdiction be applied. In such cases, the court should simply apply the law of the forum rather than engaging in an elaborate and drawn-out discussion of choice-of-law issues.

I. BACKGROUND

This Part first discusses the origins of the claims brought against state sponsors of terrorism in the U.S. District Court for the District of Columbia and explains the significance of choice-of-law rules in these cases. It then examines the choice-of-law rules utilized by local courts sitting in the District of Columba in cases not having anything to do with terrorism.

A. *Civil Suits Against State Sponsors of Terrorism*

On October 23, 1983, terrorists affiliated with a group known as Islamic Jihad drove two trucks filled with explosives into a Marine Corps barracks in Beirut, Lebanon.[29] Two hundred forty-one U.S. service members were killed.[30] Although the attack prompted a far-reaching reevaluation of U.S. counterterrorism policies, it did not immediately lead to any civil lawsuits for two reasons.[31] First, the individuals who carried out the attack were unknown and almost certainly judgment-proof.[32] Second, the doctrine of sovereign immunity at that time prevented U.S. courts from adjudicating most claims against sovereign states. Even if the survivors of the attack had known that Iran was responsible, the courts in the United States would have lacked subject-matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA).

In the years that followed, there were more terrorist attacks on U.S. citizens traveling and working overseas.[33] In the wake of these attacks, survivors and family members lobbied Congress to amend the FSIA to allow civil suits against the state sponsors of terrorism.[34] In

29 *See They Came in Peace*, DEF. INTEL. AGENCY (Oct. 22, 2013), https://www.dia.mil/News-Features/Articles/Article-View/Article/566917/they-came-in-peace/ [https://perma.cc/S4AJ-E2JE].

30 *See id.*

31 *See id.*

32 *See* John M. Goshko, *The Beirut Massacre: Reagan's Speech Contains No New Lebanon Strategy*, WASH. POST (Oct. 28, 1983), https://www.washingtonpost.com/archive/politics/1983/10/28/the-beirut-massacre/0db9522c-b23f-4036-aec4-5c37c1e20d18/ [https://perma.cc/4FHW-P8V4].

33 In 1984, terrorists carried out a suicide car bombing which targeted the U.S. embassy annex in Lebanon. *See* John Kifner, *23 Die, Including 2 Americans, in Terrorist Car Bomb Attack of the U.S. Embassy at Beirut; Blast Kills Driver*, N.Y. TIMES, Sep. 21, 1984, at A1. Twenty-three people were killed, including two U.S. citizens. *Id.* In 1988, terrorists detonated a bomb on a plane operated by Pam Am Airlines traveling from Frankfurt to New York. *See Pan Am Flight 103 Memorial (Lockerbie Memorial Cairn)*, ARLINGTON NAT'L CEMETERY, https://www.arlingtoncemetery.mil/explore/monuments-and-memorials/pan-am-flight-103 [https://perma.cc/Y4VP-J4DP] (last visited Oct. 16, 2025). Two hundred seventy people were killed, including 190 U.S. citizens. *Id.* In 1995, terrorists set off a car bomb at U.S. facility in Saudi Arabia, killing eight people. *See* Richard Bumgardner, *Security Enterprise Marks 25th Anniversary of Riyadh Bombing*, U.S. ARMY (Dec. 1, 2020), https://www.army.mil/article/241288/security_enterprise_marks_25th_anniversary_of_riyadh_bombing [https://perma.cc/G2RD-RLUV].

34 *See* Joseph Keller, *The Flatow Amendment and State-Sponsored Terrorism*, 28 SEATTLE U. L. REV. 1029, 1030 (2005).

1996, Congress obliged.[35] It amended the FSIA to state that foreign states would not be immune from suit in U.S. courts in civil cases

> for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.[36]

This law cracked open the door to civil lawsuits in cases where a person had suffered a loss as a result of a terrorist attack. There were, however, two important caveats.[37] First, civil suits would only be permitted against foreign sovereigns listed as state sponsors of terrorism by the U.S. State Department.[38] Second, civil suits would only be permitted when either the victim or the claimant was a citizen of the United States.[39]

Stripping away foreign sovereign immunity was, however, only the first step. A few months later, Congress further amended the FSIA to create a cause of action for claims arising out of terrorist attacks abroad.[40] This amendment became known as the "Flatow Amendment" to honor the memory of Alisa Flatow, a U.S. citizen who was killed by a suicide bomber in the Gaza Strip.[41] The Flatow Amendment created a federal cause of action against *officials, employees, and agents of foreign states*.[42] In 2004, however, the D.C. Circuit held that the Amendment did not create a federal cause of action against *foreign states themselves*.[43] Instead, that court held that claims against foreign states were

---

35 *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

36 § 221, 110 Stat. at 1241.

37 Technically, there was a third caveat which only permitted a suit to be brought when "the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration." *Id.* This caveat has not played a significant role in subsequent practice.

38 *See id.* (codified as amended at 28 U.S.C. § 1605A(a)(2)(A)(i)(I) (2018)); *see also* 28 U.S.C. § 1605A(h)(6) (2018).

39 *See id.* (codified as amended at 28 U.S.C. § 1605A(a)(2)(A)(ii) (2018)).

40 *See* Keller, *supra* note 34, at 1031.

41 *See id.*

42 *See id.*

43 *See* Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024, 1033 (D.C. Cir. 2004) ("We now hold that neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government. Section 1605(a)(7) merely waives the immunity of a foreign state without creating a cause of action against it, and the Flatow Amendment only provides a private right of action against officials, employees, and agents of a foreign state, not against the foreign state itself.").

governed by whatever state or foreign law was selected pursuant to a choice-of-law analysis.[44]

This decision set the stage for the first wave of choice-of-law decisions in terrorism cases. Under the FSIA, a plaintiff can only obtain a default judgment against a foreign state if the plaintiff first "establishes his claim or right to relief by evidence satisfactory to the court."[45] The DDC has interpreted this language to mean that it can only grant a default judgment if the plaintiff shows that (1) the choice-of-law rules followed by local courts in the District of Columbia select the substantive law of a particular jurisdiction, and (2) the plaintiff has stated a valid claim under that jurisdiction's law.[46] With this limitation in mind, let us now turn our attention to the choice-of-law rules utilized by local courts in the District.

B. D.C. Choice-of-Law Rules

Choice-of-law rules are used to determine the rights, duties, and liabilities of individuals involved in a case with connections to more than one jurisdiction.[47] In the United States, most choice-of-law rules are state law; the federal government rarely legislates in this area.[48] When terrorism cases are litigated in the DDC, judges have consistently applied the choice-of-law rules followed by the D.C. Court of Appeals, the court of last resort for matters of local D.C. law.[49] These rules require courts to engage in a "modified governmental interests" analysis pursuant to which the courts consider (1) "which jurisdiction has the most significant relationship to the dispute," and (2) "which jurisdiction's policy would be more advanced by applying its law."[50]

Under the most significant relationship test, the court will consider the factors enumerated in Section 145 of the *Restatement (Second)*

---

44 *See id.* at 1036. In 2008, the FSIA was amended again to create a federal cause of action for U.S. citizens, individuals serving in the U.S. armed forces, and individuals working for the U.S. government. *See infra* Part III.

45 28 U.S.C. § 1608(e) (2018).

46 *See infra* Part II. The correctness of this decision was later confirmed when the U.S. Supreme Court held in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502, 1507–08 (2022), that a "court in an FSIA case raising non-federal claims (relating to property, torts, contracts, and so forth) should apply the forum State's choice-of-law rule."

47 *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 2 cmt. a (A.L.I. 1971).

48 *See* Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847, 1907.

49 *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); *supra* note 46 (discussing *Cassirer*).

50 Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP, 68 A.3d 697, 714 (D.C. 2013) (quoting USA Waste of Md., Inc. v. Love, 954 A.2d 1027, 1030–31 (D.C. 2008)); *see also* Iron Vine Sec., LLC v. Cygnacom Sols., Inc., 274 A.3d 328, 348 n.62 (D.C. 2022); Corp. Accountability Lab v. Sambazon, Inc., 340 A.3d 1277, 1286 (D.C. 2025).

of Conflict of Laws: (1) "the place where the injury occurred"; (2) "the place where the conduct causing the injury occurred"; (3) "the domicile, residence, nationality, place of incorporation and place of business of the parties"; and (4) "the place where the relationship is centered."[51]

Under governmental interest analysis, the court will first "evaluate the governmental policies underlying the applicable laws and to determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case under review."[52] In making this determination, the courts frequently distinguish between false conflicts and true conflicts. A false conflict exists "[w]hen the policy of one state would be advanced by application of its law, and that of another state would not be advanced by application of its law."[53] In cases involving false conflicts, the court will apply the law of the interested state.[54] A true conflict exists when "each state [has] an interest in the application of its own law to the facts."[55] In cases involving true conflicts, the local courts in the District will apply the law of the state with the "stronger interest" in applying its law.[56]

The D.C. Court of Appeals has offered conflicting answers as to how these two tests—the most significant relationship test and governmental interest analysis—should be blended together. In *Drs. Groover, Christie and Merritt, P.C. v. Burke*, it suggested that a two-step analysis is appropriate.[57] At step one, the court will consider the Section 145 factors to identify the state with the "most significant relationship" to the dispute.[58] That state is "presumptively . . . the jurisdiction whose policy would be more advanced by application of its law."[59] At step two, the court considers which states have an interest in applying their law.[60] In a different case, *Iron Vine Security, LLC v. Cygnacom Solutions, Inc.*, however, the D.C. Court of Appeals suggested that the two approaches

51 District of Columbia v. Coleman, 667 A.2d 811, 816 (D.C. 1995) (citing RESTATEMENT (SECOND) OF CONFLICT OF L. § 145 (A.L.I. 1971)).

52 Hercules & Co., Ltd. v. Shama Rest. Corp., 566 A.2d 31, 41 (D.C. 1989) (quoting Kaiser-Georgetown Cmty. Health Plan, Inc. v. Stutsman, 491 A.2d 502, 509 (D.C. 1985)) (quote corrected).

53 *Stutsman*, 491 A.2d at 509 (quoting Biscoe v. Arlington Cnty., 738 F.2d 1352, 1360 (D.C. Cir. 1984)).

54 *See id.*

55 *In re* Est. of Delaney, 819 A.2d 968, 988 (D.C. 2003).

56 *Id.*; *see also* Symeonides, *supra* note 48, at 1864 (observing that courts in the District of Columbia "openly and unapologetically weigh the conflicting state interests").

57 *See* Drs. Groover, Christie & Merritt, P.C. v. Burke, 917 A.2d 1110, 1117 (D.C. 2007).

58 *Id.*

59 *Id.*

60 *See id.*

collapse into one single test.[61] Under this approach, the court must engage in a "qualitative weighing" of the most significant relationship factors to ascertain which jurisdiction's policy "would be advanced by the application of its law."[62]

To illustrate how these rules have been applied in the context of wrongful death suits outside the context of terrorism cases, it is useful to consider the facts of *Herbert v. District of Columbia*.[63] A resident of Maryland was shot and killed by an off-duty D.C. police officer in the District of Columbia.[64] After the victim's estate filed a lawsuit against the D.C. government for wrongful death, the court performed a choice-of-law analysis to determine whether D.C. law or Maryland law governed the issue of damages.[65] The court began its analysis by discussing the factors listed in Section 145.[66] It held that these factors "overwhelmingly" favored the application of D.C. law notwithstanding the fact that the plaintiff was domiciled in Maryland.[67] Indeed, the court specifically noted that the place of the plaintiff's domicile was "not dispositive" in the most significant relationship inquiry.[68] Turning to governmental interest analysis, the court held that the District had a "strong policy interest in the matter" because the "decedent was shot and killed by a District of Columbia police officer in the District of Columbia."[69] On these facts, the court had little trouble concluding that the wrongful death claim was governed by the law of the District.[70]

To illustrate how these rules have been applied in the context of claims involving intangible harm outside the context of terrorism cases, it is useful to consider the facts of *Cárdenas v. Muangman*.[71] The husband of a woman who suffered complications following a medical procedure performed in the District sued the surgeon for loss of consortium.[72] The court held that this claim was governed by the laws of Virginia—the state where the married couple resided—because otherwise "Virginia's clearly-expressed intent in regulating the legal rights of married couples domiciled within its borders would be seriously

61 *See* Iron Vine Sec., LLC v. Cygnacom Sols., Inc., 274 A.3d 328, 348–49 (D.C. 2022).
62 *Id.*; *see also* Jones v. Clinch, 73 A.3d 80, 83 (D.C. 2013).
63 Herbert v. District of Columbia, 808 A.2d 776 (D.C. 2002).
64 *Id.* at 778.
65 *Id.* at 779.
66 *Id.* at 779–80.
67 *Id.*
68 *Id.* at 780.
69 *Id.* at 780–81.
70 *Id.* at 781.
71 Cárdenas v. Muangman, 998 A.2d 303 (D.C. 2010).
72 *See id.* at 305.

impaired."[73] In reaching this conclusion, the court did not discuss the connecting factors laid out in Section 145. It did, however, hold that that the medical malpractice claim brought by the wife was governed by the laws of the District because the District had a "strong interest in punishment and deterrence of wrongful conduct causing harm to . . . plaintiffs within its borders."[74] In so holding, the court signaled its openness to the concept of *dépeçage,* i.e., the application of law of different jurisdictions to different issues in the same lawsuit.[75] The loss of consortium claim was governed by the laws of Virginia. The medical malpractice claim was governed by the laws of the District.

The foregoing cases suggest a number of important insights. First, the place of the injury is more important than the place of the plaintiff's domicile in wrongful death suits. Second, the place of the injury is less important than the place of the plaintiff's domicile in cases involving intangible torts such as loss of consortium. Third, the courts may engage in *dépeçage* to apply the law of different jurisdictions to different issues within the same case. With these insights in mind, let us now address the choice-of-law issues raised by the first wave of terrorism cases filed in the DDC.

II. CHOICE OF LAW IN TERRORISM CASES: 2004–2008

There were dozens of cases filed against state sponsors of terrorism between 2004 and 2008.[76] In each instance, the plaintiff lacked a federal cause of action because the defendant was a foreign state as opposed to an official, employee, or agent of a foreign state. Accordingly, the court had to perform a choice-of-law analysis to ascertain the governing law for the plaintiffs' claims. In performing this analysis, the DDC utilized the choice-of-law rules followed by the local courts in the District of Columbia. Applying these rules invariably led to one of three

73 *Id.* at 311, 311–12 (quoting Stutsman v. Kaiser Found. Health Plan of the Mid-Atl. States, Inc., 546 A.2d 367, 376 (D.C. 1988)).

74 *Id.* at 312 (alteration in original) (quoting *Stutsman*, 546 A.2d at 374 n.13).

75 *Id.*; Mims v. Mims, 635 A.2d 320, 326 n.1 (D.C. 1993) (Ferren, J., concurring in part and dissenting in part) ("Notwithstanding Stephen Mims's assertion to the contrary, nothing prevents this court from applying the law of Maryland to the issue of the disposition of the marital home while determining that the law of the District should control the question of child support. The process of applying the law of one jurisdiction to one aspect of a case while determining that the law of another jurisdiction should control another aspect of the same case is known as *depecage*.").

76 Several of the cases discussed in this Part were first filed prior to 2004. In each instance, however, the plaintiffs had to amend their complaints after the D.C. Circuit decided *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033–34 (D.C. Cir. 2004), and held that the FSIA did not create a federal cause of action against foreign state sponsors of terrorism. The relevant pleadings for choice-of-law purposes, therefore, were all filed or amended after 2004.

outcomes: (1) the court applied the law of the plaintiff's domicile, (2) the court applied the law of the forum, or (3) the court applied the law of the place of the attack.

