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TOWARD A PRAGMATIC SOLUTION OF CHOICE-OF-LAW PROBLEMS—AT THE INTERFACE OF SUBSTANCE AND PROCEDURE

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Choice-of-law theory has not been characterized by a sense of flexibility and accommodation. The rigidity of *First Restatement* territorialism¹ was followed by a doctrine of interest analysis² which was equally rigid in its approach.³ The efforts of the *Second Restatement*⁴

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¹ RESTATEMENT OF CONFLICT OF LAWS (1934); J. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945). See generally *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209 (1922); *Forbes v. Forbes*, 226 Wis. 477, 277 N.W. 112 (1938); *Alabama Great S. R.R. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892).

² B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). See generally Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973); *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964). See also Baade, *Judge Keating and the Conflict of Laws*, 36 BROOKLYN L. REV. 10 (1969) [hereinafter cited as Baade 1969]; Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEX. L. REV. 141 (1967) [hereinafter cited as Baade 1967]; Sedler, *Characterization, Identification of the Problem Area and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUT.-CAM. L.J. 8; (1970); Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181 (1977) [hereinafter cited as Sedler 1977].

³ Peterson, *Developments in American Conflict of Laws, Torts*, 1969 U. ILL. L.F. 289; Twerski, *Neumeier v. Kuehner: Where are the Emperor's Clothes?* 1 HOFSTRA L. REV. 104 (1973) [hereinafter cited as Twerski HOFSTRA]; Twerski, *To Where Does One Attach the Horses*, 61 KY. L.J. 393 (1973) [hereinafter cited as Twerski KENTUCKY]; von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927 (1975). A leading exponent of Professor Currie's theory of interest analysis has recently categorized the actual holdings of courts that have adopted interest analysis and concludes that "not only do the courts of one state decide cases presenting the same law-fact patterns the same way, even when different substantive laws are involved, but also the courts of different states, with only limited exceptions, tend to decide cases presenting the same law-fact patterns in the same way." Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Tort Cases*, 44 TENN. L. REV. 975, 981 (1977).

⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

and the scholars who owe allegiance to its methodology⁵ did not signal a radical departure from the never-ending search for truth that has become the hallmark of conflicts law. The almost theological cast to the arguments and the fervor with which they are presented evidence that conflicts law is a serious game of applied jurisprudence.⁶ One is left with the distinct impression that conflicts law is outside the mainstream of American judicial thought. Instead of a wholesome, pragmatic approach to decisionmaking that is highly fact-sensitive, even the judicial decisions read as philosophical manifestos in which the facts and the conflicting law are secondary in importance.⁷ Ultimately, it is theory that predominates.

For some time, the authors of this article have argued that it is necessary to build conflicts law from the ground up—to develop the rules and theory considering all of the factual nuances which pervade interstate cases.⁸ The thesis of this article is that a large number of conflict cases since *Babcock v. Jackson*⁹ have involved clashes, not between substantive rules of liability,¹⁰ but between liability rules which

⁵ Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548 (1971); Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972); Reese, *Conflict of Laws and the Restatement, Second*, 28 LAW & CONTEMP. PROB. 679 (1963); Rosenberg, *Two Views On Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459 (1967) [hereinafter cited as Rosenberg 1967]; Rosenberg, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 551, 641 (1968) [hereinafter cited as Rosenberg 1968]. Although Professors Reese and Rosenberg inject a sense of pragmatism in their suggestions for the resolution of choice-of-law problems, it is evident that their major concern stems from the unwieldiness of interest analysis as an effective method for predicting and resolving choice-of-law problems. Indeed, they are willing to sacrifice a good result to the goal of effective judicial administration. See Reese, *The Kentucky Approach to Choice of Law: A Critique*, 61 KY. L.J. 368 (1975); Rosenberg 1968, *supra*. The works of Professor Cavers, D. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965) and Professor Weintraub, R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* (1971) are more difficult to characterize, but the jurisprudential overtones clearly predominate.

⁶ Baade 1967, note 2 *supra*. See Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1; Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966); Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125 (1973).

⁷ See Twerski, Book Review, 61 CORNELL L. REV. 1045, 1052 n.38 (1976), suggesting the reader compare *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) with *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969). It is apparent from such a comparison that for all the supposed sensitivity of interest analysis to the factual nuances of the case, it is only those facts which can be easily tied to certain preordained policy considerations that are given attention. See Sedler, *supra* note 3, at 1032-40 for a demonstration as to how interest analysis rules can be formulated. This is accomplished by narrowly focusing on predetermined interests and isolated aspects of the fact pattern which bring these interests into being.

⁸ Twerski, note 7 *supra*; Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971); Twerski KENTUCKY, note 3 *supra*.

⁹ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

¹⁰ The term "substantive" will be used to connote those liability rules that are designed to regulate human conduct and to promote certain states of mind. See *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 726 (1974).

stem from concern that the judicial process is inadequate to the task of arriving at truth.¹¹ There has been a failure to examine some practical and realistic methods of accommodating conflicting state policies¹² because the judicial and scholarly inquiry into conflicts problems has been so heavily oriented toward jurisprudence. By utilizing varying standards of proof and shifting burdens of proof, courts could resolve many conflicts problems by creating special multistate rules that significantly advance the interests of the concerned jurisdictions.

A multistate rule is a rule created by the courts to resolve conflicts by giving effect to the domestic interests of the contact states without applying the domestic rule of either state. The multistate rule differs in content from the domestic rule, but attempts to address the basic policy

¹¹ These liability rules would not be labeled as procedural for the purposes of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) or *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Indeed, it is difficult to characterize rules of liability which deny or sharply delimit substantive rights out of a concern that the judicial process cannot adequately insure against fraud or collusion. In a sense, these issues are procedural because they stem from a belief in the inadequacies of the judicial process to assure a result that has integrity. On the other hand, these rules do not deal with the management of litigation, but rather in foreclosing or sharply limiting litigable issues by affecting substantive rights.

A host of conflict cases are grounded in the differing policies of states regarding the effectiveness of the litigation process to arrive at truth. The cases usually pit a rule severely restricting or limiting liability against a more liberal rule which permits litigation of the suspect issue. *See, e.g.*, *Gordon v. Parker*, 83 F. Supp. 40 (D. Mass. 1949) (heart balm statutes); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (host-guest statutes); *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969) (statute of frauds). *But see* *George v. Douglas Aircraft Co.*, 332 F.2d 73 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964) (strict liability standard or negligence in products liability). There has been considerable debate whether the shift to strict liability was primarily motivated by proof problems that hampered the plaintiff. *See, e.g.*, *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944); *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973). *See also* Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267; Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972); Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797 (1977). To the extent that the negligence standard was abandoned for reasons other than its inherent substantive validity, it reflects a change of substantive law stemming from the inability of the judicial process to fairly present the negligence issue for decision. It should be noted that in this instance the higher liability standard, *i.e.*, strict liability, represents a shift away from a standard which at the litigation stage was considered unmanageable and nonlitigable by one of the parties. *See* text accompanying notes 49-52 *infra*.

¹² *But see* Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 LAW & CONTEMP. PROB. 105 (1977); von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974) [hereinafter cited as von Mehren 1974]; von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROB. 27 (1977) [hereinafter cited as von Mehren 1977]; Weintraub, *Beyond Dépeçage: A "New Rule" Approach to Choice of Law in Consumer Credit Transactions and a Critique of the Territorial Application of the Uniform Consumer Credit Code*, 25 CASE W. RES. L. REV. 16 (1974). The concept of a multistate rule as proposed by Professor Trautman is substantially different than that presented in this article. Professor Trautman suggests that courts should extend beyond resolving conflicts to seek solutions which reflect multijurisdictional or shared policies.

concerns that motivated the adoption of the domestic rule. It seeks accommodation with the rules of other concerned jurisdictions when such an accommodation reflects sensitivity to a state's own real interests, which have been subordinated in purely domestic litigation. By employing multistate rules, some of the thorniest choice-of-law problems—those arising from such diverse issues as statute of frauds, host-guest statutes, interspousal immunity, statutes of limitation, and wrongful death limitations—might be resolved in a pragmatic fashion. Theorists may be unhappy, but such multistate rules might enable courts to return to the tradition of judging and resolving cases, rather than slavishly following highly structured conflicts doctrine.

THE FALSE CONFLICT BETWEEN LIABILITY RULES

Breakdown of the Procedural-Substantive Dichotomy

Traditional teaching has characterized rules of law as either procedural or substantive.¹³ In the era that preceded the policy-centered approach to choice-of-law problems, the procedural-substantive dichotomy was often utilized as an escape mechanism to arrive at a result that was consistent with sound interest analysis.¹⁴ The newer teaching eschews the unprincipled categorization of problems and demands that there be a balance struck between the need of the forum to retain the integrity of its own mechanisms for the effective operation of its courts and the impact of the foreign rule on the outcome of the lawsuit.¹⁵ The effect of utilizing this approach has been to delimit sharply the number and scope of issues that can be properly identified as procedural and to facilitate the application of true interest analysis to resolve the real policy differences between conflicting rules.¹⁶

¹³ See generally *Bournias v. Atlantic Maritime Co.*, 220 F.2d 152 (2d Cir. 1955); *Levy v. Steiger*, 233 Mass. 600, 124 N.E. 477 (1919); Cook, "Substance" and "Procedure" in the Conflict of Law, 42 YALE L.J. 333 (1933); Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153 (1944); Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U. L. REV. 813 (1962).

¹⁴ *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953); *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). See generally Paulsen & Sovern, *Public Policy in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

¹⁵ Lorenzen, *Comment: The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492 (1919); Morgan, note 13 *supra*; Sedler, note 13 *supra*; R. WEINTRAUB, *supra* note 5, at 45-48. The outcome-determinative approach would apply the procedural rules of the jurisdiction whose substantive law otherwise governs the case. A true interest analysis approach would examine each procedural rule to determine whether a given state has an interest in having the rule applied. In making the decision, a court would take into account the impact of such a ruling on the operation of its own judicial machinery. See Note, *An Interest Analysis Approach to the Selection of Statutes of Limitation*, 49 N.Y.U. L. REV. 299 (1974) [hereinafter cited as N.Y.U. Note].

¹⁶ The recent trend toward true interest analysis which focuses directly on whether a state has an interest in having its so-called "procedural" rule applied has much to recommend it. The logic of dealing with a choice-of-law situation by defining the issues in conflict rather than seeking to tie the "procedural" rule to the law of the state that otherwise governs is merely the completion of the

Accommodating Policy Goals with Multistate Rules

There is a need to rethink the problem. Many of the issues that have been treated as substantive conflict problems under interest analy-

process of weaning ourselves away from jurisdiction-selecting rules. Courts and commentators have recognized that the "procedural" rule may have policy dimensions that need not necessarily be tied to other substantive law questions in the case. See *Dindo v. Whitney*, 429 F.2d 25 (1st Cir. 1970); *Farrier v. May Dep't Stores Co.*, 357 F. Supp. 190 (D.D.C. 1973); *Heavner v. Uniroyal*, 63 N.J. 130, 305 A.2d 412 (1973); *Marshall v. George M. Brewster & Son, Inc.*, 37 N.J. 176, 180 A.2d 129 (1962); *Air Prods. & Chem., Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 206 N.W.2d 414 (1973); D. CAVERS, *supra* note 5, at 40-42; N.Y.U. Note, note 15 *supra*. Thus, the courts appear willing to apply *dépeçage* between the procedural and substantive issues. *Dépeçage* has been described as

a simple phenomenon; applying the rules of different states to determine different issues. When a case presents more than one choice-of-law issue and each is analyzed separately, situations arise in which it is claimed that the law of one state should govern one issue and that of another a second. . . . As choice-of-law thinking has moved in the direction of analyzing each issue separately, the use of *dépeçage* has become much more widespread. But what is not so common is to piece together the substantive rules of the relevant states to reach a result that could not be reached if the domestic law of either state were applied to the entire case.

R. CRAMTON, D. CURRIE, & H. KAY, *CONFLICT OF LAWS* 383 (2d ed. 1975).

It is not clear, however, that the aforementioned cases demonstrate a trend toward true interest analysis. The leading case rejecting the *lex fori* rule for statute of limitation questions, *Heavner v. Uniroyal*, 63 N.J. 130, 305 A.2d 412 (1973) did not suggest a clear preference for an interest analysis which would examine the claims of the concerned jurisdictions for the application of their respective statutes of limitation independent of the otherwise controlling substantive law. *Id.* at 141, 305 A.2d at 418. In *Henry v. Richardson-Merrell, Inc.*, 366 F. Supp. 1192 (D.N.J. 1973), *rev'd*, 508 F.2d 28 (3d Cir. 1975), the court held that *Heavner* required that it perform an interest analysis with regard to conflicting statutes of limitation. 366 F. Supp. at 1196-97 n.8. The court explicitly eschewed choosing which state's substantive law would govern. *Id.* at 1200 n.12. It was thus clear that an interest analysis would be undertaken on the statute of limitation issues alone. In reversing, the United States Court of Appeals for the Third Circuit held that it could not consider the statute of limitation issue in isolation since to do so would defeat the very purpose of *Heavner*, which seeks to discourage forum shopping. 508 F.2d at 36. The court said that the foreign state's policy of protecting the court and defendant from tardy litigation will never seem relevant to a local court dealing with a defendant not domiciled in the foreign jurisdiction. *Id.* at 32 n.10. It thus intimated that the only methodology available to thwart rampant forum shopping was to tie the statute of limitations to the substantive law which would otherwise govern the case. For an effective rebuttal to this argument, see N.Y.U. Note, *supra*, note 15, at 314-16.