This Part discusses how and why judges on the DDC reached these varying outcomes during this time period. The most important variable—by far—was the location of the plaintiff's domicile. When the plaintiff was domiciled in the United States, the courts consistently applied the law of the U.S. state where the plaintiff resided. When the plaintiff was domiciled abroad, the court either applied the law of the District of Columbia or the law of the place of the attack.

A. *The Law of the Domicile*

In cases where the plaintiff was domiciled in the United States, the DDC generally applied the law of the state where that person was domiciled in cases against state sponsors of terrorism filed between 2004 and 2008. It did so on the theory that it was important for U.S. law to be applied in cases where U.S. citizens were injured or killed by terrorists.

1. *Dammarell*

The seminal decision holding that courts should apply the law of the plaintiff's domicile was *Dammarell v. Islamic Republic of Iran.*[77] In 1983, a suicide bomber drove a car filled with explosives into the main entrance of the U.S. Embassy in Beirut, Lebanon.[78] He killed sixty-three people and injured many more.[79] One year later, the State Department concluded that "radical Lebanese Shi'a . . . operat[ing] with Iranian support and encouragement" were responsible for the attack.[80] The victims of the bombing later sued Iran in the District of Columbia seeking compensation.

Although all of the plaintiffs were U.S. citizens, they were not all similarly situated.[81] The first group of plaintiffs consisted of the estates of individuals killed in the blast.[82] The second group was comprised of family members of people who lost their lives in the attack.[83] The third group was comprised of persons merely injured in the bombing.[84] The

77 Dammarell v. Islamic Republic of Iran, 404 F. Supp. 2d 261, 287 (D.D.C. 2005).

78 *Id.* at 271.

79 *Id.*

80 *Id.* (alteration in original) (quoting U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1983, at 11 (1984)).

81 *Id.* at 274.

82 *Id.*

83 *Id.*

84 *Id.*

claims asserted by plaintiffs in these groups ranged from wrongful death to solatium to battery to intentional infliction of emotional distress.[85] At the outset of its seminal choice-of-law analysis, the court suggested that the domicile of the plaintiff was extremely important:

> The various factors in the [approach to choice-of-law utilized by the District] can point a court in any number of directions. Nonetheless, certain patterns have developed in the law in similar cases that guide the inquiry. The most important of these is the recognition that the "law of the injured person's domicile" should govern the issue of compensatory damages in wrongful death actions arising out of mass disasters because that locale "has an important and obvious interest in ensuring that its residents are fully and adequately compensated for tortious harm."[86]

This statement is curious because the Court of Appeals for the District of Columbia had previously held (in *Herbert*) that the plaintiff's domicile was "not dispositive" in wrongful death cases under District choice-of-law rules.[87] Nevertheless, the DDC immediately singled out the significance of the plaintiff's domicile as a factor to consider.

The court then identified three laws that might govern the claims: (1) the law of each plaintiff's domicile, (2) the law of the forum (the District of Columbia), or (3) the law of the place of the tort (Lebanon).[88] The court quickly concluded that it would be inappropriate to apply the law of the District:

> The District of Columbia can lay claim to very little interest in this case. Almost all of the plaintiffs are from outside of the District of Columbia (as are the decedents), the attack occurred entirely outside of the District of Columbia, and the defendants have no particular connection with the District of Columbia. The only plausible rationale for choosing the law of the District of Columbia in an FSIA case is to adopt a single, familiar rule of decision in the interest of developing a uniform and easy to apply set of legal standards. These are undeniably relevant factors under the Restatement. However, the D.C. Court of Appeals has emphasized that concerns of uniformity and familiarity cannot prevail when another location otherwise has "a significantly greater interest than does the District" in the cause of action. Given the strong and recognized interest of the domicile state in ensuring that its citizens are compensated for harm, and the intrinsic interest of the lex loci in deterring attacks within its jurisdiction, the law of the forum state must give

85 *See id.* at 275–79.

86 Dammarell v. Islamic Republic of Iran, No. 01-2224, 2005 WL 756090, at *19 (D.D.C. Mar. 29, 2005) (quoting Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 13 (2d Cir. 1996)).

87 Herbert v. District of Columbia, 808 A.2d 776, 780 (D.C. 2002).

88 *Dammarell*, 2005 WL 756090, at *19.

> way to one of these options under the choice of law rule of the District of Columbia.[89]

The court then reasoned that it should apply the law of the U.S. state where each plaintiff was domiciled—rather than the law of the place of the attack—for two reasons. First, it observed that even though the attack had occurred in Lebanon, the state of each plaintiff's domicile had a "strong and often paramount interest in guaranteeing redress to its citizens."[90] Second, the court reasoned that the fact that the case arose out of a state-sponsored terrorist attack at a U.S. embassy gave the United States a "unique interest in [applying] its domestic law" to the suit.[91]

The court acknowledged that singling out the place of the plaintiffs' domiciles would "lead to different recoveries for each of the plaintiffs" depending on the content of the laws in their respective home states.[92] It did not, however, believe that there was anything "unusual or unfair about this result."[93] As it explained:

> Each state will choose rules of liability and damages that it thinks are best designed to protect the welfare of its citizens. There is no injustice in a plaintiff finding herself subject to the laws of his or her state of domicile. The injustice would be if the law governing a single plaintiff's claims were to change based on nothing more than the fortuitous presence of other plaintiffs in the suit (leading a judge to displace the various rules of decision that would otherwise apply to each plaintiff with a single rule of law applicable to them all).
>
> Although this result might be cumbersome, it is common for mass disaster tort cases outside of the FSIA to use the plaintiff's domicile as the rule of decision even though it follows that there will be varying results for the defendants.[94]

In light of this reasoning, the court held that claims brought by each of the three groups—the estates of the deceased, the family members, and the injured—should be governed by the law of the state where the person bringing the claim was domiciled.[95] If a U.S. citizen plaintiff was living abroad at the time of the attack, their claims would be governed by the law of their last U.S. domicile.[96] The court also held that the

89 *Id.* at *19 (citations omitted) (quoting Mims v. Mims, 635 A.2d 320, 325 (D.C. 1993)).

90 *Id.* at *19–20.

91 *Id.* at *20.

92 *Id.*

93 *Id.*

94 *Id.* (citation omitted).

95 *Id.* at *22.

96 *Id.*

state of domicile for all of the plaintiffs "should be assessed as of the date that the embassy bombing occurred."[97] If someone had relocated from Florida to New York after the attack, in other words, that person would still be assigned a Florida domicile in the litigation to discourage "forum shopping."[98]

In concluding that the plaintiffs' claims were governed by the law of individual U.S. states, the court specifically rejected the argument that "federal common law should provide the substantive rule of decision."[99] The court observed that it was appropriate to "craft a federal common law rule only in cases where there are both 'uniquely federal interests' and a 'significant conflict between some federal policy or interest and the use of state law.'"[100] It concluded that these criteria were not satisfied even when a U.S. embassy was attacked. "Although the protection of our embassies overseas is an unquestionably significant federal concern," it stated, "the Court is not presented with any reason to believe that state law is incompatible with the protection of that concern."[101] The court also rejected the plaintiffs' suggestion that it develop a federal common law of torts to promote predictability and uniformity in state-sponsored terrorism cases.[102] It held that "an interest in uniformity standing alone is an insufficient basis for fashioning a federal common law remedy."[103] State law—not federal law—would supply the governing law in these cases.

2. A Critique

The choice-of-law analysis in *Dammarell* proved enormously consequential. In no fewer than eighteen cases decided over the next three years, the court applied the law of U.S. state where the plaintiff was domiciled to claims asserted against a state sponsor of terrorism.[104]

97 *Id.*

98 *Id.* (quoting Perloff v. Symmes Hosp., 487 F. Supp. 426, 428–29 (D. Mass. 1980)).

99 *Id.* at *23.

100 *Id.* at *24 (first quoting Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988); and then quoting Woodward Governor v. Curtiss-Wright Flight Sys., 164 F.3d 123, 127 (2d Cir. 1999)).

101 *Id.* at *27.

102 *Id.* at *26.

103 *Id.* at *24.

104 *See* Salazar v. Islamic Republic of Iran, 370 F. Supp. 2d 105, 114 (D.D.C. 2005); Price v. Socialist People's Libyan Arab Jamahiriya, 384 F. Supp. 2d 120, 133 (D.D.C. 2005); Holland v. Islamic Republic of Iran, 496 F. Supp. 2d 1, 24 (D.D.C. 2005); Wyatt v. Syrian Arab Republic, 398 F. Supp. 2d 131, 141 (D.D.C. 2005), *aff'd*, 266 F. App'x 1 (D.C. Cir. 2008); Est. of Heiser v. Islamic Republic of Iran, 466 F. Supp. 2d 229, 266 (D.D.C. 2006); Prevatt v. Islamic Republic of Iran, 421 F. Supp. 2d 152, 159 (D.D.C. 2006); Greenbaum v. Islamic Republic of Iran, 451 F. Supp. 2d 90, 102 (D.D.C. 2006); Blais v. Islamic Republic of Iran, 459 F. Supp. 2d 40, 54 (D.D.C. 2006); Reed v. Islamic Republic of Iran, 439 F. Supp. 2d 53,

Although these decisions all invoked the choice-of-law rules followed by local courts in the District of Columbia, they all reached the same outcome as *Dammarell*.[105] A complex multi-factor test blending governmental interest analysis with the most significant relationship test was thus reduced to a simple choice-of-law rule—apply the law of the plaintiff's domicile. This rule presents three problems: (1) it is inconsistent with D.C. choice-of-law rules, (2) it does not consider the content of the chosen law, and (3) it generates inconsistent results for similarly situated plaintiffs.

1. <u>It Is Inconsistent With D.C. Choice-of-Law Rules</u>. The choice-of-law rules followed by the local courts in the District mandate that courts identify the jurisdiction that has the most significant relationship with the events and the parties. That test, it will be recalled, requires the courts to consider (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship is centered.[106] When one applies these factors to the facts of *Dammarell*, it is very difficult to see why they would result in the selection of the law of the plaintiff's domicile.

The place where the injury occurred was Lebanon.[107] The place where the conduct causing the injury occurred was Lebanon.[108] The relationship between the parties was centered in Lebanon.[109] While some of the plaintiffs were domiciled in the United States at the time of the attack, others were domiciled in Lebanon.[110] To hold that each plaintiff's claim is governed by his or her domicile, therefore, is to ignore the many factors pointing in the direction of Lebanon. This holding is also very difficult to square with the statement by the D.C. Court of Appeals in *Herbert* that the domicile of the plaintiff is "not

66 (D.D.C. 2006), *reh'g granted in part*, 242 F.R.D. 125 (D.D.C. 2007); Welch v. Islamic Republic of Iran, No. 01-863, 2007 WL 7688043, at *10 (D.D.C. Sep. 20, 2007); Nikbin v. Islamic Republic of Iran, 517 F. Supp. 2d 416, 426 (D.D.C. 2007); Bennett v. Islamic Republic of Iran, 507 F. Supp. 2d 117, 126 (D.D.C. 2007); Valore v. Islamic Republic of Iran, 478 F. Supp. 2d 101, 108 (D.D.C. 2007); Peterson v. Islamic Republic of Iran, 515 F. Supp. 2d 25, 38 (D.D.C. 2007); Sisso v. Islamic Republic of Iran, No. 05-0394, 2007 WL 2007582, at *8 (D.D.C. July 5, 2007); Rimkus v. Islamic Republic of Iran, 575 F. Supp. 2d 181, 196 (D.D.C. 2008); Kirschenbaum v. Islamic Republic of Iran, 572 F. Supp. 2d 200, 210 (D.D.C. 2008); Beer v. Islamic Republic of Iran, 574 F. Supp. 2d 1, 10 (D.D.C. 2008).

105 *See supra* note 104.

106 *Dammarell*, 2005 WL 756090, at *18 (citing RESTATEMENT (SECOND) OF CONFLICT OF L. § 145 (A.L.I. 1971)).

107 *Id.* at *1.

108 *Id.*

109 *Id.* at *2.

110 *Id.* at *22.

dispositive" when identifying the significant relationship in wrongful death cases.[111]

D.C. choice-of-law rules, it will be recalled, also require the court to consider which government has the "stronger interest" in applying its law.[112] The court in *Dammarell* justified its decision to apply the law of a U.S. state by stating that the United States had a "unique interest" in applying domestic law to claims arising out of a terrorist attack on a U.S. embassy.[113] There are two problems with this analysis. First, if there is a unique national interest in applying U.S. law, then the logical response would be to create a body of federal common law to apply to these cases. And yet the court expressly declined the plaintiffs' invitation to do precisely that.[114] Second, the court's analysis does not consider whether the place of the attack—Lebanon—might also have an interest in applying its law to a terrorist attack that occurred within its borders. In the court's telling, the State of Alaska would have a stronger interest in applying its law than Lebanon on these facts if one of the victims was domiciled in Alaska.[115]

The choice-of-law rule adopted in *Dammarell* is also problematic because it does not distinguish among the different causes of action asserted in that case. The court will apply the law of the plaintiff's domicile regardless of whether the claim is for wrongful death, intentional infliction of emotional distress, solatium, or battery. The notion that a single choice-of-law rule should be applied to all of these claims is inconsistent with past decisions by the D.C. Court of Appeals. In *Herbert*, for example, that court held that claims for wrongful death are typically governed by the law of where the injury occurred.[116] In *Cárdenas*, it held that claims for intangible torts such as loss of consortium are typically governed by the laws of the state where the relationship was centered.[117] In creating a single choice-of-law rule that applied to

111 Herbert v. District of Columbia, 808 A.2d 776, 780 (D.C. 2002).

112 *In re* Est. of Delaney, 819 A.2d 968, 988 (D.C. 2003) (quoting Biscoe v. Arlington Cnty., 738 F.2d 1352, 1360 (D.C. Cir. 1984)).

113 *Dammarell*, 2005 WL 756090, at *20.

114 *See id.*

115 *See id.*

116 *See Herbert*, 808 A.2d at 780. Sections 146 and 175 of the *Restatement (Second) of Conflict of Laws* state that claims for personal injury or wrongful death are presumptively governed by the "local law of the state where the injury occurred." RESTATEMENT (SECOND) OF CONFLICT OF L. § 146 (A.L.I. 1971); *id.* at § 175 ("In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.").

117 *See* HAY ET AL., *supra* note 20, § 17.51; Cárdenas v. Muangman, 998 A.2d 303, 311 (D.C. 2010).

claims for both tangible torts such as wrongful death and intangible torts such as intentional infliction of emotional distress, the *Dammarell* court failed to recognize that a different choice-of-law analysis might be required for each claim. In so doing, it took itself out of sync with prior decisions by the D.C. Court of Appeals endorsing the concept of *dépeçage*.

2. <u>It Does Not Consider the Content of the Chosen Law</u>. In holding that the plaintiffs' claims were governed by the laws of their respective domiciles, the *Dammarell* court also did not consider whether applying those laws would benefit the plaintiff.