There does exist a class of cases in which it appears that the very best that courts can do is to apply the law of the state whose substantive law governs the case. Those courts that have been called upon to interpret borrowing statutes have been faced with a dilemma. The statutes call for the application of the shorter statute of limitations of the state in which the cause of action "arose" or "accrued." The question arises how the statutory language should be interpreted after a state has adopted interest analysis. The terms "arose" and "accrued" were meaningful when *First Re-statement* territorial concepts prevailed, but are decidedly out of step with modern interest analysis. The better reasoned decisions have read interest analysis into the old statutory language. See *Hamilton v. General Motors Corp.*, 490 F.2d 223 (7th Cir. 1973); *Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co.*, 372 F.2d 18, 21 (3d Cir. 1966) (Freedman, J., dissenting); *O'Keefe v. Boeing Co.*, 335 F. Supp. 1104 (S.D.N.Y. 1971); *Klondike Helicopters Ltd. v. Fairchild-Hiller Corp.*, 334 F. Supp. 890 (N.D. Ill. 1971); Millhollin, *Interest Analysis and Conflicts Between Statutes of Limitation*, 27 HASTINGS L. REV. 1 (1975). Nonetheless, given the statutory emphasis on the place where the cause of action arose or accrued, a court may not be free to

sis do not lend themselves to easy categorization. A large number of issues belong to a separate genre, encompassing rules of law that are far more than housekeeping rules and thus deserve careful interest analysis. Yet, when the origin of these rules is uncovered, it is clear that a "deep false conflict" exists between the competing rules of the concerned jurisdictions, for both states agree as to the proper substantive law that should govern the case. When clear-cut substantive rules that either deny or sharply limit a cause of action are based on the inability of the courts to assure themselves that the parties and witnesses are not involved in fraud, duress, collusion, or fabrication, then a method of accommodation exists to further the policy goals of the rules in conflict. By creating a multistate rule that raises or lowers the standard of proof required to establish a case, courts can accommodate differing views. This accommodation is possible because the underlying substantive law is not in conflict; rather, the conflict lies in the method by which the substantive rights may be established. Unlike other areas of substantive law in which policy differences can be expressed only on an all-or-nothing basis, the quantum of proof necessary to establish a case has an accordion-like quality that can be tailored to fit the situation.

THE HOST-GUEST CONFLICTS

Traditional Interest Analysis

The host-guest statutes have spawned more choice-of-law litigation than any other area of the law.¹⁷ They provided the backdrop for the abandonment of rigid territorial doctrine in many states. The classic false conflict case that led the revolution was the New York Court of Appeals decision in *Babcock v. Jackson*.¹⁸ In that case, plaintiff and defendant, both New York residents, embarked on a weekend trip to Canada. The plaintiff was a guest-passenger in the defendant's automobile. The defendant lost control of his car while driving in the Province of Ontario; it went off the highway into an adjacent stone wall, and the plaintiff was seriously injured. At that time, Ontario had a statute barring any action on behalf of a guest against a host.¹⁹ The object of the statute was to prevent collusive actions between passengers and drivers that could lead to fraudulent claims. New York, on the other

perform an interest analysis on the statute of limitation issue alone, but may be required to tie the result to the substantive law which governs the case.

¹⁷ *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972); *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973); *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

¹⁸ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

¹⁹ Highway Traffic Act of Province of Ontario, ONT. REV. STAT. ch. 172, § 105 (2) (1960).

hand, favored compensation to automobile accident victims and recognized a cause of action based on common law negligence in host-guest situations.

The New York court decided that this case presented only an apparent conflict between the laws of the two jurisdictions. New York had no reason to depart from its policy, which permitted recovery, merely because an accident affecting its citizens happened to occur beyond its borders, and Ontario had no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario. The court held that the Ontario statute sought to prevent fraudulent claims asserted against Ontario defendants and their insurance carriers, not those asserted against New York defendants and their insurance carriers. The court reasoned that where a New York plaintiff imposed upon New York defendants or defrauded insurers of New York defendants,²⁰ Ontario had little legislative concern simply because the accident occurred there.

In the decade that followed, the *Babcock* rationale was tested by a series of cases, many with facts unlike the New York-dominated *Babcock* situation.²¹ In these cases the issue was whether the policy analysis expressed in *Babcock* would dominate or whether the courts would acknowledge territorial considerations as significant in resolving choice-of-law problems.²² In *Neumeier v. Kuehner*,²³ the court was forced to recognize the limitations of interest analysis and reckon with territorial considerations too significant to ignore. The defendant in *Neumeier* was a New York resident who traveled from Buffalo, New

²⁰ For an excellent discussion of the legislative history behind the Ontario host-guest statute, see Baade, *The Case of the Disinterested Two States: Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 150, 152-56 (1973).

²¹ *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972) (plaintiff—Canadian resident, defendant—New York resident, site of accident—Canada); *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969) (plaintiff—New York resident, defendant—New York resident, site of accident—Michigan); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968) (plaintiff—New York resident, defendant—Maine resident, site of accident—Maine); *Farber v. Smolack*, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967) (plaintiff—New York resident, defendant—New York resident, site of accident—North Carolina); *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966) (plaintiff—New York resident, defendant—New York resident, site of accident—Canada); *Long v. Pan American World Airways, Inc.*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965) (plaintiff—Pennsylvania resident, defendant—New York resident, site of accident—Maryland); *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965) (plaintiff—New York resident, defendant—New York resident, site of accident—Colorado); *Oltarsh v. Aetna Ins. Co.*, 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965) (plaintiff—New York resident, defendant—Connecticut resident, site of accident—Puerto Rico).

²² This conflict became especially clear in the split between the majority and dissent in *Dym v. Gordon*, 16 N.Y.2d 120, 129, 209 N.E.2d 792, 797, 262 N.Y.S.2d 463, 470 (1965) and *Tooker v. Lopez*, 24 N.Y.2d 569, 592, 249 N.E.2d 394, 408, 301 N.Y.S.2d 519, 539 (1969). See D. CAVERS, *supra* note 5, at 293-311 app.; von Mehren, *supra* note 3, at 948-52.

²³ 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

York to Ontario, Canada. He picked up his guest, Neumeier, an Ontario resident, in Ontario. The defendant's car was struck by a train at a railroad crossing in Ontario, and both the host and his guest-passenger were killed.

This simple fact pattern, superimposed on the legal positions of New York and Ontario as to host-guest liability, presents an anomalous situation. New York has no host-guest statute; Ontario, on the other hand, requires a guest to prove gross negligence against a host in order to recover. Under traditional interest analysis, to determine whether there is a true policy conflict, the policies supporting the supposedly conflicting rules must be examined. This analysis would lead a court to conclude that New York's policy favoring compensation is not relevant. Since New York is concerned primarily with the welfare of its domiciliaries and the plaintiff is an Ontario resident, New York has no stake or interest in whether the plaintiff recovers. But neither is the Ontario host-guest statute relevant. Since the Ontario host-guest statute is designed to protect Ontario domiciliaries or insurance companies doing business in Ontario from host-guest collusion, Ontario clearly has no strong reason to apply the statute for the benefit of a New York defendant.²⁴

The late Professor Brainerd Currie, when faced with this kind of dilemma, was quite direct as to its implication. He said: "This is the 'unprovided for case' in a very special sense. Neither state cares what happens."²⁵ Realizing that this statement was somewhat shocking, Currie defended his position.

It may be that the laws of neither state, nor of both states together, purport to dispose of the entire universe of possible cases. Identical laws do not necessarily mean identical policies, when it is remembered that the scope of policy is limited by the legitimate interests of the respective states.²⁶

Devotees of interest analysis were troubled by the inability of conflicts jurisprudence to provide available law to decide a simple interstate automobile accident case.²⁷ They argued that the courts had

²⁴ The *Neumeier* court applied Ontario law, however. The court adopted a compromise rule that Chief Judge Fuld had formulated in a previous concurring opinion:

Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.

Id. at 128, 286 N.E.2d at 460, 335 N.Y.S.2d at 70 (quoting *Tooker v. Lopez*, 24 N.Y.2d 569, 585, 249 N.E.2d 394, 404, 301 N.Y.S.2d 519, 532 (1969) (Fuld, C.J., concurring)). The *Neumeier* court found that the plaintiff had failed to offer evidence sufficient to displace the general rule.

²⁵ B. CURRIE, *supra* note 2, at 128. See also Baade 1969, *supra* note 2, at 30, where the author labels this phenomenon the "no policy" case or "the case where a sensible result could only be obtained by altruistic interests analysis."

²⁶ B. CURRIE, *supra* note 2, at 153.

²⁷ Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v.*

overlooked a common policy that exists as a substratum to resolve this very kind of case. They posited that all states have a common policy to provide compensation to the victims of auto accidents at the hands of negligent drivers. Host-guest statutes are limited exceptions to the normal compensatory policy. In a case like *Neumeier*, both New York and Ontario are viewed as having a common policy of compensating plaintiffs for ordinary negligence. Ontario, however, recognizes an exception to this policy for the purpose of protecting Ontario insurers or domiciliaries. Since the defendant and the insurer are from New York, the Ontario exception does not apply; the common policy of compensation therefore surfaces and controls the outcome of the case.

For all the ingenuity that this approach offers, it has a basic flaw. If there is an underlying policy that favors the compensation of plaintiffs for injuries done them by negligent defendants, it appears that New York and Ontario have parted ways regarding whether a guest should be able to recover from a host for ordinary negligence. Although the common policy approach may have much to recommend it when viewed in the context of the interplay between shared domestic and interstate policies, the authors find the approach to be inadequate from the perspective of parochial domestic interests.²⁸

Subordinating Individualized Justice

An inquiry into the interest of any state in applying a host-guest rule in a totally domestic situation is in order. Can it be said that a state seeks to accomplish "justice" or the "right result" by applying its host-guest statute to each and every case before the courts? Ontario would not seem to endorse such an overreaching expression of statutory purpose. A more modest, honest formulation of its policy is that its concern that collusion between the parties will occur in a significant percentage of host-guest cases has led it to bar all such actions within the state. Although this total bar may be statistically justified, the rule

Kuehner, 1 HOFSTRA L. REV. 125 (1973); Sedler, *Weintraub's Commentary on the Conflict of Laws: The Chapter on Torts*, 57 IOWA L. REV. 1229 (1972). See also R. CRAMTON, D. CURRIE, & H. KAY, *supra* note 16, at 283.

²⁸ Twerski, HOFSTRA, *supra* note 3, at 109. The common policy approach is based on a belief that, if we gave full play to parochial domestic interests, both concerned jurisdictions would agree that in a *Neumeier* fact situation the compensation policy would govern since there is no relevant policy to protect insurance companies from fraud at defendant's domicile. The upshot of this approach is that a state's antifraud policy is considered irrelevant to an accident which occurs within the plaintiff's home state. The notion that an antifraud policy is only to protect the defendant and does not seek to deter both parties from engaging in fraud seems strange and somewhat forced. In his excellent analysis of *Neumeier*, Professor Trautman acknowledges that the "anti-ingrate" policy, which is offered as a rationale to support host-guest legislation, may be two-sided. It may protect hosts against ungrateful guests and may seek to deny recovery to ungrateful guests. Trautman, *Rule or Reason in Choice-of-Law: A Comment on Neumeier*, 1 VT. L. REV. 1, 6-7 (1976). Yet, in describing the possible impact of host-guest statutes, he finds the anticollusion principle as only protecting the defendant.

does not always accomplish justice in individual cases.²⁹ It is not a finely tuned instrument. It has all the subtlety of a meat axe.

In instances where the choice-of-law question centers around legal prescriptions based upon "statistical justice" rather than "individual justice," the concept of interest analysis cannot move easily from the general prescription to the individual case. This problem is even more acute when the interest analysis is focused upon narrow and parochial domestic interests.³⁰ If, for example, compensation or protection from fraud is identified as the only relevant state interest, it strains credulity to suggest that the state's rule, which is structured to accomplish these goals over the statistical sample, must be applied in a choice-of-law setting. Indeed, it does little good to ask whether the state's interest would be furthered by the application of its rule to a multistate situation. The question is illegitimate since, even in a purely domestic situation, the state has subordinated "individualized justice" to larger overall policy considerations.