Imagine a scenario where applying the tort law of Lebanon would result in victory for the plaintiff, but applying the tort law of Alaska would result in a victory for the defendant.[118] Under the choice-of-law rule adopted by the court, the court would apply Alaskan law to the exclusion of Lebanese law, even though the U.S. plaintiff had specifically asked the court to apply the law of Lebanon. To the extent that the United States has a "unique interest" in applying its law to these cases, one would assume that that interest is focused on ensuring that U.S. citizens are able to obtain a recovery. This is not, however, the rule adopted by the *Dammarell* court. It held that this "unique interest" was furthered by applying the law of a U.S. state where the plaintiff was domiciled *even if* applying that law would actually operate to defeat the plaintiff's claim.[119]

Consider the facts of *Holland v. Islamic Republic of Iran*.[120] The DDC held that the mother, father, and brother of a Marine killed in a 1983 bombing in Lebanon—all Kentucky domiciliaries—could not bring a wrongful death claim against Iran under the laws of Kentucky.[121] It further held that the wife of the decedent—another Kentucky domiciliary—could not recover for loss of consortium under the laws of

118 *Cf.* Oveissi v. Islamic Republic of Iran, 573 F.3d 835, 839 (D.C. Cir. 2009) ("Because the plaintiff was born in California and had briefly resided there, the court determined that it should apply California law to the [intentional infliction of emotional distress] claim. In light of its reading of California law, however, the court concluded that the plaintiff 'lack[ed] standing to bring an [intentional infliction of emotional distress] claim.'" (second alteration in original) (quoting Oveissi v. Islamic Republic of Iran, 498 F. Supp. 2d 268, 283 (D.D.C. 2007), *rev'd*, 573 F.3d 835 (D.C. Cir. 2009))); Wachsman *ex rel.* Wachsman v. Islamic Republic of Iran, 537 F. Supp. 2d 85, 96 (D.D.C. 2008) ("[A]pplying the D.C. wrongful death statute, with its geographical limitations, would prevent recovery, and thereby run counter to the purpose of the FSIA, which is to 'give American citizens . . . [a] financial weapon against . . . outlaw states.'" (quoting H.R. REP. NO. 104–383, at 62 (1995)) (quote corrected)).

119 *See Dammarell*, 2005 WL 756090, at *20–21. There is one recent decision where the DDC did, in fact, consider the content of the law in evaluating state interests. *See* Thuneibat v. Syrian Arab Republic, 167 F. Supp. 3d 22, 42 (D.D.C. 2016).

120 Holland v. Islamic Republic of Iran, 496 F. Supp. 2d 1, 4 (D.D.C. 2005).

121 *See id.* at 28.

Kentucky because he had "died instantaneously from his injuries."[122] Finally, the court held that neither the decedent's parents nor his brother nor his wife nor his children could recover on a theory of intentional infliction of emotional distress under the laws of Kentucky because the defendant's conduct was not "directed" at them.[123] It is far from clear that the "unique interest" of the United States in applying the law of the plaintiffs' domicile to their claims was furthered by the court's choice-of-law analysis in this case. It is entirely possible that they would have been better off under the law of Lebanon.

3. <u>It Generates Inconsistent Results for Similarly Situated Plaintiffs</u>. Plaintiffs who are identical in every respect save for their domicile will also be treated differently under the court's approach. The wrongful death statute in Wisconsin, for example, does not apply to deaths caused outside the state.[124] The wrongful death statute in Florida, by comparison, may be applied extraterritorially.[125] If a Wisconsin domiciliary is killed in a terrorist attack in Lebanon, that person's family members may not bring a wrongful death action under Wisconsin law. If a Florida domiciliary is killed in the same attack, that person's family members may bring a wrongful death action under Florida law.

The *Dammarell* court, to its credit, acknowledged the possibility of inconsistent treatment in its decision. It offered the following response:

> Plaintiffs complain that relying on the law of the state of domicile will lead to different recoveries for each of the plaintiffs. This is true, but there is nothing unusual or unfair about this result. "[I]t is not uncommon for courts to apply the substantive law of several different states" in resolving mass tort cases. . . .
>
> Although this result might be cumbersome, it is common for mass disaster tort cases outside of the FSIA to use the plaintiff's domicile as the rule of decision even though it follows that there will be varying results for the defendants.[126]

This response is unconvincing for several reasons.

---

122 *Id.* at 29.

123 *Id.* at 30.

124 Waranka v. Wadena Ins. Co., 847 N.W.2d 324, 326 (Wis. 2014).

125 *See* Yelton v. PHI, Inc., 669 F.3d 577, 583 (5th Cir. 2012) ("Every court that has examined this question since the adoption of the new statute has agreed that the Florida wrongful death statute may be applied extraterritorially by the relatives of Florida decedents . . . .").

126 Dammarell v. Islamic Republic of Iran, No. 01-2224, 2005 WL 756090, at *20 (D.D.C. Mar. 29, 2005) (first alteration in original) (quoting *In re* Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 926 F. Supp. 736, 740 (N.D. Ill. 1996)).

In choosing to adopt the domicile rule, the court cited prior mass tort cases involving commercial airline crashes.[127] These cases are, however, easily distinguishable. First, the choice-of-law analysis in these cases was directed solely on the issue of *damages*; in none of these cases did the court analyze what law should govern the underlying *cause of action*.[128] Second, the decision to apply the law of the plaintiff's domicile in the airplane cases stemmed in part from the fact that it is difficult to predict exactly where an airplane will crash.[129] This element of randomness gave the jurisdiction where the crash actually occurred a weak interest in applying its law to the ensuing lawsuits. Nothing about the terrorist attack on the U.S. embassy in Lebanon was random.[130] Third, none of these prior cases were decided using the choice-of-law rules of the District of Columbia.[131] These distinguishing factors call into question whether the choice-of-law rule selected by *Dammarell* court—apply the law of the plaintiff's domicile—was the correct rule.

It is also noteworthy that the DDC subsequently applied this rule to a number of cases that did not involve mass casualties. In *Reed v. Islamic Republic of Iran*, for example, the plaintiff was the son of a man who had been kidnapped and held hostage for 1,330 days in

127 *See id.* at *19; Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 14 (2d Cir. 1996); *In re* Air Crash Disaster Near Chi., Ill. on May 25, 1979, 644 F.2d 594, 613 (7th Cir. 1981); Burgio v. McDonnell Douglas Inc., 747 F. Supp. 865, 873 (E.D.N.Y. 1990).

128 *See Pescatore*, 97 F.3d at 4–5 ("The question that we therefore must answer is which sovereign's law would govern the issue of the plaintiff's damages . . . ."); *In re Air Crash Disaster Near Chi.*, 644 F.2d at 612 ("[T]he precise issue, of course, is which state's law regarding the availability of punitive damages should apply."); *Burgio*, 747 F. Supp. at 872 ("Louisiana's only interest, as the site of the injury, is in deterrence. Since the issue here is damages and not liability, however, that interest is considerably diminished.").

129 *See Pescatore*, 97 F.3d at 13 ("[I]n a disaster befalling a plane aloft, the place of the crash is often random (or, as here, fixed by a warped mind) and the sovereignty in which the accident occurs has little interest in applying its substantive law to the case."); *In re Air Crash Disaster Near Chi.*, 644 F.2d at 612 ("It is unclear where the relationship of the parties is 'centered.'").

130 *See* Dammarell v. Islamic Republic of Iran, 281 F. Supp. 2d 105, 112 (D.D.C. 2003) ("[T]here's no question that Iran was responsible for the selection of the target, provided much of the information for how to carry out the bombing, the expertise for how to build the bomb, the political direction that said that this was an important target to bomb, provided financial support for the bombers. It has the Iranians' fingerprints all over it . . . . [T]his was quite a sophisticated and large bomb against a well-guarded target." (alterations in original) (citation omitted)), *vacated*, 404 F. Supp. 2d 261 (D.D.C. 2005).

131 *See Pescatore*, 97 F.3d at 13–14 (applying New York choice-of-law rules and the *Restatement (Second) of Conflict of Laws*); *In re Air Crash Disaster Near Chi.*, 644 F.2d at 610 (applying the "choice-of-law rules of the states where the actions were originally filed," a list of states that did not include the District of Columbia); *Burgio*, 747 F. Supp. at 870 (applying choice-of-law rules of Louisiana).

Lebanon.[132] He sued Iran for intentional infliction of emotional distress and solatium.[133] Although the son was the only plaintiff in the case, the court invoked *Dammarell* to hold that his claims were governed by the laws of the U.S. state where he was domiciled: Massachusetts.[134] In *Nikbin v. Islamic Republic of Iran*, the plaintiff was a man who had been imprisoned and tortured in Iran for three and a half years.[135] He sued Iran for assault, battery, and intentional infliction of emotional distress.[136] Again, the court applied the law of the U.S. state in which the plaintiff was domiciled—New York—even though he was the only plaintiff in the case.[137] In these and other cases, a choice-of-law rule created to select a damages law in a mass tort case was used to select the cause of action in an individual case asserting claims arising out of a hostage taking. It is far from clear that these two situations are comparable. And yet they were treated as such by the DDC.

None of this is to say that that court was obviously *wrong* to conclude that the plaintiffs' claims should be governed by the laws of their respective domiciles. Domicile is listed as one of the contacts to consider under the approach to choice of law adopted by the local courts in the District of Columbia.[138] And the United States clearly has an interest in applying its law when its citizens and interests are attacked by terrorists overseas. It is merely to say that the choice-of-law framework utilized by local courts in the District of Columbia is a multiple-choice test to which there are many possible right answers. It is far from clear that the answer selected by DDC in *Dammarell* represented the best one on the facts presented.

B. The Law of the Forum

In a number of instances, terrorist attacks on buses, restaurants, and pedestrian malls in Israel have resulted in the death or injury of U.S. citizens domiciled in Israel. When plaintiffs in cases arising out of these attacks previously resided in the United States, the DDC would—per *Dammarell*—generally apply the law of their last U.S. domicile. Occasionally, however, the plaintiff had never lived in the United States notwithstanding their U.S. citizen status. In these cases, the DDC would

---

132 *See* Reed v. Islamic Republic of Iran, 439 F. Supp. 2d 53, 57–58 (D.D.C. 2006), *reh'g granted in part*, 242 F.R.D. 125 (D.D.C. 2007).

133 *Id.* at 57, 59.

134 *Id.* at 65–66.

135 Nikbin v. Islamic Republic of Iran, 517 F. Supp. 2d 416, 420–22 (D.D.C. 2007).

136 *Id.* at 419, 426.

137 *Id.* at 426.

138 Dammarell v. Islamic Republic of Iran, No. 01-2224, 2005 WL 756090, at *18 (D.D.C. Mar. 29, 2005).

generally apply the law of the District of Columbia as a "default" U.S. domicile.

In 1996, for example, a U.S. citizen named Yonathan Barnea was killed in the terrorist bombing of a passenger bus in Jerusalem.[139] In 2003, the administrator of his estate—along with his mother, father, brother, and sister—sued Iran in the DDC. All of the plaintiffs were domiciled in Israel at the time of the attack.[140] After performing a choice-of-law analysis, the court concluded that the plaintiffs' claims were governed by the laws of the District of Columbia because the family had lived there before moving to Israel.[141] Since the District was their last U.S. domicile, the court reasoned, that jurisdiction's law supplied the governing law.[142]

This decision highlights the extent to which the choice-of-law rule laid down in *Dammarell* influenced the reasoning in subsequent cases. It is not at all clear that the United States has a "unique interest" in applying its law when all of the plaintiffs are domiciled in Israel and the attack occurred in Israel. Nevertheless, the court invoked *Dammarell* to hold that the tort law of the District governed the plaintiffs' claims.

A second case decided at about the same time raises additional questions. In 1995, a U.S. citizen named Seth Klein Ben Haim was badly injured when terrorists attacked a passenger bus in Israel.[143] Seth—along with his father and brother—subsequently sued Iran in the DDC.[144] After performing a choice-of-law analysis, the court concluded that these claims were governed by the laws of the District of Columbia even though none of the plaintiffs had *ever* been domiciled in the District.[145] "[S]ince plaintiffs have no United States domicile," the court reasoned, "the forum [District of Columbia] is the state with the greatest interest, and thus the application of its law is proper."[146]

This analysis raises a number of questions. If none of the plaintiffs had ever lived in the District, and if they were all domiciled in Israel at the time of the attack, then it is difficult to understand why the District would have the "most significant relationship" to the dispute or why it would have the "greatest interest" in applying its law to the claims asserted. These issues are not addressed in the opinion; the sentence

139 Bodoff v. Islamic Republic of Iran, 424 F. Supp. 2d 74, 77 (D.D.C. 2006).
140 *See id.* at 83.
141 *See id.* at 83–84.
142 *See id.*
143 Haim v. Islamic Republic of Iran, 425 F. Supp. 2d 56, 60–61 (D.D.C. 2006).
144 *See id.* at 59.
145 *See id.* at 69.
146 *Id.*

quoted above constitutes the entirety of the court's analysis with respect to this issue.

A third case is even more mystifying. In 1992, an Israeli citizen named David Ben-Rafael was killed when "a suicide bomber drove a truck filled with explosives into the Israeli embassy in Buenos Aires, Argentina."[147] At the time of the attack, Ben-Rafael was working as the Deputy Chief of Mission at the embassy.[148] In 2006, his widow, mother, father, sisters, son, and daughter, all of whom were U.S. citizens, sued Iran in the DDC.[149] The court duly invoked the choice-of-law rules of the District of Columbia and set about ascertaining the governing law.[150] Since the decedent's parents and one of his sisters were domiciled in New York at the time of the attack, the court held that their claims were governed by New York tort law.[151] Since the decedent's widow, children, and other sister were domiciled in Israel at the time of the attack, however, the court reasoned that their claims were governed by the tort law of the District because it had the "greatest interest" in applying its law on these facts.[152]

At this point, the choice-of-law train was well and truly off the tracks. To hold that the District of Columbia had the "greatest interest" in applying its tort law to claims against Iran arising out of the terrorist bombing of an Israeli embassy in Argentina where the decedent was an Israeli citizen employed by the Israeli foreign service whose immediate family members were domiciled in Israel is gobbledygook. It is impossible to justify this outcome using the choice-of-law rules utilized by the District of Columbia. And yet the DDC held that the claims of the Israeli domiciliaries were governed by the laws of the District.

C. The Law of the Place of Attack

The choice-of-law decisions rendered by the DDC in terrorism cases are rarely reviewed by the D.C. Circuit. When the defendant fails to appear, and the court grants the plaintiff's motion for a default judgment, there is nobody with an interest in appealing the case. There was, however, one case where the *plaintiff* filed an appeal because the trial court denied his motion for a default judgment. In that case, *Oveissi v. Islamic Republic of Iran*, the D.C. Circuit did not hold that the plaintiff's claims were governed by the law of the domicile or the law

147 Ben-Rafael v. Islamic Republic of Iran, 540 F. Supp. 2d 39, 43, 47 (D.D.C. 2008).

148 *Id.* at 48.

149 *Id.* at 43, 48–53 ("[A]ll of the plaintiffs were citizens of the United States at the time of the bombing, though decedent was not." *Id.* at 53.).

150 *Id.* at 54.