Liability Rules in Conflict—The True Dilemma

At this juncture we are faced with a true dilemma. If we ask whether the mixed fact situation was part of the overall sample of cases that led the legislature or the court to establish its general rule and thus is covered by that general rule, the answer will usually be clear. The mixed fact situation is rarely contemplated by legislators or judges; it is usually faced only after the fact. At times, the extraterritorial scope of the law is rather clearly defined, but this is the exception rather than the rule.³¹ What we are faced with in this type of conflicts case, be it a "true" or a "false" conflict, is a situation where two or more states have created statistically based rules that do not necessarily address the foreign case and cannot be counted on, even if the case is purely domestic, to accomplish "individualized justice" or to maximize the state's "interest" in the particular case. The only way to articulate the state interest in this type of case is to say that in a large number of cases the rule will accomplish a just result over time and that justice in the individual case

²⁹ Indeed, even at the domestic level several courts have found that the host-guest statutes create irrational classifications, thus violating the equal protection clause. *See* *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (finding the California guest statute unconstitutional under both federal and state law); *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974) (finding the Kansas guest statute unconstitutional under both federal and state law). *See* text and cases cited in *Sidle v. Majors*, 429 U.S. 945, 946-47 n.2 (1976) (Brennan, J., dissenting from denial of certiorari), for a general review of the controversy over the constitutionality of guest statutes.

³⁰ *See* B. CURRIE, note 2 *supra*; Sedler 1977, note 2 *supra*. For those commentators who take into account a broader range of domestic and interstate goals in defining state interests, the problem raised in the text is of less moment. *See* von Mehren, note 3 *supra*; Trautman, note 12 *supra*.

³¹ R. CRAMTON, D. CURRIE, & H. KAY, *supra* note 16, at 178-94. Examples of statutory solutions to multistate legal problems can be found in the Uniform Commercial Code, no-fault insurance statutes, borrowing statutes, and the Uniform Probate Code.

may have to suffer in order to further some other policy goal. There can be, however, no pretense about the rule making good law or good sense in the individual case. Although the policy reasons for broad rulemaking, which exclude taking into account the particularized factors of individual cases, do in a sense accrue to the whole body politic of the state, and thus to the individual who suffers the sting of the overbroad rule, the statistically based rule does not bring the state's interest into play at a level that demands its application in a choice-of-law setting.

This mode of analysis can lead to some rather unsettling observations. If, as has been posited, a state eschews an interest in accomplishing justice in each and every host-guest case by applying the preclusive rule, but instead adopts a rule that will foster such interests as honesty and witness integrity over a long period of time in domestic cases, the claim for application of the rule in the conflicts theater on the basis of state interest is suspect. In the infrequent and highly individual fact situation of a host-guest conflicts case, it is questionable that state policy will be furthered by denial of a cause of action to the injured plaintiff. Courts are not unaccustomed to dealing with the possibility of fraud and, in any one case, will not be overly burdened should such a possibility be present. It is a multiplicity of such cases that the domestic immunity rule seeks to avoid. Furthermore, to the extent that the antifraud rule seeks to foster morality, that is well accomplished by its application in the domestic setting. Thus, if it does not further the state's interest to preclude a cause of action in an individual case when other methods are available to discover fraud, and no flood of similar cases can be anticipated, it might be beneficial to the state to allow the cause of action, even though a similar domestic fact pattern would be barred.³²

³² It may be questioned why the authors seek to formulate a multistate rule to resolve the host-guest problem. If, as we have argued, the statistically based rule is not necessarily applicable in a choice-of-law setting, we should be prepared to fall back on normal compensatory policies. Indeed, it has been strongly argued that courts should perceive themselves as exercising national authority in choice-of-law cases. To formulate this multistate law, courts would consider the fact that host-guest laws represent obsolescent policies and that they are contrary to strong compensatory policies that are the multistate norm. Trautman, *supra* note 12, at 115-16.

The argument presented in the text, that rules of statistical justice indicate a diminished state interest in the case at bar, could be viewed as an additional reason for not insisting on the promotion of domestic interests. It thus might be argued that there is no need to utilize the kind of multistate substantive rule which raises the standard of proof and accommodates the interests of both jurisdictions. It is the position of the authors, however, that there is good reason to use a multistate rule in a high percentage of host-guest cases. As is noted later, the authors' territorialist bias leads to the conclusion that a "true conflict" exists in such cases as *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972) and *Tooker v. Lopez*, 24 N.Y.2d 394, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969). The need for a multistate rule to resolve choice-of-law problems is a function of how significant the conflicts problem is, given the choice-of-law preference. See text accompanying notes 45-56 *infra*.

Once freed from the tyranny of domestic interest analysis in host-guest cases,³³ an accommodation between apparently conflicting rules can be sought. One state's rule allowing recovery and the rule of another state barring a cause of action may be based on similar premises, the only difference being the conclusion each state has reached in resolving its internal policy. Assuming that a host-guest case does present a particularly good opportunity for fraud and collusion, then New York, as an enlightened jurisdiction, must share Ontario's concern over the possibility of unjust recoveries. That New York has resolved the problem in favor of the ordinary negligence rule does not, however, lessen the threat of collusion; the courts have merely subordinated that concern at a domestic level in favor of compensation. New York, like Ontario, has made a judgment based on statistical justice.³⁴

³³ In one sense, the two thoughts presented in the text stand independently. One could argue for the utilization of a multistate rule which resolves the clash between the two conflicting host-guest rules without giving credence to the concept that rules which are statistically based do not speak to individual cases. The authors tie the two together, believing that the adherents of state interest analysis will be more receptive to multistate rules if it can be demonstrated that the interests supposedly fostered by the statistically based rules have a weak claim to application in a choice-of-law setting.

³⁴ Professor Currie has touched upon the question whether a policy that has been subordinated has continued viability for choice-of-law purposes. B. CURRIE, *supra* note 2, at 158 n.86. He suggests that, in some instances, whether the subordinated policy is viable may have constitutional ramifications. In his discussion of equal protection, Professor Currie questions whether a state may justify classifications made on the basis of a nonresident's home law. *Id.* at 526. In general, he concludes that a state may refuse the beneficence of its law to a nonresident if the nonresident's domiciliary law is less generous than that of the forum.

Professor Currie then confronts a difficult question. Dealing with a hypothetical variant of *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953), he asks:

What of the situation in which an Arizona plaintiff brings his action in California against the administrator of the deceased California tortfeasor? Rather plainly, for California to deny the benefit of its survival statute to non-residents generally would be a violation of the Equal Protection Clause (or the Privileges and Immunities Clause). Would it be permissible to grant that benefit or deny it according to whether the law of the state where the plaintiff resides also provides for survival?

B. CURRIE, *supra* note 2, at 571. Professor Currie concludes that differential treatment of nonresidents on the basis of their domiciliary laws cannot be justified unless the law of the forum expresses two policies, one of which sustains the judgment against the nonfavored defendant. He reasons:

[I]n a superficial way, it might be said that California has an "interest" in protecting the estates of local decedents against tort liability, subject to an overriding exception in favor of securing compensation for local victims. But an interest is the product of the application of legal policy to a state of facts; and it is questionable whether California can be said to have retained a policy of protecting the estates of decedents against liability for their torts in any situation. If not, California can have no interest in their protection, and there is no California law in existence to preclude recovery by any nonresident. Because we could not discern in California law any residual policy for the protection of decedents' estates we have previously expressed the opinion that a classification of nonresident plaintiffs according to their domiciliary laws in order to determine their right to sue California estates would be not so much a differential treatment in good faith of persons differently situated as a mere attempt to preclude recovery by as many foreigners as possible.

Id.

Under the analysis suggested in this article, a court would not quickly conclude that a

Resolving the Interstate Problem—The Multistate Rule

If the above arguments ring true, then there appears to be a pragmatic method of resolving the interstate problem. When a choice-of-law case raises a question as to the extraterritorial reach of the host-guest statute, the courts should address not only the operative policies of both states,³⁵ but also those domestic policies that have been set aside in favor of the statistical rule. The latter can be specifically addressed once the court has broken free from the shackles imposed by the nondiscriminating domestic rule. For example, in a case where the clash is between a host-guest rule requiring proof of gross negligence and the common law rule permitting recovery based on ordinary negligence, the courts could allow recovery by permitting liability to be proven if ordinary negligence is established, but require that the evidentiary burden be that normally imposed in fraud cases, *i.e.*, "clear and convincing evidence." This would foster not only the shared interests of both states in preventing fraud and collusion and permitting legitimate recoveries, but would allow also for judicial control of those cases that were made suspect by use of the directed verdict. This Solomon-like compromise may be viewed as unconscionable in some quarters.³⁶ The suggested resolution is, however, not unprincipled. It is not even a compromise. By applying the multistate rule to a case in which, admittedly, a state cannot assure itself that justice will be done,

subordinated policy is so devoid of merit that it disappears from the corpus juris of the state. For example, it might be argued that if host-guest or interspousal immunity is abolished, then the state has decided to hold the host or spouse equal to any other defendant. See *Cavers, Comments on Reich v. Purcell*, 15 U.C.L.A. L. Rev. 647, 653 (1968). That does not mean, however, that the state is no longer concerned with possible fraud or collusion. If, in a choice-of-law situation, that concern is brought forward because of multistate facts, a court could fashion a remedy which gives some recognition to the concern of a sister state that such litigation is susceptible to fraud and collusion. For an interesting discussion of the issue of subordination, see von Mehren, *supra* note 3, at 936-38.

It should be noted that even courts that have found the host-guest statutes to be unconstitutional have not held that the fear of collusion is unwarranted. Rather, the grounds for striking down the statutes have been their overbreadth. The court in *Henry v. Bauder*, 213 Kan. 751, 761-62, 518 P.2d 362, 370 (1974), makes this clear:

In *Brown* the Supreme Court of California effectively refuted the "collusion" argument by pointing out that under the terms of the guest statute the rider and driver can escape the statute's bar and thwart the "anti-collusion" purpose, simply by colluding on the issue of whether the rider provided any compensation or payment for the ride. By broadly prohibiting all automobile guests from instituting causes of action for negligence because a small segment of that class may file collusive suits, the guest statute creates an overinclusive classification scheme. It results as throwing out the baby simply because the bath water gets dirty once in a while. The statutory scheme clearly imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims. We believe that in barring suits for all automobile guests simply to protect insurance companies from some collusive lawsuits, the guest statute exceeds the bounds of rationality and constitutes a denial of equal protection of the law.

³⁵ See A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 215-327 (1965); Trautman, *supra* note 28, at 16-20.

³⁶ B. CURRIE, note 2 *supra*.

even in a totally domestic setting, each state receives a full loaf by giving effect to its primary goal and the normally subordinated goal. Since the mixed fact situation case is not directly addressed by the statistically based rule, the state is free to inquire whether, in a case that is not governed by that rule, it can fashion a solution that maximizes both conflicting policies.³⁷ That the impetus to do so is occasioned by the rather strong feelings of another jurisdiction as to the problem ought not to make the process suspect. If, in addition to a good domestic result, the court accomplishes a diplomatic coup by not ignoring the competing concerns of a sister state, that is occasion for jubilation, since good domestic analysis has been merged with diplomacy in choice-of-law.

STATUTE OF FRAUDS

In analyzing the role of the statute of frauds in a choice-of-law setting, one must determine the goals to be furthered by enforcement of the requirement of a written contract. An immediate consideration is the "planning" aspect that inheres in most contractual arrangements—whether application of the statute of frauds promotes planning and discourages reliance by others on oral promises. There is a general lack of solicitude for the party who has not committed the contract to writing as some foresight would have eliminated the problem in its entirety. But the parties who enter into oral contracts often lack the sophistication of good planners, and it is perhaps unrealistic to hope, even in a purely domestic setting, that enforcement of the writing requirement will cause others to contract with greater forethought regarding potential contract problems. In a choice-of-law setting, the likelihood that planning will be promoted through application of the statute of frauds becomes even more remote. The ability of the layman to appreciate the subtleties of the multistate setting are such that "planning" cannot be viewed as a realistic goal to be furthered by the enforcement of the writing requirement. Thus, the statute of frauds must be evaluated for choice-of-law purposes on the basis of its success in achieving the goals

³⁷ The suggestion that a state utilize a multistate rule to give effect to both its dominant and subordinated policies is similar to the *dépeçage* concept in which a result is attained in a choice-of-law setting which would not be reached if the domestic law of either state were applied to the entire case. See Reese, *Dépeçage: A Common Phenomenon in Choice-of-Law*, 73 COLUM. L. REV. 58 (1973). It differs from classical *dépeçage* in that in evaluating the need for the formulation of such a rule, a state must perform an internal *dépeçage* with regard to an issue to which its domestic rule has a resolution. By recognizing that the domestic rule itself required the subordination of other policy interests, it seeks to give effect to those interests when they are consistent with the interests of another concerned jurisdiction. The domestic rule thus becomes a source of policy, but not a straitjacket which prevents creative rulemaking in a multistate setting. For a similar line of analysis, see also *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962); Trautman, *supra* note 12, at 122-24.

of fraud and perjury prevention.³⁸

The Need for an Evidentiary Compromise

If one focuses directly on the fraud prevention policy of the statute of frauds, it is clear that the statute is not finely tuned to the equities of the individual case. It is, in the parlance utilized earlier, a rule of statistical justice. There is no pretense that "justice will be done" in any given case. Indeed, much fraud is fostered by the statute of frauds itself.³⁹ All that can be said in its defense is that it is necessary to sacrifice individual meritorious cases for the benefit of a rule that cuts broadside.