151 *Id.*

152 *Id.* (holding that claims brought by "plaintiffs without a U.S. domicile shall be governed by District of Columbia law").

of the forum.[153] Instead, it held that they were governed by the law of the place of the attack.[154]

The plaintiff in *Oveissi* was the grandson of a man—Gholam Oveissi—who had been the chief of the Iranian armed forces prior to the Iranian Revolution in 1979.[155] Oveissi was assassinated in Paris in 1984 by a terrorist organization funded and directed by the Iranian government.[156] In 2003, the plaintiff sued Iran for intentional infliction of emotional distress in the U.S. District Court for the District of Columbia.[157] After Iran failed to appear, the plaintiff moved for a default judgment.[158]

The district court found that the plaintiff was a U.S. citizen because he had been born in California in 1979.[159] It also found that the plaintiff had only lived in California for a few months before the family relocated to France and that, at the time of the assassination, the plaintiff was domiciled in France.[160] Consistent with the last-U.S.-domicile rule adopted in *Dammarell*, the district court held that it was appropriate to apply the law of California to the plaintiff's claims against Iran.[161] The district court offered the usual justification for this decision:

> [T]he United States has a "unique interest" in having its domestic law apply when its citizens are injured by state-sponsored terrorist acts. Indeed, this consideration "elevates the interests of the United States to nearly [their] highest point." Born in California, Amir Reza Oveissi is and was a United States citizen. As such, the United States' "paramount interest in guaranteeing redress to its citizens" militates against the application of French law.
>
> In 1984, plaintiff had resided in only one U.S. state: California. This period of residence, though brief, gave rise to his status as a United States citizen . . . . Therefore, the Court concludes it is appropriate to apply California law to plaintiff's claim for intentional infliction of emotional distress.[162]

The court then dismissed the complaint after concluding that the plaintiff had failed to state a claim for intentional infliction of

153 Oveissi v. Islamic Republic of Iran, 573 F.3d 835, 843 (D.C. Cir. 2009).

154 *Id.*

155 *Id.* at 837.

156 *Id.*

157 *Id.*

158 *Id.* at 838.

159 Oveissi v. Islamic Republic of Iran, 498 F. Supp. 2d 268, 272 (D.D.C. 2007), *rev'd*, 573 F.3d 835.

160 *Id.* at 281.

161 *Id.*

162 *Id.* (second alteration in original) (citations omitted) (quoting Dammarell v. Islamic Republic of Iran, No. 01-2224, 2005 WL 756090, at *19–20 (D.D.C. Mar. 29, 2005)).

emotional distress under California law.[163] The plaintiff appealed the decision to the D.C. Circuit.[164]

That court fully endorsed the choice-of-law rule stated in *Dammarell* in cases where U.S. citizens were targeted "by reason of their nationality."[165] In cases where the plaintiffs were injured in an attack on a U.S. embassy, in other words, then it was appropriate to apply the law of the domicile. In cases where the terrorist attacks were not aimed at U.S. persons or interests, however, the D.C. Circuit held that the claim should be governed by the law of the place of the attack.[166] As it explained:

> Gholam Oveissi was not an American national; nor has the plaintiff suggested that the defendants knew Oveissi had an American grandchild or that the United States or its nationals were in any other way the object of the attack. To the contrary, plaintiff's counsel conceded at oral argument that there is no evidence that Oveissi's assassination was intended to affect the United States. Moreover, the plaintiff's international terrorism expert testified that assassinations like this one "were intended to silence the Iranian regime's critics *and to deter French intervention in Lebanon.*" Hence, if any country was the object of the attack, it was France. Accordingly, all of the relevant choice-of-law factors point to the application of French law to the plaintiff's claims.[167]

The decision marked a significant shift in the way that the courts in the District of Columbia went about their choice-of-law analysis. Going forward, the domicile rule laid down in *Dammarell* would continue to apply when the terrorist attack was specifically directed at U.S. persons or interests. When the attack was not directed at U.S. persons or interests, however, the D.C. Court held that it was appropriate to apply the law of the place where the attack occurred.[168]

If *Oveissi* had been decided a few years earlier, then it is likely that *Bodoff*, *Haim*, and *Ben-Rafael* would have been decided differently. In none of these cases were the attacks directed at the United States. Applying the rule laid down in *Oveissi*, the claims in *Bodoff* and *Haim* probably would have been governed by Israeli law because the attacks occurred in Israel. The claims in *Ben-Rafael* probably would have been governed by the law of Argentina because the attack occurred in

163 *Id.* at 283.

164 *Oveissi*, 573 F.3d at 839.

165 *Id.* at 843.

166 *Id.*

167 *Id.* (citation omitted) (quoting *Oveissi*, 498 F. Supp. 2d at 273).

168 *See id.* at 844 ("We close this discussion by emphasizing that we are not setting forth a general choice-of-law rule for terrorism cases, but merely applying the District of Columbia's rules to the facts . . . .").

Argentina. One can be reasonably confident in these predictions because there was a case decided shortly after *Oveissi* where the district court adopted precisely this reasoning.

In *Estate of Botvin v. Islamic Republic of Iran*, the plaintiffs sued Iran after a suicide bomber targeted an Israeli pedestrian mall.[169] Yael Botvin, a fourteen-year-old U.S. citizen domiciled in Israel, was killed in the blast.[170] Her estate, her mother, and her siblings all filed claims against Iran.[171] In contrast to prior cases, the court emphasized Israel's interest in applying its law to the exclusion of U.S. law:

> Although the decedent in this case was a U.S. citizen, she and the individual plaintiffs were domiciled in Israel at the time of the attack. The suicide bombing, which killed the decedent, occurred in Israel. . . .
>
> Furthermore, like the plaintiff in *Oveissi* and unlike the plaintiffs in *Dammarell*, the plaintiffs in this case have presented no evidence that the terrorist attack was targeted specifically at U.S. nationals or was otherwise intended to affect the United States. To the contrary, it appears that the terrorist attack was targeted at Israel, which, like all nations, "has a strong governmental interest in both deterring attacks within its sovereign borders and ensuring compensation for injuries to its domiciliaries." California's interest is slight by comparison because it arises only out of the fact that the decedent and two of the plaintiffs were born there and the fact that the decedent and the plaintiffs briefly resided there. Although the United States has a "strong interest in applying its domestic law to terrorist attacks on its nationals," the court concludes that in the absence of any suggestion that the terrorist attack was targeted at the United States, Israel's governmental interest outweighs that of California.[172]

In *Oveissi*, the D.C. Circuit belatedly acknowledged that countries other than the United States might have an interest in applying their law when the attacks occur within their borders.[173] It also helpfully distinguished between attacks aimed at the United States and attacks that

169 Est. of Botvin *ex rel.* Ellis v. Islamic Republic of Iran, 684 F. Supp. 2d 34, 36 (D.D.C. 2010).

170 *Id.* at 36, 38, 41.

171 *Id.* at 36.

172 *Id.* at 41 (citations omitted) (quoting *Oveissi*, 573 F.3d at 842–43); *see also* Wachsman *ex rel.* Wachsman v. Islamic Republic of Iran, 537 F. Supp. 2d 85, 95–96 (D.D.C. 2008) (observing that "the United States has a unique interest in applying its own law, rather than the unfamiliar law of a foreign nation, to determine liability involved in a state-sponsored terrorist attack on one of its citizens, particularly when such an attack is directed against its national interests" but also observing that "with respect to wrongful death claims, Israel has a unique interest as well").

173 *See Oveissi*, 573 F.3d at 843.

merely injured U.S. citizens. This decision laid the groundwork for a better and more nuanced choice-of-law analysis that rejected the "always apply the law of the plaintiff's domicile" rule adopted in *Dammarell*.[174]

And then Congress amended the FSIA.

III. CHOICE OF LAW IN TERRORISM CASES: 2009–2024

In 2008, Congress approved two amendments to the FSIA.[175] The first eliminated the sovereign immunity of foreign states in cases where the claimant or the victim was (1) a U.S. citizen, (2) a member of the U.S. armed forces, or (3) an employee or contractor of the U.S. government.[176] The second created a federal cause of action against the foreign state for individuals in these same groups.[177] Going forward, U.S. citizens, foreign nationals servicing in the U.S. military, and foreign nationals working for the U.S. government would not have to rely on state or foreign law when asserting these claims. They could invoke the new federal cause of action created by Congress.

The effect of these amendments was to reduce the number of cases where a choice-of-law analysis had to be performed. After 2008, most of the claims arising out of terrorist acts proceeded under the new federal cause of action.[178] There was, however, a catch. Congress did not create a federal cause of action for the *non-U.S. citizen family members* of individuals who were injured or killed in terrorist attacks.[179] When these family members sued a foreign state for money damages, they had to proceed under state or foreign law.[180] In such cases, the

174 Dammarell v. Islamic Republic of Iran, No. 01-2224, 2005 WL 756090, at *21 (D.D.C. Mar. 29, 2005).

175 *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338–44 (codified as amended at 28 U.S.C. § 1605A (2018)).

176 28 U.S.C. § 1605A(a)(2)(A)(ii) (2018).

177 *Id.* § 1605A(c). The second amendment was deemed necessary because the D.C. Circuit had held that the Flatow Amendment did not create a federal cause of action directly against state sponsors of terrorism. *See* Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024, 1033 (D.C. Cir. 2004).

178 *See, e.g.*, Opati v. Republic of Sudan, 140 S. Ct. 1601, 1606 (2020).

179 *See* Borochov v. Islamic Republic of Iran, 94 F.4th 1053, 1057 (D.C. Cir. 2024) ("Congress also created a cause of action for U.S. citizens, members of the U.S. armed forces, and U.S. government employees who have been injured by foreign states' acts or sponsorship of terrorism. *All others suing under the terrorism exception must rely on state- or foreign-law causes of action.*" (emphasis added)).

180 *See e.g.*, *Opati*, 140 S. Ct. at 1606; Roberts v. Islamic Republic of Iran, 581 F. Supp. 3d 152, 157, 173 (D.D.C. 2022), *vacated in part*, No. 20-cv-1227, 2023 WL 4351468 (D.D.C. July 5, 2023).

DDC still had to perform a choice-of-law analysis to determine the law that governed their claim,[181] as shown in Table 1.[182]

Table 1: Causes of Action Against State Sponsors of Terrorism Post-2008 Amendments	
Plaintiff	**Cause of Action**
U.S. Citizen	Federal Law
Foreign National (U.S. servicemember)	Federal Law
Foreign National (U.S. employee/contractor)	Federal Law
Foreign National (family member of any of the above)	State/Foreign Law

One might expect that the choice-of-law outcomes in cases brought by family members after these amendments would be the same as those in the cases filed between 2004 and 2008. The court was, after all, applying the same choice-of-law rules. The defendants, causes of action, and underlying facts were all essentially the same. This is not, however, what happened. The place of the plaintiff's domicile played a vanishingly small role in the choice-of-law analysis in cases filed after 2008. In its place, the courts increasingly applied the law of the forum. There was, however, one thread of continuity. The DDC continued to apply the law of the place of the attack when the attack was not aimed at the United States. We begin our analysis with a discussion of these cases.

A. *The Law of the Place of Attack*

When a terrorist attack in a foreign country is not directed at the U.S. government or a person affiliated with it, and when a foreign national family member of a person killed or injured in that attack brings a lawsuit in the United States, the DDC will generally follow the choice-of-law rule established in *Oveissi* and applied in *Botvin.* While the judges pay lip service to the "most significant relationship" factors, and while they purport to analyze the "interests" of various governments, they almost always land in the same place.[183] They apply the law of the place of the attack.

181 *See Roberts*, 581 F. Supp. 3d at 173.

182 *See supra* notes 175–80 and accompanying text.

183 There were two cases where the court applied the law of the District even though the decedent lacked an affiliation with the U.S. government. *See* Cohen v. Islamic Republic of Iran, 238 F. Supp. 3d 71, 80 (D.D.C. 2017) (claims arising out of a terrorist attack in Israel); Messina v. Syrian Arab Republic, No. 20cv1237, 2024 WL 4199369, at *4 (D.D.C. Sep. 16, 2024) (claims arising out of an attack on a hotel in Iraq).

In *Estate of Buonocore v. Great Socialist People's Libyan Arab Jamahiriya*, for example, the plaintiffs were the Italian sons of a U.S. citizen killed in a terrorist attack at the Rome Airport in 1985.[184] After the sons sued Libya in the DDC, the court held that the claim was governed by the laws of Italy for three reasons.[185] First, it held that the interest of the United States in applying its law was "diminished" when the plaintiffs were not U.S. nationals.[186] Second, the court observed that there was "no evidence in the record that the U.S. or its nationals were the specific object" of the attack at the airport.[187] Third, the court commented that Italy had a "strong governmental interest in deterring attacks within its sovereign borders and the most significant relationship to the attack."[188]

The court engaged in similar reasoning in *Henkin v. Islamic Republic of Iran*.[189] The plaintiffs were the non-U.S. citizen family members of a U.S. citizen who was shot and killed by terrorists while living in Israel.[190] The family members sued Iran and Syria in the DDC.[191] The court held that their claims were governed by the laws of Israel because that nation had a stronger governmental interest in applying its law:

> Between D.C. and Israel, Israel clearly has the stronger governmental interest. . . . First—combating terrorism. Whether it be protecting Israeli citizens or protecting visitors, the Israeli government has a strong interest in deterring and compensating for terrorism. Protecting tourists also creates an economic interest. If individuals traveling through Israel are at risk of terrorist attacks, people may avoid passing through or visiting the country. Losing tourists will in turn, have a negative impact on the economy. Not only does Israel have an interest in protecting its individual citizens, but it also has an interest in punishing those committing crimes on Israeli territory. Awarding damages to those harmed, via Israeli law, will show Israel's disapproval of the attack, and specifically its disapproval towards Iran and Syria's support for these behaviors. . . .
>
> . . . Plaintiffs did not provide any evidence connecting this case to D.C. besides the venue provision. Thus, it is clear that between

184 Est. of Buonocore v. Great Socialist People's Libyan Arab Jamahiriya, 942 F. Supp. 2d 13, 14, 16 (D.D.C. 2013).

185 *Id.* at 16.

186 *Id.*

187 *Id.*

188 *Id.*

189 *See* Henkin v. Islamic Republic of Iran, No. 18-cv-1273, 2021 WL 2914036, at *6–7 (D.D.C. July 12, 2021).

190 *See id.* at *1, *6.

191 *See id.* at *1.

> D.C. and Israeli law, Israeli law would prevail under a pure governmental-interest analysis.[192]

The court also held that the most significant relationship test cut decisively in favor of applying the law of Israel:

> All of these factors unambiguously point to Israeli law. The injury—witnessing the murder of Eitam—occurred in Israel. The actual murder happened in Israel. Prior to the attack, Eitam, Na'ama, and their children were all domiciled in Israel. Eitam was a dual Israeli and United States citizen at the time of his death, but he lived in Israel his entire life. The relationship between the parties was also centered in Israel. Because all of these § 145 factors are so Israel-centric, the most-significant-relationship test dictates that the Court apply Israeli law.[193]

It is interesting to compare this outcome with the ones reached in *Haim* and *Ben-Rafael*. In those cases, it will be recalled, the court applied D.C. tort law—not the law of Israel—to claims brought by U.S. citizens domiciled in Israel. The judges deciding those cases took the position that the United States had a unique interest in applying D.C. law to cases where the decedent was a U.S. citizen. Today, that unique interest is no longer said to be implicated in suits brought by non-U.S. citizen family members unless the attack directly targeted the United States.[194]

B. The Law of the Forum

In most cases filed after 2008, the DDC has not applied the law of the place of the attack. Nor has it applied the law of the plaintiff's domicile. Instead, it has applied the law of the District of Columbia.

The seminal decision is *Estate of Doe v. Islamic Republic of Iran*.[195] The event giving rise to this suit was the same as in *Dammarell*—the bombing of the U.S. embassy in Lebanon in 1983.[196] The plaintiffs in

---

192 *Id.* at *5.

193 *Id.* at *6 (citations omitted).