The conflicts case, as noted earlier, demands under modern policy analysis an exacting examination of the facts in the individual case to determine whether one rule has claim to application by virtue of some state interest. This mode of examination itself becomes suspect, however, if the rule being examined does not purport to further the state interest in any particular fact setting. If it appears from the facts that states with conflicting policies may each have a legitimate claim to the application of their rule on the statute of frauds issue, an evidentiary compromise will further the interests of both states. If the rule in such a conflicts case would be that the contract may be proven by utilizing an evidentiary standard of "clear and convincing evidence,"⁴⁰ then the interests of both states would be substantially furthered. The state that

³⁸ See J. MURRAY, CONTRACTS § 312 (1974); 3 S. WILLISTON, CONTRACTS § 448 (1960 & Supp. 1979). The preamble to the original Statute of Frauds (enacted by the English Parliament in 1677) stated the purpose: "for prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury." Rabel, *The Statute of Frauds and Comparative Legal History*, 63 LAW Q. REV. 174, 175 (1947). Other reasons have been postulated, including the promotion of deliberation, certainty of terms, and proof of volition. *Id.* In all such cases, however, the statute is prophylactic, and it is unlikely that any state interests are promoted by application of the statute to the infrequent conflicts case. See also Cavers, *Oral Contracts to Provide by Will and the Choice of Law Process: Some Notes on Bernkrant*, in PERSPECTIVES OF LAW-ESSAYS FOR AUSTIN WAKEMAN SCOTT 60 (1964) (suggests that the statute of frauds may be designed not only to prevent frauds and perjury after a testator's death but also to discourage individuals from making plans on the strength of oral promises). In suggesting that the only appropriate considerations in a choice-of-law setting are the deterrence of fraud and perjury, the authors imply that the prophylactic role which Professor Cavers suggests seems unrealistic. The planning aspect which would deny the enforcement of a contract so that others would be discouraged from relying on oral promises seems remote. See Twerski, *Choice-of-Law in Contracts—Some Thoughts on the Weintraub Approach*, 57 IOWA L. REV. 1239 (1972).

³⁹ Those critical of the statute of frauds have suggested that it "perpetrates more injustice than it prevents . . ." 2 A. CORBIN, CONTRACTS § 275 (1950). See also 3 S. WILLISTON, *supra* note 38, at §§ 448 n.7, 449. For review and discussion of such criticism, see Yonge, *The Unheralded Demise of the Statute of Frauds Welsher in Oral Contracts For the Sale of Goods and Investment Securities: Oral Sales Contracts are Enforceable by Involuntary Admissions in Court Under U.C.C. Sections 2-201(3)(b) and 8-319(d)*, 33 WASH. & LEE L. REV. 1, 4-5 nn.23 & 24 (1976).

⁴⁰ C. MCCORMICK, EVIDENCE § 340 (2d ed. 1972). Certain jurisdictions have applied the "clear and convincing" standard to prove an oral contract to make a will. *Hill v. Talbert*, 210 Ark.

espouses the statute of frauds rule would be assured that the contract would not be enforced unless exacting standards of proof were met. The state that enforces oral contracts without special safeguards would, in this instance, allow special attention to be focused on a concern (fraud) that is somewhat subordinated in most domestic litigation. The factual development of the issue cannot be avoided since, if fraud is an issue, it will be litigated in any event. The only question is whether the standard of proof will be that which ordinarily prevails in an ordinary contracts case. This accommodation to another state's legitimate concern is a modest one at best. But it may not be even that. If the premise is that the application of a rule of statistical justice has little bearing in a conflicts setting, then a state may simply be adjusting its domestic rule for a fact pattern in order to address an interest subordinated in most domestic litigation.⁴¹

An illustration of the operation of such a multistate conflicts rule and how its adoption would avoid the sophistry of exaggerated interest analysis is provided by *Intercontinental Planning, Ltd. v. Daystrom*.⁴² In this case, the court had to decide whether to apply the New York Statute of Frauds, which requires brokerage contracts to be in writing, against a New York plaintiff-broker. The defendant, a New Jersey corporation, could not seek the protection of the New Jersey Statute of Frauds since the statute did not require brokerage contracts to be in writing. New York might have had an interest in enforcing the oral contract, but its Statute of Frauds would deny enforcement. The New Jersey law, on the other hand, would permit enforcement of the contract, but New Jersey had no compelling reason to do so since plaintiff was not a domiciliary of New Jersey. Thus, neither state had any compelling interest either in enforcing or in not enforcing the contract. The traditional argument in such circumstances would be that both states have a subsidiary goal of enforcing contracts and that New York's exception to that goal is not applicable since the defendant is not a New York domiciliary.

The New York Court of Appeals did not, however, follow traditional analysis in *Daystrom*. It reasoned that New York had an interest in attracting business to the state, since New York is the commercial center of the United States. Thus, the state wanted businessmen to know that New York does not enforce oral brokerage contracts. The

866, 869, 197 S.W.2d 942, 943 (1946); *Jensen v. Housley*, 207 Ark. 742, 745, 182 S.W.2d 758, 759 (1944); *St. Louis Union Trust Co. v. Busch*, 346 Mo. 1237, 1244-45, 145 S.W.2d 426, 430 (1940).

⁴¹ This mode of analysis is not unlike that suggested by Professor Trautman in his discussion of *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961). See Trautman, *supra* note 12, at 107 (suggesting that the court in *Bernkrant* indicated that it was totally convinced that the promise was in fact made). It should be noted that even in purely domestic litigation, some courts have permitted proof of the underlying transaction in the face of the statute of frauds in order to remedy an injustice. See 1 A. SCOTT, TRUSTS § 44 (1967).