194 *See* Force v. Islamic Republic of Iran, 464 F. Supp. 3d 323, 373 (D.D.C. 2020) (applying the law of Israel after finding "no evidence that 'the United States or its nationals were in any . . . way the object' of any of the attacks" even though the victims were all U.S. nationals (alteration in original) (emphasis omitted) (quoting Oveissi v. Islamic Republic of Iran, 573 F.3d 835, 843 (D.C. Cir. 2009))); *see also* Borochov v. Islamic Republic of Iran, 589 F. Supp. 3d 15, 38 (D.D.C. 2022), *vacated and remanded*, 94 F.4th 1053 (D.C. Cir. 2024); Fraenkel v. Islamic Republic of Iran, 248 F. Supp. 3d 21, 39 (D.D.C. 2017). *But see* M.M. v. Islamic Republic of Iran, 708 F. Supp. 3d 22, 47 (D.D.C. 2023) (applying the law of the place of the attack even though the bomb was detonated near the U.S. embassy in Afghanistan and the decedents were Afghan security contractors employed the United States).

195 Est. of Doe v. Islamic Republic of Iran, 808 F. Supp. 2d 1 (D.D.C. 2011).

196 *Id.* at 6.

Doe were 255 non-U.S. citizen family members of individuals injured or killed in the attack.[197] Since these plaintiffs lacked a federal cause of action, the court had to perform a choice-of-law analysis to determine the law that would govern their claims for intentional infliction of emotional distress and solatium.[198]

The court began its analysis by identifying three possible laws to govern the claims: (1) the law of the forum (the District), (2) the law of the place of the tort (Lebanon), and (3) the law of the place where the plaintiff was domiciled (many different countries).[199] It acknowledged the significant body of prior precedent—all involving U.S. citizen plaintiffs, all stemming from *Dammarell*—where it had applied the law of the U.S. state where the plaintiff was domiciled.[200] The court ultimately concluded, however, that a different rule should apply when the plaintiff was a non-U.S. citizen family member of a person injured in a terrorist attack.[201] In such cases, the court concluded, the tort law of the District of Columbia should generally supply the rule of decision.[202]

In support of this holding, the court cited three considerations: (1) the "unique interest" of the United States in applying its domestic law to state-sponsored terrorism cases,[203] (2) the need for uniformity,[204] and (3) the fact that the District of Columbia is the seat of the federal government.[205] Since the "unique interest" rationale was discussed at length in Part II, the discussion below focuses on the latter two rationales.[206]

197 *Id.* at 6, 11.

198 *See id.* at 19–21 ("Although § 1605A created a new cause of action, it did not displace a claimant's ability to pursue claims under applicable state or foreign law upon the waiver of sovereign immunity." *Id.* at 20.).

199 *Id.* at 21.

200 *See id.* ("In previous *Dammarell* decisions involving U.S. citizen plaintiffs, this Court ruled that the law of the domicile state of each plaintiff should provide the rule of decision, noting each state's interest in the welfare and compensation of the surviving family members of individuals killed in the 1983 attack.").

201 *See id.*

202 *Id.*

203 *See id.* at 22–23.

204 *Id.* at 23.

205 *Id.* ("The application of District of Columbia substantive law best promotes the United States' interest in applying domestic law rather than the law of a foreign nation, Congress's intent to promote uniformity of result, and the District of Columbia's real connection to the attacks in this case.").

206 *See supra* Section II.A.1.

1. The Need for Uniformity

Although most of the plaintiffs in *Doe* were domiciled in Lebanon, a handful were domiciled in Canada, France, Saudi Arabia, and Tunisia.[207] In light of this fact, the court held that it was appropriate to apply the tort law of the forum—the District of Columbia—to all of these plaintiffs' claims to promote "uniformity of decision among the foreign national family members."[208] The court acknowledged several of its prior decisions had disclaimed the notion that the tort law of the District should be applied in the name of promoting uniformity.[209] In *Welch v. Islamic Republic of Iran*, for example, the court had expressly stated that "[t]he strong interest of each domicile state in compensating its citizens for harm far outweighs the benefit of uniformly applying a single body of law, *i.e.*, the law of the forum, to all claims."[210] The *Estate of Doe* court concluded, however, that the 2008 amendments to the FSIA provided two bases for reconsidering these prior decisions.[211]

First, the court reasoned that the purpose of these amendments was to "strengthen enforcement of United States terrorism laws and to extend their protections to foreign nationals who are employees of United States embassies targeted by terrorists *and their immediate family members*."[212] The last five words of this statement lack any textual support in the statute. Nothing in the 2008 revisions to the FSIA purported to confer a federal cause of action on non-U.S. citizen family members of individuals injured or killed in a terrorist attack.

Second, the court invoked two statements by Senator Frank Lautenberg to support the notion that claims brought by non-U.S. citizen family members should be governed by the law of the District.[213] In the first statement, Senator Lautenberg stated that the amendments to the FSIA were "essential to providing justice to those who have

207 *See Est. of Doe*, 808 F. Supp. 2d at 22.

208 *Id.* ("Without doubt, applying District of Columbia law will provide greater uniformity of result, as individual plaintiffs domiciled in different states and foreign nations will all be subject to the same substantive law." *Id.* at 23.).

209 *See id.* at 22.

210 Welch v. Islamic Republic of Iran, No. 01-863, 2007 WL 7688043, at *10 (D.D.C. Sep. 20, 2007); *see also* Holland v. Islamic Republic of Iran, 496 F. Supp. 2d 1, 24 (D.D.C. 2005) ("While choosing the law of the District of Columbia would certainly allow for greater uniformity and ease in applying a single set of legal standards, these considerations . . . are trumped when another location otherwise has 'a significantly greater interest than does the District' in the cause-of-action." (quoting Dammarell v. Islamic Republic of Iran, No. 01-2224, 2005 WL 756090, at *19 (D.D.C. Mar. 29, 2005))).

211 *See Est. of Doe*, 808 F. Supp. 2d at 23 ("[T]he 2008 FSIA amendments—and the stated goal of those amendments to promote uniformity—serve to increase the interest in applying District of Columbia substantive law to this case.").

212 *Id.* (emphasis added).

213 *Id.*

suffered at the hands of terrorists and [were] an important tool designed to deter future state-sponsored terrorism."[214] This statement makes no mention of uniformity or foreign nationals. Accordingly, it provides no support for the decision by the *Doe* court to apply the law of the District to claims brought by family members. In the second statement, Senator Lautenberg stated that the FSIA amendments were intended, in part, to fix the problem of "judges hav[ing] been prevented from applying a uniform damages standard to all victims in a single case because a victim's right to pursue an action against a foreign government depends upon State law."[215] Although this statement stresses the importance of uniformity, it provides little support for the court's holding that claims brought by non-U.S. citizen family members should always be governed by the laws of the District.[216]

The lack-of-uniformity problem referenced by Senator Lautenberg stemmed from the fact that there was no federal cause of action against state sponsors of terrorism prior to 2008. Absent a federal cause of action, the courts were required to perform a choice-of-law analysis that—per *Dammarell*—led to the application of the law of the U.S. state where each plaintiff was domiciled. In cases where similarly situated plaintiffs were domiciled in states with different laws relating to wrongful death or intentional infliction of emotional distress, as discussed above, the result was a lack of uniformity.[217] After Congress created a federal cause of action for U.S. citizens in 2008, this problem went away; all claims brought by U.S. citizens, U.S. servicemembers, and U.S. contractors would henceforth be governed by a uniform federal law irrespective of where they were domiciled. When Senator Lautenberg described the FSIA amendments as having created a "uniform damages standard to all victims in a single case," this is clearly what he was referring to.[218]

Congress specifically chose, moreover, *not to extend the federal cause of action* to non-U.S. citizen family member plaintiffs. Going forward, these plaintiffs would have to rely on state and foreign law if they wanted to bring a claim in the DDC. It is therefore difficult to credit

---

214 *Id.* (quoting 154 CONG. REC. S54 (daily ed. Jan. 22, 2008) (statement of Sen. Frank Lautenberg)).

215 *Id.* (alteration in original) (quoting 154 CONG. REC. S55 (daily ed. Jan. 22, 2008) (statement of Sen. Frank Lautenberg)).

216 The U.S. Supreme Court has held that "legislative history is not the law." Azar v. Allina Health Servs., 139 S. Ct. 1804, 1814 (2019) (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1631 (2018)); *see also* Int'l Bhd. of Elec. Workers, Loc. Union No. 474 v. NLRB, 814 F.2d 697, 699–700 (D.C. Cir. 1987) ("Although legislative history may give meaning to ambiguous statutory provisions, courts have no authority to *enforce* alleged principles gleaned *solely* from legislative history that has no statutory reference point.").

217 *See supra* Section II.A.2.

218 154 CONG. REC. 500 (2008) (statement of Sen. Frank Lautenberg).

the court's assertion that Congress intended for claims brought by family members to be governed by the tort law of the District in the name of uniformity. Congress had an opportunity to create a uniform federal cause of action for this group of plaintiffs. It declined to do so. In light of this fact, neither of Senator Lautenberg's statements can be fairly read as a congressional directive to apply District law to claims brought by non-U.S. citizen family members.[219]

2. Seat of Government

The *Estate of Doe* court also reasoned that the tort law of the District should be applied in cases brought by non-U.S. citizen family members because "all of plaintiffs' claims derive from employment with a federal agency headquartered in the District of Columbia, the seat of the federal government."[220] The federal agency at issue in that case was the State Department, whose headquarters are located in the District.[221] The court took the position that the District's status as the seat of the federal government gave it an overwhelming interest in applying its tort law to claims asserted by non-U.S. citizen family members of individuals affiliated with the State Department.[222] In the court's telling, this interest was stronger than the interest of both the jurisdiction where the attack occurred and the jurisdiction where the plaintiffs were domiciled.[223]

There are three problems with this argument. The first is that, again, it is very difficult to square with the local D.C. choice-of-law rules that the court was ostensibly applying. Those rules, it will be recalled, direct the court first to consider (1) "the place where the injury occurred"; (2) "the place where the conduct causing the injury occurred"; (3) "the domicile, residence, nationality, place of incorporation and place of business of the parties"; and (4) "the place where the relationship is centered."[224] On the facts presented in *Estate of Doe*, not a single one of these factors points to the District of Columbia. The

219 One may also fairly question whether it is appropriate for the DDC to fashion a new choice-of-law rule emphasizing the need for "uniformity" based on a single statement by a single senator. *See* Valdes v. United States, 475 F.3d 1319, 1327 (D.C. Cir. 2007) (observing that general statements in legislative history offer a "weak basis for disregarding . . . statutory language").

220 *Est. of Doe*, 808 F. Supp. 2d at 23.

221 *See id.* at 8. This abrupt turn to territoriality represents a departure from the usual practice of the DDC. If it matters that the State Department is headquartered in the District, then it should also matter that virtually all of the other territorial factors point in the direction of Lebanon.

222 *See id.* at 23.

223 *See id.*

224 District of Columbia v. Coleman, 667 A.2d 811, 816 (D.C. 1995).

injury occurred in Lebanon.[225] The conduct causing the injury occurred in Lebanon.[226] None of the parties were domiciled in the District.[227] And the place where the relationship was centered was Lebanon. If one were to go looking for the jurisdiction with the most significant relationship to the parties and the events giving rise to the litigation, it would most certainly not be the District.[228]

The District's choice-of-law rules also call for the court to "evaluate the governmental policies underlying the applicable laws and to determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case under review."[229] The court's analysis suggests that the District had the superior interest in applying its law because the victim's employer—the State Department—was headquartered there. If this is truly the rule, however, then attacks on individuals employed by the military or the Central Intelligence Agency (CIA) would be governed by the laws of Virginia, as both of these entities are headquartered in Virginia.[230] This is not, however, what the DDC has done. In cases decided after *Estate of Doe*, that court has applied the law of the District of Columbia to cases where the United States was the target of the attack even when the injured party was employed by the military or the CIA.[231]

Second, the DDC's holding that the District has a compelling governmental interest in applying its tort law in these cases is belied by its own prior decisions. To quote from the DDC decision in *Holland v. Islamic Republic of Iran*, which was decided in 2005:

> [T]he District of Columbia can lay claim to very little interest: all plaintiffs (as well as the decedent) are from outside the District of

---

225 *See Est. of Doe*, 808 F. Supp. 2d at 6.

226 *See id.*

227 *See id.* at 22.

228 It is also relevant that none of the choice-of-law factors followed by local courts in the District direct the court to consider the place where the plaintiff's *employer* was headquartered at the time of the events giving rise to the claim.

229 Hercules & Co. v. Shama Rest. Corp., 566 A.2d 31, 41 (D.C. 1989) (quoting Kaiser-Georgetown Cmty. Health Plan, Inc. v. Stutsman, 491 A.2d 502, 509 (D.C. 1985)) (quote corrected).

230 *See* United States v. Hill, 473 F.3d 112, 114 (4th Cir. 2007) (observing that the CIA is headquartered in Virginia); Vorleamesi v. Esper, No. 19-1561, 2020 WL 13442698, at *1 (D.D.C. Feb. 12, 2020) (observing that the U.S. military is headquartered in Virginia).

231 *See* Fritz v. Islamic Republic of Iran, 320 F. Supp. 3d 48, 90–91 (D.D.C. 2018) (applying District law because the decedent was a U.S. serviceman who was kidnapped and killed while serving in the U.S. military in Iraq); W.A. v. Islamic Republic of Iran, 427 F. Supp. 3d 117, 124, 127, 139 (D.D.C. 2019) (applying District law because the decedent was an Iraqi contractor targeted due to the services he was performing for the U.S. Coalition Provisional Authority in Iraq); Abedini v. Gov't of the Islamic Republic of Iran, 422 F. Supp. 3d 118, 130, 132 (D.D.C. 2019) (applying District law because the Iranian government kidnapped and imprisoned man accused of being a spy for the CIA).

> Columbia, the attack occurred outside of the District of Columbia, and Iran, the MOIS, and the IRGC have no particular connection to the District of Columbia. While choosing the law of the District of Columbia would certainly allow for greater uniformity and ease in applying a single set of legal standards, these considerations—certainly relevant under the Restatement—are trumped when another location otherwise has "a significantly greater interest than does the District" in the cause-of-action.[232]

This analysis discounting the District's interest in applying its law to these cases was quite persuasive in 2005. It continues to be persuasive in 2026.

Third, and finally, the court's analysis is flawed in that it conflates the government of the District of Columbia with the government of the United States. The *government of the United States* clearly has an interest in applying federal law to cases involving attacks on U.S. persons and interests overseas. It is not at all clear, however, that the *government of the District of Columbia* has a similar interest. A terrorist attack on a U.S. embassy in Lebanon can reasonably be viewed as an attack on the U.S. government. That same attack, however, cannot reasonably be viewed as an attack on the government of the District of Columbia. Nevertheless, the court's analysis in *Estate of Doe* effectively treats these two entities as one and the same.

It is easy to understand why the judges on the DDC would prefer to apply a uniform body of familiar law to claims brought by non-U.S. citizen family members. If this is truly what they want to do, however, they should create a body of federal common law to govern these claims. They have refused to do so.[233] Instead, the DDC has created a sort of faux federal common law by holding that the local tort law of the District shall be applied to these cases even though the District has no geographical connection to the case and its government is distinct and separate from the U.S. government.[234] This rule does achieve a

---

232 Holland v. Islamic Republic of Iran, 496 F. Supp. 2d 1, 24 (D.D.C. 2005) (quoting Dammarell v. Islamic Republic of Iran, No. 01-2224, 2005 WL 756090, at *19 (D.D.C. Mar. 29, 2005)).

233 *See Dammarell*, 2005 WL 756090, at *28 ("The possibility that a cause of action might be based in the federal common law in the absence of section 1606 must give way to the instruction provided by Congress in section 1606. Accordingly, the Court does not find this to be one of the 'few and restricted' cases where it is appropriate to fashion federal common law as the rule of decision. The desire for uniformity alone is not a sufficient reason to create federal common law, no other unique federal interest is implicated, and there is no significant conflict between some important federal policy or interest and the application of state law.").

234 *See, e.g.*, Opati v. Republic of Sudan, 60 F. Supp. 3d 68, 76 (D.D.C. 2014) (stating that it would "apply District of Columbia law to the claims of any plaintiffs for whom jurisdiction is proper, but who lack a federal cause of action under the FSIA"), *aff'd in part, vacated in part sub nom.*, Owens v. Republic of Sudan, 864 F.3d 751 (D.C. Cir. 2017), *vacated*

measure of uniformity; in the years since *Estate of Doe* was decided, the DDC has applied the law of the District to at least fifteen cases where non-U.S. citizen family members sued foreign states to recover damages resulting from terrorist attacks occurring on foreign soil.[235] It is far from clear, however, that applying the local law of the District to tort claims brought by non-U.S. citizen plaintiffs relating to foreign terrorist attacks as a matter of D.C. choice-of-law rules is logically coherent.

C. The Law of the Domicile

In light of the foregoing discussion, it is tempting to assume that the rule adopted in *Dammarell*—that the court should always apply the law of the plaintiff's domicile—has been consigned to the dustbin of history. This assumption is mostly correct; it was rare for the DDC to apply the domicile rule to cases filed after 2008. There is, however, at least one recent case where the DDC dusted off the old rule and took it out for a spin—*Roberts v. Islamic Republic of Iran*, which was decided in 2022.[236]

The plaintiffs in *Roberts* were foreign nationals domiciled in England, Maryland, and South Africa.[237] Each was related to a separate U.S. government contractor who had been injured or killed by an explosive

sub nom., Opati v. Republic of Sudan, 140 S. Ct. 1601 (2020); Amduso v. Republic of Sudan, 61 F. Supp. 3d 42, 46 (D.D.C. 2014) ("[A]lthough those plaintiffs who are foreign national family members of victims lack a federal cause of action, they may nonetheless pursue claims under the laws of the District of Columbia."), *aff'd in part, vacated in part sub nom.*, *Owens*, 864 F.3d 751, *vacated sub nom.*, *Opati*, 140 S. Ct 1601.

235 *See, e.g.*, Owens v. Republic of Sudan, 826 F. Supp. 2d 128, 156 (D.D.C. 2011), *aff'd in part, vacated in part*, 864 F.3d 751, *vacated sub nom.*, *Opati*, 140 S. Ct. 1601; *Opati*, 60 F. Supp. 3d at 76; Wamai v. Republic of Sudan, 60 F. Supp. 3d 84, 90 (D.D.C. 2014), *aff'd in part, vacated in part sub nom.*, *Owens*, 864 F.3d 751, *vacated sub nom.*, *Opati*, 140 S. Ct. 1601; Onsongo v. Republic of Sudan, 60 F. Supp. 3d 144, 148 (D.D.C. 2014), *aff'd in part, vacated in part sub nom.*, *Owens*, 864 F.3d 751, *vacated sub nom.*, *Opati*, 140 S. Ct. 1601; *Amduso*, 61 F. Supp. 3d at 46; Mwila v. Islamic Republic of Iran, 33 F. Supp. 3d 36, 40–41 (D.D.C. 2014); *Fritz*, 320 F. Supp. 3d at 91; *W.A.*, 427 F. Supp. 3d at 139; *Abedini*, 422 F. Supp. 3d at 134; Barry v. Islamic Republic of Iran, 437 F. Supp. 3d 15, 47 (D.D.C. 2020); Maalouf v. Islamic Republic of Iran, 514 F. Supp. 3d 280, 287 (D.D.C. 2021); Hammons v. Islamic Republic of Iran, No. 19-2518, 2023 WL 5933340, at *25 (D.D.C. July 24, 2023); Abedinigalangashy v. Gov't of the Islamic Republic of Iran, No. 23-1105, 2024 WL 4227133, at *5 (D.D.C. Sep. 18, 2024); Est. of Fouty v. Syrian Arab Republic, 743 F. Supp. 3d 118, 167 (D.D.C. 2024); Maxwell v. Islamic Republic of Iran, No. 22-173, 2024 WL 1342775, at *16 (D.D.C. Mar. 29, 2024).

236 Roberts v. Islamic Republic of Iran, 581 F. Supp. 3d 152 (D.D.C. 2022), *vacated in part*, No. 20-cv-1227, 2023 WL 4351468 (D.D.C. July 5, 2023) *appeal dismissed*, No. 23-7106, 2025 WL 2737850 (D.C. Cir. Sep. 25, 2025).

237 *Roberts*, 2023 WL 4351468, at *1.

device set by terrorists operating in Iraq.[238] The plaintiffs sued Iran for intentional infliction of emotional distress and asked the court to apply the tort law of the District.[239] It refused:

> None of the plaintiffs were D.C. domiciliaries at the time of the . . . attacks. Nor did the . . . attacks occur in the District. Applying D.C. law to this dispute would not further the compensatory or conduct-regulating policies underlying D.C.'s law permitting recovery for [intentional infliction of emotional distress]. And doing so would cut against the Second Restatement's focus on preventing forum shopping, respecting interested states, and ensuring predictable results.[240]

The plaintiffs then requested that the court apply the law of Iraq because it was the place of the attack.[241] Again, the court refused. Instead, it concluded—in a throwback to *Dammarell*—that their claims should be governed by the law of each plaintiff's separate domicile:

> In cases brought under the terrorism exception to the FSIA, the plaintiffs' domicile often has a more significant relationship to the dispute than the law of the place of the conduct giving rise to the injury. Accordingly, in actions seeking compensation for injuries caused by terrorist attacks abroad, "[c]ourts in this District frequently apply the law of the plaintiffs' domicile to non-U.S. national family members' claims." While Iraq has some relevant relationship to the case, as the location where the U.S. contractors were attacked, its relationship cannot be said to be more significant than that of the [plaintiffs'] domicile countries, where they reside and where their injuries were felt.[242]

The court reached this conclusion notwithstanding the fact that the people injured by the explosive devices were U.S. contractors who were harmed in the course of their employment for the U.S. military. Under the logic of *Estate of Doe*, this should have been enough to trigger the application of the law of the District. Instead, the court reached all the way back to *Dammarell* to apply the law of the plaintiffs' respective domiciles even though the plaintiffs specifically requested that the court apply the law of the forum or the law of the place of the attack.

This case serves as a useful reminder that—with the notable exception of *Oveissi*—the judges on the DDC are not bound by much in the way of appellate precedent relating to choice-of-law rules in

238 *Roberts*, 581 F. Supp. 3d at 156.

239 *Id.*

240 *Id.* at 176.

241 *See Roberts*, 2023 WL 4351468, at *4.

242 *Id.* (emphasis omitted) (citations omitted) (quoting Farhat v. Islamic Republic of Iran, No. 19-cv-03631 (D.D.C. July 11, 2022) (order denying motion for default judgment)) (quote corrected).

terrorism cases. While most judges tend to fall in line with the reasoning adopted in *Estate of Doe*, they are not required to do so. One federal district court cannot compel another federal district court to follow its decisions.[243]

IV. IMPLICATIONS

It is rare for a single U.S. jurisdiction to issue more than fifty decisions in cases presenting complex choice-of-law issues on similar facts in the course of twenty years. The fact that the DDC has done precisely this presents a golden opportunity to test a number of theories developed by legal scholars relating to conflict of laws. The first addresses the difference between conflicts justice and material justice. The second relates to the tendency of complex choice-of-law frameworks to ossify into simple rules over time. The third focuses on the constitutional limitations on choice of law imposed by the Due Process Clauses of the Fifth and Fourteenth Amendments.

A. *Conflicts Justice vs. Material Justice*

One of the most enduring scholarly debates in conflict of laws is whether judges should seek to achieve conflicts justice or material justice in their choice-of-law decisions. Conflicts justice is realized when the court applies the law of the proper *jurisdiction*.[244] On this account, the role of the court is to identify the jurisdiction with the most appropriate relationship to the dispute and apply that jurisdiction's law.[245] The content of the law is irrelevant to a court concerned with conflicts justice. Material justice, on the other hand, is realized when the court applies the proper *law*.[246] On this account, the role of the court is to apply the law that will generate a result that is fair and equitable.[247] The

243 *See* Gardner, *supra* note 28, at 1622 (observing that a decision by one federal district court is "never binding" on another federal district court).

244 *See* Symeon C. Symeonides, *Material Justice and Conflicts Justice in Choice of Law*, *in* INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM: ESSAYS IN HONOR OF FRIEDRICH K. JUENGER 125, 126 (Patrick J. Borchers & Joachim Zekoll eds., 2001).

245 *See id.*

246 *See id.* at 127.

247 *See* Roxana Banu, *Conflicting Justice in Conflict of Laws*, 53 VAND. J. TRANSNAT'L L. 461, 470 (2020) ("Material-justice takes what could be called a 'transactional justice perspective' according to which claims to justice are considered from the point of view of plaintiffs and defendants in particular kinds of interactions. Conflicts-justice references a more 'systemic' standpoint, for example, that of refugees, debtors to transnational maintenance obligations, investors, travelers, states receiving immigrants, guest workers, etc.")

content of the law is clearly relevant to a court concerned with material justice.[248]

Under the traditional approach to choice-of-law utilized by U.S. courts in the years before the Conflicts Revolution, the courts consistently utilized the rhetoric of conflicts justice.[249] It was almost unheard-of for a judge to state outright that he was applying the laws of a particular jurisdiction to achieve a fair and equitable outcome. In practice, however, these courts frequently relied on so-called "escape devices" to achieve equitable results.[250] If the court believed that the equities favored the plaintiff, for example, it could choose to characterize an issue as substantive rather than procedural to engineer the selection of plaintiff-friendly law. Alternatively, the court could invoke public policy as a basis for refusing to apply a foreign law that would operate to the detriment of a local litigant. In these ways, the courts were sometimes able to achieve material justice even as they continued to formally profess their allegiance to conflicts justice.

One of the goals of the Conflicts Revolution was to bring these subterranean efforts to achieve material justice into the light.[251] When a court engages in governmental interest analysis, for example, it may conclude that a government has an interest in applying its law because doing so will benefit one of its domiciliaries.[252] In this respect, governmental interest analysis expressly invites courts to consider the content of the interested jurisdictions' laws in a way that is foreign to the traditional approach to conflict of laws.

---

248 *Id.* at 464; *see also* SYMEON C. SYMEONIDES, PRIVATE INTERNATIONAL LAW: IDEALISM, PRAGMATISM, ECLECTICISM 220 (2021) ("Thus, the classical conception of the choice-of-law process (statutory or judicial) as a blindfolded, value-neutral exercise is either wrong or outdated. During the last fifty years, we have moved from an era in which material justice was officially unmentionable, to an era in which it has become an important and, in some instances, co-equal goal to conflicts justice.").

249 *See* Simon v. Philip Morris Inc., 124 F. Supp. 2d 46, 63–67 (E.D.N.Y. 2000); Banu, *supra* note 247, at 483 (arguing that classical conflict of laws theory "encourages decision-makers to 'feed the data into the machine, using certain standard procedures, and to write down as his decision the result that comes out of the machine. He is not supposed to question the wisdom, or soundness, or justice of the result . . . .'" (quoting BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 138 (1963))).

250 *See* SYMEONIDES, *supra* note 248, at 176–77; *see also* Ralf Michaels, *Private International Law and the Question of Universal Values*, *in* PRIVATE INTERNATIONAL LAW: CONTEMPORARY CHALLENGES AND CONTINUING RELEVANCE 148, 169 (Franco Ferrari & Diego P. Fernández Arroyo eds., 2019) ("Both values [conflicts justice and material justice] are in tension, but both quite clearly exist. Indeed, no regime appears to exist on one extreme of the continuum. On the one hand, even in regimes that ostensibly subscribe entirely to [conflicts justice], judges slip in substantive considerations, even if they do so under the cloak of formal language.").

251 *See* Banu, *supra* note 247, at 482–83.

252 *Id.* at 510.

The terrorism cases filed in the DDC over the past twenty years offer a golden opportunity to see how one group of U.S. judges think about the relationship between conflicts justice and material justice. It is difficult to imagine a more sympathetic set of plaintiffs. These are individuals whose lives have been torn apart by suicide bombers, torturers, and hostage takers. It is similarly difficult to imagine a less sympathetic set of defendants. These are sovereign states who have provided material support to groups that launch attacks on civilians in hotels, buses, and restaurants. Even more damning, these defendants typically do not even appear to defend themselves. If ever there was a set of cases that cried out for material justice, these are those cases.

It is surprising, therefore, that the judges in the DDC have consistently refused to analyze choice-of-law issues through a material justice lens. Their opinions invariably emphasize the importance of selecting the proper *jurisdiction* rather than selecting the proper *law*. In *Dammarell*, the court held that the claims would be governed by the laws of the plaintiff's domicile regardless of whether that law helped or hurt the plaintiff.[253] In *Estate of Doe*, the court held that the claims would be governed by the laws of the District of Columbia even though applying that law could potentially benefit defendants alleged to have provided aid and comfort to terrorists.[254] In neither case was the content of the chosen law deemed relevant. The court was focused solely and exclusively on finding the law of the proper jurisdiction.

Indeed, the decision to apply the law of the District in *Estate of Doe* was actually something of a boon to state sponsors of terrorism. The D.C. wrongful death statute clearly states that it only applies when the injury leading to death occurs "within the limits of the District."[255] If a death occurred outside the District—in Lebanon, for example, or Israel or Iraq—then the statute does not give rise to a cause of action. In holding that wrongful death claims brought by family members against state sponsors of terrorism were governed by the laws of the District, the DDC made it all but impossible for these claims to succeed.

The common law of the District relating to claims for the intentional infliction of emotional distress (IIED) is similarly problematic from the perspective of the victims. That law ordinarily requires that a plaintiff be physically present at the place of the injury to bring an IIED claim.[256] The purpose of this rule is to "shield[] defendants from unwarranted liability . . . to ensure that compensation is awarded only to victims with genuine claims of severe emotional distress, and [to]

253 Dammarell v. Islamic Republic of Iran, No. 01-2224, 2005 WL 756090, at *20–21 (D.D.C. Mar. 29, 2005).

254 *See* Est. of Doe v. Islamic Republic of Iran, 808 F. Supp. 2d 1, 23 (D.D.C. 2011).

255 D.C. CODE § 16-2701(a) (2026).

256 *See* Republic of Sudan v. Owens, 194 A.3d 38, 41 (D.C. 2018).

provide[] a judicially manageable standard that protects courts from a flood of IIED claims."[257] In the overwhelming majority of IIED claims brought by family members against state sponsors of terrorism, the plaintiff was not present at the site of the terrorist attack that killed or injured their loved one. As a matter of D.C. tort law, therefore, these claims would ordinarily be barred.

In 2018, however, the D.C. Court of Appeals carved out an exception to this rule for terrorism cases. In response to a question certified to it by the D.C. Circuit, it held that the "presence" element in an IIED claim did not apply when the defendant was a state sponsor of terrorism.[258] To hold otherwise, the court reasoned, would "do little more than shield culpable defendants from liability and deny relief to deserving plaintiffs."[259] This decision clearly benefitted the plaintiffs in these cases. It is noteworthy, however, that it was not issued until seven years *after* the DDC first adopted a choice-of-law rule calling for the application of D.C. law in *Estate of Doe.* In adopting this rule, the DDC was seemingly indifferent to the fact that the presence requirement could lead to the failure of every IIED claim brought by plaintiffs suing state sponsors of terrorism.

There is nothing inherently wrong with pursuing conflicts justice at the expense of material justice. It is, however, important to ensure that the choice-of-law rules created to further the goal of conflicts justice rest on a sound foundation. This cannot always be said for the choice-of-law rules invoked by the DDC in terrorism cases. In cases filed prior to 2008, the court typically applied the law of the plaintiff's domicile. It justified this rule by pointing to (distinguishable) mass tort cases arising out of airplane crashes and the "unique interest" of the United States in applying the law of individual U.S. states (rather than federal law) to terrorism cases. In cases filed after 2008, the court frequently applied the tort law of the District by invoking a (dubious) congressional mandate for uniformity and the fact that the District (defined to include Northern Virginia) was the seat of the federal government.

There is, moreover, no question that some of the rules developed by the DDC in its pursuit of conflicts justice have made it impossible for some plaintiffs to obtain a recovery. In *Roberts v. Islamic Republic of Iran,* for example, the plaintiffs asked the court to apply the law of the District.[260] It refused. The plaintiffs then asked it to apply the law of

257 *Id.* at 42.

258 *Id.* at 45.

259 *Id.* at 44.

260 Roberts v. Islamic Republic of Iran, 581 F. Supp. 3d 152, 156 (D.D.C. 2022), *vacated in part,* No. 20-cv-1227, 2023 WL 4351468 (D.D.C. July 5, 2023), *appeal dismissed,* No. 23-7106, 2025 WL 2737850 (D.C. Cir. Sep. 25, 2025).

Iraq. It again refused. The court ultimately held that the plaintiffs' claims were governed by the laws of their respective domiciles and instructed them to file additional evidence on the content of that law.[261] After this evidence was submitted, the court concluded that the plaintiffs from the United Kingdom had failed to establish that they had a cause of action for intentional infliction of emotional distress under English law.[262] It held that that law—like the law of the District prior to 2018—required the plaintiff to have been in "close proximity in space and time to the incident or its immediate aftermath."[263] When the court held that the plaintiffs' claims were governed by the law of England, in other words, it knew nothing about the content of that law. When English law later proved favorable to the defendants, the plaintiffs' claims were dismissed.

To be sure, plaintiffs have won most of the terrorism cases they have filed in the DDC.[264] That court has granted dozens of default judgments and awarded billions in damages.[265] Nevertheless, the available evidence provides little reason to think that these victories are the product of a court committed achieving material justice via its choice-of-law decisions.

B. *The Mutability of Modern Choice-of-Law Rules*

In the years before the Conflicts Revolution, the choice-of-law rules applied by U.S. courts were relatively simple. A breach of contract claim was governed by the law of the place where the contract was made. A tort claim was governed by the law of the place of the injury. A claim relating to family law was governed by the place of the domicile. In the mid-twentieth century, however, conflicts scholars in the United States grew disenchanted with these rules. They urged judges to adopt one of several new approaches to choice of law. The judges responded. In the 1960s and 1970s, a majority of states set aside the traditional rules in favor of one of the modern approaches.

While the modern approaches differ from one another in many respects, their proponents all believed that the traditional approach was too simplistic. These proponents argued that complex choice-of-law questions could only be properly resolved by applying more nuanced and complex choice-of-law rules. Governmental interest analysis called for courts to ascertain which jurisdictions had an interest in applying their laws. The better law approach called upon courts to

261 *Id.* at 176.

262 *Roberts*, 2023 WL 4351468, at *9.

263 *Id.* at *7.

264 *See supra* notes 234–35 and accompanying text.

265 *See supra* note 235 (collecting cases).

balance five different factors to determine which law to apply. The approach set forth in the *Restatement (Second) of Conflict of Laws* identified no fewer than ten different factors for the courts to consider. Each of these modern approaches rejected the simplicity of the traditional rule—which was based on a single territorial connection that was usually easy to ascertain—in favor of intricate frameworks that sought to answer the question of what law should govern events connected to more than one jurisdiction.

The problem with intricate frameworks, of course, is that they are intricate. They require courts to exercise significant time and attention on a threshold issue—choice of law—that has been described as the "most difficult and most confused of all branches of the law."[266] In an effort to streamline this analysis, courts in states that follow one of the modern approaches have developed heuristics and shortcuts. In New York, the Court of Appeals developed the *Neumeier* rules to guide lower courts struggling to apply that state's version of interest analysis.[267] In Louisiana, the courts have developed rules of thumb that they apply to choice-of-law issues in insurance cases.[268] Even the *Restatement (Second) of Conflict of Laws* lists presumptive rules—which are frequently ignored by the courts—that identify the law to be generally applied depending on the type of claim.[269] The effect of these rules is to sacrifice some of the complexity and nuance associated with the modern approaches in favor of the predictability and simplicity associated with the more traditional approach.[270]

The terrorism cases represent yet another example of a complex modern approach to choice of law devolving into a simple rule. In most of these cases, the court duly recites the usual incantations as to how the D.C. choice-of-law rules are supposed to work.[271] After this task is done, the court will apply a simple rule to determine the governing law.[272] In the cases decided between 2004 and 2008, the following rule

266 Max Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMPAR. L. 632, 655 (1962) (reviewing David F. Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts*, *in* TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA (Kurt Nadelmann, Arthur T. von Mehren & John N. Hazard eds., 1961)).

267 Neumeier v. Kuehner, 286 N.E.2d 454, 457–58 (N.Y. 1972).

268 *See* John F. Coyle, William S. Dodge & Aaron D. Simowitz, *Choice of Law in the American Courts in 2021: Thirty-Fifth Annual Survey*, 70 AM. J. COMPAR. L. 318, 330 (2022) ("The statute stating the general choice-of-law rules for contracts lists a lengthy multi-factor balancing test that requires the court to weigh a number of considerations to determine the governing law. In practice, the Louisiana courts seem to have developed shorthand rules that are easier to apply.").

269 *See* RESTATEMENT (SECOND) OF CONFLICT OF L. §§ 146–55, 189–97 (A.L.I. 1971).

270 *See, e.g.*, *Neumeier*, 286 N.E.2d at 457.

271 *See supra* notes 234–35 and accompanying text.

272 *See supra* notes 234–35 and accompanying text.

was followed in the overwhelming majority of cases: *Apply the law of the U.S. state in which the plaintiff is domiciled unless the attack did not target the United States, in which case apply the law of the District (early cases) or the law of the place of the attack (later cases).*

After the FSIA amendments were enacted in 2008, the DDC developed a different choice-of-law rule to ascertain the law that governed claims brought by non-U.S. citizen family members. The following rule is followed in the overwhelming majority of cases: *Apply the law of the District unless the attack did not target the United States, in which case apply the law of the place of the attack.* There are only a handful of cases where the DDC did not adhere to these rules.[273]

This state of affairs is interesting because these rules bear little resemblance to the modern approach to choice of law ostensibly being applied by the courts in the District. Indeed, they more closely resemble the territorial rules that were rejected by most U.S. courts in the 1960s and 1970s.[274] They take a single fact—the place of the attack, for example, or the place of the plaintiff's domicile—and deem that fact conclusive for choice-of-law purposes.

Although inconsistent with modern approaches to choice of law, this process of rule-ification is consistent with notions of precedent. Many of the terrorism cases present very similar facts, so much so that it would be incongruous if judges sitting in the DDC were to reach radically different outcomes in their choice-of-law analyses when deciding them. This reality casts the modern approaches to choice of law in a new light. It seems clear that the *first* case that comes before a court that has adopted a modern approach to choice of law will be exhaustively analyzed. This is exactly what happened in *Dammarell* and *Estate of Doe*.[275] When the *second* case with similar facts comes along, however, it will typically be resolved in a manner consistent with the first case. The *third* case will typically be resolved in a manner consistent with prior cases. And so on and so forth. Over time, these decisions will inevitably cohere into something approaching a rule. And since it will generally be easier for courts and litigants to apply that rule than to reason from first principles, that rule will grow in prominence until it supplants the (complex, nuanced) modern approach that the court is ostensibly following.

In the final analysis, therefore, the terrorism cases offer two important insights into the mutability (or immutability) of modern approaches to choice of law. First, they make clear that these approaches

273 *See, e.g.*, Cohen v. Islamic Republic of Iran, 238 F. Supp. 3d 71, 86 (D.D.C. 2017).

274 *See* HAY ET AL., *supra* note 20, § 2.16–.17.

275 *See* Dammarell v. Islamic Republic of Iran, No. 01-2224, 2005 WL 756090, at *17–32 (D.D.C. Mar. 29, 2005); Est. of Doe v. Islamic Republic of Iran, 808 F. Supp. 2d 1, 20–23 (D.D.C. 2011).

represent a starting point rather than a destination. As time passes and cases are decided, these approaches will ossify into rules. Second, they highlight the fact that the modern approaches are less flexible than they may appear at first glance. After a few cases are decided, states following these approaches may find themselves applying rules that bear a strong resemblance to the bad old days that preceded the Conflicts Revolution.

C. Due Process

When I write exams for my Conflict of Laws class, I always include a fact pattern where the court applies forum law even though the parties and the dispute have absolutely no connection to the forum. The Supreme Court has long held that the Due Process Clause of the Fourteenth Amendment prohibits U.S. states from applying forum law to cases with which they have no connection.[276] Even though I devote an entire class day to this issue, and even though I always warn my students that I'm going to test them on it, a majority of test takers consistently fail to spot it. They are so focused on the mechanics of the choice-of-law analysis that they forget to take a step back to ask themselves whether applying the law of the forum is permitted as a matter of due process.

In applying the law of the District to many of the cases filed after 2009, the DDC has fallen into precisely the same trap. The court has been so focused on the choice-of-law analysis—the constructive blending, the governmental interests, the most significant relationship, the place of the injury, the domicile of the plaintiff, etc.—that it has failed to ask whether applying the tort law of the District of Columbia is constitutionally permitted.

Constitutional limits on choice of law have a long history. In 1930, the Supreme Court held that due process limits the ability of states to apply their law to disputes with no connection to the state in *Home Insurance Company v. Dick*.[277] The question presented in that case was whether a Texas statute invalidating certain contract provisions could be constitutionally applied to an agreement made in Mexico.[278] In holding that it could not, the Court noted the lack of any link between Texas and the events giving rise to the litigation.[279] It stated that "nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts

276 *See* Home Ins. Co. v. Dick, 281 U.S. 397, 407–08 (1930).

277 *Id.*; *see also* John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 182–83 (1936).

278 *See Dick*, 281 U.S. at 408.

279 *Id.*

relating to the making of the policy were done in Mexico."[280] In light of this fact, the Court held that the Texas statute could not be applied to invalidate the contract provision *even though* the plaintiff to whom the agreement had been assigned was a U.S. citizen and a permanent resident of Texas:

> The fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon . . . violates the guaranty against deprivation of property without due process of law.[281]

If the events giving rise to a lawsuit have no connection with a state, the Court held, that state may not apply its substantive law even if the plaintiff is a permanent resident of that state.

In 1980, the Court reiterated this constraint in *Allstate Insurance Company v. Hague*.[282] "In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair," the plurality opinion stated, "the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction."[283] The purpose of this rule, the plurality explained, was to protect defendants against "unfair surprise or frustration of legitimate expectations" by having to litigate under the law of a state that could never have been foreseen.[284] The plurality further stated that "if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional."[285] Although the plurality ultimately affirmed the application of Minnesota law in *Hague* on the facts presented, nothing in that decision can be read to undermine the Court's holding in *Dick* that the nominal residence of a litigant—standing alone—is not enough to permit a state to apply its law.[286]

There are, to be sure, several reasons to be cautious before applying the reasoning in these decisions to the terrorism cases in the DDC.

---

280 *Id.*

281 *Id.*

282 *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) (plurality opinion).

283 *Id.*

284 *Id.* at 318 n.24.

285 *Id.* at 310–11.

286 *Id.* at 320; *see Dick*, 281 U.S. at 408; *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) ("There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control. . . . Kansas 'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.'" (quoting *Dick*, 281 U.S. at 410)).

First, each of these decisions was based on the Due Process Clause of the Fourteenth Amendment.[287] The Fourteenth Amendment does not apply to the District because it is not a state. The District is instead governed by the Due Process Clause of the Fifth Amendment.[288] The Supreme Court has never addressed the issue of whether the Fifth Amendment imposes limitations on choice of law that are similar to the Fourteenth Amendment.[289] Second, there is scholarly disagreement as to whether foreign states are "persons" entitled to due process protections under the Fifth and Fourteenth Amendments.[290] If foreign states are not entitled to these protections, then there is no due process problem with applying the law of the District to cases with no connection to the District. Third, it is reasonable to ask whether applying the law of the District to a case against Iran would constitute an "unfair surprise" the third or fourth or twentieth time that it happens.

However, if one assumes that the Fifth Amendment limits the ability of the District to apply forum law to events outside of the District, that foreign states may assert rights under that Amendment, and that applying the law of the District would frustrate the expectations of foreign states in terrorism cases, then many of the choice-of-law decisions in which the DDC has applied forum law are arguably unconstitutional.[291] In the first wave of cases, it will be recalled, the court applied D.C. law in cases such as *Bodoff*, *Haim*, and *Ben-Rafael* because it concluded that the plaintiffs needed to be assigned a U.S. domicile to further the nation's "unique interest" in applying its law to terrorism cases.[292] In applying the law of the District to cases with absolutely no connection to the District, the court may have run afoul of the Due Process Clause of the Fifth Amendment.

These constitutional problems were also presented in a number of cases in the years after *Estate of Doe*. In that case, it will be recalled, the DDC applied D.C. law to a case with only the most tangential connection to the District by invoking the need for uniformity and the fact

287 *Hague*, 449 U.S. at 320; *Dick*, 281 U.S. at 408; *Shutts*, 472 U.S. at 797.

288 *See* Neild v. District of Columbia, 110 F.2d 246, 256–57 (D.C. Cir. 1940) ("The Fourteenth Amendment is not applicable in the District of Columbia." *Id.* at 256.).

289 *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 403 reporters' note 4 (A.L.I. 2018). In *Fuld v. Palestine Liberation Org.*, the Supreme Court held that "the Due Process Clause of the Fifth Amendment necessarily permits a more flexible jurisdictional inquiry" than the Fourteenth Amendment in personal jurisdiction cases. 145 S. Ct. 2090, 2105 (2025).

290 *See* Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633, 635–36 (2019).

291 *See Dick*, 281 U.S. at 408.

292 Bodoff v. Islamic Republic of Iran, 424 F. Supp. 2d 74, 83 (D.D.C. 2006); Haim v. Islamic Republic of Iran, 425 F. Supp. 2d 56, 68 (D.D.C. 2006); Ben-Rafael v. Islamic Republic of Iran, 540 F. Supp. 2d 39, 54 (D.D.C. 2008).

that the District is the seat of the federal government.[293] As a matter of U.S. constitutional law, courts cannot apply forum law to disputes that lack a meaningful connection to the parties and the dispute.[294] If the defendant (Iran) had chosen to appear to defend any of these cases, then its lawyers almost certainly would have argued that applying the law of the District violated due process. Since each case was decided in the context of a motion for a default judgment, however, the constitutional issue was never raised. Indeed, it seems unlikely that the issue will ever be raised so long as the defendants in these cases continue to decline to enter an appearance.

V. WAIVING CHOICE OF LAW

Up to this point, this Article has accepted a premise implicit in every choice-of-law decision rendered by the DDC since 2004. That is the premise that it is necessary for the court to perform a choice-of-law analysis when the defendant fails to appear. In this final Part, the Article questions that premise. In so doing, it opens the door to an alternative rationale—one grounded in notions of waiver—for applying the law of the District.

Although choice-of-law doctrine offers the litigants the option of arguing the case under the law of a different jurisdiction, there is nothing in the law that requires them to exercise that option.[295] Indeed, the issue is often waived. In *Gold-Flex Elastic Ltd. v. Exquisite Form Industries, Inc.*, for example, a U.S. company purchased goods from a company based in Hong Kong.[296] When the buyer failed to pay on time, the seller sued in federal court in Manhattan.[297] Neither party briefed the court

293 Est. of Doe v. Islamic Republic of Iran, 808 F. Supp. 2d 1, 23 (D.D.C. 2011).

294 Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) (plurality opinion).

295 *See* Peter Hay, *The Use and Determination of Foreign Law in Civil Litigation in the United States*, 62 AM. J. COMPAR. L. SUPP. 213, 215 (2014) ("Foreign law . . . must be invoked—raised by at least one of the parties—otherwise its possible applicability is not in issue and the case will proceed on the basis of forum law."); SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 90–91 (2008) ("[W]hen neither party raises the question of foreign law or provides proof of its content, most American courts will adjudicate the case under the law of the forum, even though under the forum's choice-of-law rules the case would be governed by foreign law. . . . Here the fiction is that the parties tacitly acquiesce to the application of forum law."); Christopher A. Whytock, *Determining the Content and Meaning of Foreign Law: The Approach of the New Third Restatement of Conflict of Laws*, 39 EMORY INT'L L. REV. 1077, 1088 (2025) ("In general, if neither party gives the required reasonable written notice of foreign law, the court will apply forum law.").

296 Gold-Flex Elastic Ltd. v. Exquisite Form Indus., Inc., No. 95-cv-3881, 1995 WL 764191, at *1–2 (S.D.N.Y. Dec. 28, 1995).

297 *See id.*

on choice of law.[298] Against this backdrop, the court made the following observation:

> Under New York choice-of-law rules, it is likely that foreign law would determine the nature of the parties' obligations. Hong Kong has a strong interest in this dispute as plaintiff is incorporated in Hong Kong and plaintiff manufactures its goods in Hong Kong and ships its goods from Hong Kong. The Philippines also have a strong interest in this dispute as the elastic webbing was delivered, inspected, and manufactured [in the Philippines] . . . .
>
> Neither side has called for an application of the law of Hong Kong or of the Philippines. . . . The parties' silence on the applicability and substance of foreign law constitutes a waiver of the issue.[299]

The notion that choice-of-law is a waivable issue has been expressly endorsed by the D.C. Circuit.[300] In *In re Korean Air Lines Disaster of September 1, 1983*, for example, that court observed that "[u]nlike jurisdictional issues, courts need not address choice of law questions sua sponte."[301] In

---

298 *Id.* at *3.

299 *Id.* at *2–3.

300 *See* 9A WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 2443 (3d ed. 2008) ("If a party fails to give sufficient notice, the court is not obligated to apply the relevant foreign law and ordinarily will apply the forum's law, either by assuming that foreign law has been waived or that foreign and forum law are the same."); Vargison v. Paula's Choice, LLC, No. 24-cv-00342, 2025 WL 346197, at *4 (W.D. Wash. Jan. 30, 2025) (describing *Burnside* as "establishing 'several principles that serve as a useful starting point in choice of law analysis,' including that 'the normal expectation should be that the rule of decision will be supplied by the domestic law as a matter of course'; that '[t]he court should ordinarily depart from this procedure only at the instance of a party wishing to obtain the advantage of a foreign law'; and that '[t]he law of the forum . . . should normally be displaced only by the interested party's timely invocation of the foreign law'" (alterations in original) (quoting Burnside v. Simpson Paper Co., 864 P.2d 937, 940 (Wash. 1994))).

301 *In re* Korean Air Lines Disaster of Sep. 1, 1983, 932 F.2d 1475, 1495 (D.C. Cir. 1991). This position represents the majority view among courts in the United States. *See* Wall Recycling, LLC v. 3TEK Glob., LLC, No. 22-1271, 2024 WL 3594697, at *4 n.2 (4th Cir. July 31, 2024) (observing that "choice of law is waivable, not jurisdictional" (quoting Weiner v. AXA Equitable Life Ins., 58 F.4th 774, 779 (4th Cir. 2023))); Kearl v. Rausser, 293 F. App'x 592, 599 n.2 (10th Cir. 2008) ("[U]nlike jurisdictional issues, courts need not address choice of law issues *sua sponte*." (quoting Flying J Inc. v. Comdata Network, Inc., 405 F.3d 821, 831 n.4 (10th Cir. 2005))); GBJ Corp. v. E. Ohio Paving Co., 139 F.3d 1080, 1085 (6th Cir. 1998) (same); Gonzalez v. Volvo of Am. Corp., 752 F.2d 295, 299 (7th Cir. 1985) ("Where parties fail to raise a possible conflict of . . . law[], the better rule . . . is that the substantive law of the forum controls."); Tobin v. AMR Corp., 637 F. Supp. 2d 406, 412 (N.D. Tex. 2009) ("The court need not *sua sponte* analyze choice of law issues unless raised by the parties."); Marcella v. Glowacki, 223 N.Y.S.3d 370, 374 (App. Div. 2024) (rejecting the argument that a court is required to "undertake a choice of law analysis on a sua sponte basis"). This is also the position adopted by the DDC in some non-terrorism cases. *See* Parker v. John Moriarty & Assocs. of Va., LLC, 332 F. Supp. 3d 220, 234 n.10 (D.D.C. 2018) ("None of the parties has raised a choice-of-law issue in briefing any of the pending motions.

Perry Capital LLC v. Mnuchin, it stated expressly that "parties may waive choice-of-law issues."[302]

When the litigants do not raise choice-of-law as an issue, U.S. courts have consistently held that it is appropriate to apply the law of the forum. In *Baker v. Booz Allen Hamilton, Inc.*, the Fourth Circuit recognized that "the party claiming foreign law applies carries both the burden of raising the issue that foreign law may apply in an action and the burden of proving foreign law to enable the district court to apply it in a particular case" and observed that "[w]here a party fails to satisfy either burden, the district court should apply the forum state's law."[303] In *Malin International Ship Repair and Drydock, Inc. v. Oceanografia, S.A. de C.V.*, the Fifth Circuit held that "[i]n the absence of sufficient proof to establish with reasonable certainty the substance of the foreign principles of law, the modern view is that the law of the forum should be applied."[304] Unless a litigant affirmatively *asks* the court to apply foreign law and presents *evidence* relating to the content of that law to the court, the court is under no obligation to do anything other than apply the law of the forum.

Nevertheless, the DDC has consistently chosen to address choice-of-law issues when the state sponsors of terrorism fail to appear.[305] One

---

Because litigants may waive choice-of-law issues, the Court need not challenge their evident assumption that District of Columbia law applies."). *See generally* Michael T. Morley, *Beyond the Elements:* Erie *and the Standards for Preliminary and Permanent Injunctions*, 52 AKRON L. REV. 457, 491 n.206 (2018) ("Courts generally do not raise choice of law issues *sua sponte* when the parties do not dispute the applicable law.").

302 Perry Cap. LLC v. Mnuchin, 848 F.3d 1072, 1106 n.24 (D.C. Cir.) (quoting Williams v. BASF Catalysts LLC, 765 F.3d 306, 316 (3d Cir. 2014)), *superseded by*, 864 F.3d 591 (D.C. Cir. 2017); *see also* CSX Transp., Inc. v. Com. Union Ins. Co., 82 F.3d 478, 482–83 (D.C. Cir. 1996).

303 Baker v. Booz Allen Hamilton, Inc., 358 F. App'x 476, 481 (4th Cir. 2009) (per curiam).

304 Malin Int'l Ship Repair & Drydock, Inc. v. Oceanografia, S.A. de C.V., 817 F.3d 241, 247 (5th Cir. 2016) (alteration in original); *see also* RESTATEMENT (SECOND) OF CONFLICT OF L. § 136 cmt. f (A.L.I. 1971) ("[T]he party who claims that the foreign law is different from the local law of the forum has the burden of establishing the content of the foreign law."); Sun Life Assurance Co. of Canada v. Imperial Premium Fin., LLC, 904 F.3d 1197, 1209 (11th Cir. 2018) ("Sun Life is the party now seeking the application of non-forum law, yet it repeatedly abdicated its responsibility to proffer the information necessary for the choice-of-law analysis to take place. This is not in accord with the steps we require to raise non-forum law before a district court.").

305 *See supra* Parts II & III. Other federal courts have similarly insisted on performing a choice-of-law analysis before granting a default judgment. *See, e.g.*, Leprino Foods Co. v. JND Thomas Co., No. 16-cv-01181, 2017 WL 128502, at *6 (E.D. Cal. Jan. 12, 2017) (collecting cases), *report and recommendation adopted in part*, No. 16-cv-01181, 2017 WL 432480 (E.D. Cal. Feb. 1, 2017). This practice is, needless to say, difficult to reconcile with the notion that courts should generally apply the law of the forum unless one of the litigants specifically *requests* that it apply the law of another jurisdiction and thereafter comes forward with

could argue that such an analysis is required by the language in the FSIA stating that a court may only grant a default judgment against a foreign state if the plaintiff first "establishes his claim or right to relief by evidence satisfactory to the court."[306] But there is nothing in this language that requires the court to perform a choice-of-law analysis. Indeed, the fact that the statute uses the word "evidence" suggests that Congress was merely talking about *factual* evidence. The statute requires a plaintiff bringing a claim to present evidence establishing a right to relief for that claim. So long as this requirement is satisfied, there is nothing in the FSIA that requires the court to engage with choice-of-law issues before granting the plaintiff's motion for a default judgment.[307] That issue is left entirely to the court's discretion.

The fact that the DDC invariably exercises its discretion to consider choice-of-law issues in terrorism cases where the defendant fails to appear is not inherently objectionable. There is, after all, nothing that *prohibits* a court from considering choice of law if it so chooses.[308] Indeed, a court's decision to address choice of law sua sponte may at times be normatively desirable. If choice-of-law rules seek to achieve specific goals and policies, as Christopher Whytock has argued, then ignoring these rules may serve to undermine those goals and policies.[309] The problem is not, therefore, with the general principle. It is with the application of the principle in terrorism cases. Over the past decade, the DDC has invoked a variety of dubious arguments to hold that the law of the District should be applied in the vast majority of cases brought by non-U.S. citizen family members against state sponsors of terrorism. It has, moreover, rendered a number of decisions whose outcomes are extremely difficult to reconcile with the choice-of-law rules articulated by the D.C. Court of Appeals. Against this

materials relating to the content of that law. *See* Scharnikow v. Siracuse, No. 15-cv-6991, 2016 WL 7480360, at *3 (E.D.N.Y. Dec. 6, 2016) ("Here, as Scharnikow makes no choice-of-law argument but cites to New York cases in his brief, and as Siracuse has proffered no argument to the contrary by virtue of his default, the Court recommends that New York law be applied to this action."), *report and recommendation adopted*, No. 15-6991, 2016 WL 7480364 (E.D.N.Y. Dec. 29, 2016).

306 28 U.S.C. § 1608(e) (2018).

307 *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 463 (A.L.I. 2018) (discussing requirements for default judgments against foreign sovereigns and making no mention of choice of law); H.R. REP. NO. 94-1487, at 26 (1976) (stating that § 1608(e) establishes "the same requirement applicable to default judgments against the U.S. Government under rule 55(e), F.R. Civ. P.").

308 *See* FED. R. CIV. P. 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.").

309 Whytock, *supra* note 295, at 1090 ("There are good reasons for a court to consider independently raising a choice-of-law issue. Although states' choice-of-law rules are diverse, they are all based on particular goals and policies.").

backdrop, one might reasonably go in search of a more compelling rationale for applying D.C. law in these cases.

Waiver offers a better rationale. If one accepts that a defendant waives the choice-of-law argument when it fails to appear, then applying District law makes perfect sense.[310] This outcome is not attributable to the fact the United States has a "unique interest" in applying its law. Nor is it attributable to the need for "uniformity" or the fact that the District is the "seat" of the U.S. government. Applying the law of the District is the correct result because choice of law is a waivable issue, and the defendant waives it by failing to appear.

If adopted, this argument would lead to the application of a body of law with which the DDC is familiar and which it is already applying in many of its terrorism cases. It would also eliminate the due process problems associated with applying forum law because due process is also a waivable right.[311] In light of these many advantages, it is curious that the waiver argument has achieved virtually no traction in the DDC over the past twenty years. It is possible that the court has assumed (incorrectly) that the FSIA requires it to consider choice of law. It is also possible that *Dammarell* (unwittingly) established a precedent of engaging with choice-of-law issues that has never been revisited. Whatever the precise reason, waiver presents a golden opportunity for the DDC to adopt a better justification for applying the law of the District in these cases.

CONCLUSION

Over the past twenty years, federal judges sitting in the District of Columbia have repeatedly been asked to ascertain the governing law in civil cases brought against state sponsors of terrorism. This is no easy task. The applicable choice-of-law rules are complex. The defendants rarely appear. There is limited guidance from the appellate courts. The workings of the Foreign Sovereign Immunities Act are byzantine. And the District occupies a unique place in the constitutional system. The facts seem to have been borrowed from a fiendishly complicated Conflict of Laws exam. These are hard cases.

The mere fact that the cases are challenging, however, cannot explain the haphazard reasoning that characterizes much of the current jurisprudence. The portrait painted in this Article—the first

310 *See, e.g.*, Quinn v. Kreindler & Kreindler, No. 21-1824, 2023 WL 2351734, at *5 n.3 (D.D.C. Mar. 3, 2023) (applying forum law in non-terrorism case when the choice-of-law issue was deemed waived).

311 *See supra* Part III; John Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 53 ARIZ. STATE L.J. 65, 76–77 (2021) (discussing waiver of due process rights in the personal jurisdiction context).

comprehensive analysis of choice-of-law decisions in terrorism cases decided by U.S. courts—is one of inconsistent and arbitrary outcomes. Some courts apply the law of the domicile. Others apply the law of the place of the attack. Still others apply the law of the forum. There is often a disconnect between the outcome reached and the choice-of-law rules ostensibly being applied. Similarly situated plaintiffs are treated differently. Uniformity is not important . . . until it is. The place where a government agency is headquartered is important . . . until it is not. Ambiguous statements made by a lone senator are invoked to justify the adoption of an entirely new choice-of-law rule not referenced in the legislative text. Due process limitations on choice of law are glossed over or ignored.

However interesting these cases may be to choice-of-law scholars—and there is no question that they are fascinating—the simple fact of the matter is that there is no requirement that the court engage with the choice-of-law issue in the first place. In the overwhelming majority of cases against state sponsors of terrorism, the defendant fails to appear. In failing to appear, it waives its right to ask the court to apply the law of a jurisdiction other than the forum. Since courts are not obliged to undertake a choice-of-law analysis on their own initiative, the better course of action in these situations is to simply apply the law of the District and call it a day. Until this day arrives, however, scholars interested in conflict of laws and private international law would do well to study these cases to better understand how U.S. judges think about choice of law in the twenty-first century.