⁴² 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969).

court completed its *tour de force* by finding that New Jersey would have no opposing interest if New York gave protection to New Jersey corporations against New York plaintiffs. This kind of interest manipulation is highly questionable. Both New Jersey and New York were sufficiently involved to bring their policies on enforcement of brokerage contracts into play.⁴³ Instead of engaging in the all-or-nothing approach of interest analysis, which required interest manipulation, it would have been better for the court to apply a multistate substantive rule that would have permitted the enforcement of the contract upon proof of its existence and terms by clear and convincing evidence. Whether this exacting standard is met may be somewhat affected by the bias of the judiciary to issues raised under the statute of frauds. Nevertheless, applying the higher standard of proof would allow for the policies of both concerned states to find expression in a conflicts setting.⁴⁴

⁴³ The court listed the territorial contacts in the following manner:

It is clear that the instant dispute has sufficient contacts with New York to give our State a substantial interest in applying its policy. Plaintiff is a New York Corporation and its international finder's business centers in this State. Moreover, plaintiff's representation of Rochar derived from a New York meeting with Rochar's president. Plaintiff solicited Daystrom's interest in Rochar through an advertisement placed in a New York newspaper, and Mr. Jacob introduced the presidents of the two original principals (Rochar and Daystrom) at a meeting in a New York restaurant. At this New York meeting the principals agreed to compensate plaintiff with a finder's fee if a business relationship was concluded between Rochar and Daystrom. The remaining contacts leading up to the execution of the written finder's fee agreement involve letters and telephone calls emanating from plaintiff's New York office and the New Jersey office of Daystrom. It is therefore clear that the services for which plaintiff claims compensation were substantially rendered in New York and that our State has a substantial relationship with the formation and negotiation of the finder's fee agreement.

Id. at 384, 248 N.E.2d at 583, 300 N.Y.S.2d at 827.

⁴⁴ As noted at the outset, choice-of-law cases involving such issues as interspousal immunity, statutes of limitations, and wrongful death limitations lend themselves to a similar method of analysis. In large part, the disabilities which these issues impose on the plaintiff's right to recover stem from the concern that the judicial process is not adequate to the task of arriving at the truth. Thus, interspousal immunity is supported by the twin rationale of "collusion" and "protection of family harmony." See *Johnson v. Johnson*, 107 N.H. 30, 32, 216 A.2d 781, 783 (1966); *Thompson v. Thompson*, 105 N.H. 86, 88, 193 A.2d 439, 440 (1963); *McSwain v. McSwain*, 420 Pa. 86, 95, 215 A.2d 677, 682 (1966); *Zelinger v. State Sand & Gravel Co.* 38 Wis. 2d 98, 112, 156 N.W.2d 466, 472 (1969); W. PROSSER, *TORTS* § 122 (4th ed. 1971); R. WEINTRAUB, *supra* note 5, at 1. The substitution of a multistate rule that imposes a higher standard of proof could mute the collusion argument. As a result, a court might not feel bound to impose the "family harmony" reasoning in a multistate situation.

Statutes of limitations give voice to several legitimate state concerns. First, there is a concern that passage of time renders evidence uncertain and "stale"; memories become cloudy and less reliable, witnesses die, and documentary evidence is lost. See, e.g., *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944); *Davis v. Munie*, 235 Ill. 620, 621-22, 85 N.E. 943, 944 (1908). Second, the time bar signals to the defendant that his or her time for "final repose" has arrived vis-a-vis the transaction. See *McCluny v. Silliman*, 28 U.S. (3 Pet.) 270, 277 (1830); *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950). The "stale evidence" rationale goes to the ability of the judicial process to fairly adjudicate the case. In a choice-of-law setting, a multistate substantive rule which sets a higher evidentiary stan-

A CRITICAL LOOK AT VON MEHREN'S MULTISTATE SUBSTANTIVE RULES

The argument that multistate substantive rules should be viewed as an alternative to the all-or-nothing choice between competing domestic rules was forcefully made by Professor von Mehren.⁴⁵ In a provocative comment, von Mehren presented the following hypothetical:

A dog owned by a resident of State A strays into State B where it bites a resident of State B. Under the domestic law of State B the owner of a dog is strictly liable to a person bitten by the animal for damages inflicted. Under the law of State A the owner is not liable unless he knew that the dog had a propensity to bite. Assuming that State B's rule expresses, *inter alia*, a compensation policy while the rule of State A is designed to limit the risks attached to dog ownership, a true conflict is presented; both policies are clearly applicable to the situation. In the circumstances, certain choice-of-law theories deny all recovery, while others allow it. A third possibility, however, is to apply both states' rules, compromising differences on the basis of the relative strength of each legal order's claim to regulate. In the circumstance under discussion, this approach might result in the plaintiff's recovering one-half of his actual damages. The multi-state rule proposed, unlike a domestic-rule solution,

dard for the jury could mitigate this as a point of conflict. Given the uncertain nature of expectancies in a complex multistate case, it may be that the "repose" rationale would be less significant.

Similarly, wrongful death limitations appear to be at least partially motivated by the fear of speculative verdicts. A Pennsylvania court labeled this concern as procedural. *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d. 796 (1964). The court held that Colorado's wrongful death limit should not be applied to a Pennsylvanian killed in a Colorado air crash when the case was to be litigated in Pennsylvania. The court said:

An examination of the policies which apparently underlie that Colorado statute tends to indicate that state's lack of interest in the amount of recovery in a Pennsylvania court. The limitation would seem to have been intended to prevent Colorado courts from engaging in what they might consider speculative computation of expected earnings and the extremely difficult mathematical reduction to present worth. The statute may be based on procedural considerations of purely local concern. Colorado would be unconcerned if a Pennsylvania forum is willing to engage in such computations. Or, the limitation might have been intended to protect Colorado defendants from large verdicts against them. Although United obviously does some business in Colorado, it is not domiciled there. Furthermore, it does business in and flies over other states, including Pennsylvania, which do not limit recovery. Certainly, United could reasonably anticipate that it might be subject to the laws of such states and could financially protect itself against such eventuality. The element of surprise is lacking. *Id.* at 24, 203 A.2d at 807. The characterization of the Colorado wrongful death rule, which is designed to discourage speculative computation of expected earnings, as procedural is unfortunate. It really goes to the ability of the judicial process to fairly adjudicate this type of claim. If in fact that is the concern, then tighter control of the evidence and a higher standard of proof might substantially alleviate the concerns of Colorado in wrongful death cases. It is not the authors' intent to provide a legal mechanism for resolving the problem of speculative verdicts; rather, the purpose is to suggest the utilization of a multistate rule that would remove one of the potential sources of conflict from a choice-of-law case.

⁴⁵ Professor von Mehren attributes original thinking along this line to George Hoff. Von Mehren 1974, *supra* note 12, at 366 n.63 (citing Hoff, *Adjustments of Conflicting Rights: A Suggested Substitute for the Method of Choice-of-Laws*, 38 VA. L. REV. 745 (1952)).

thus recognizes that both states have legitimate interests in the situation.⁴⁶

Von Mehren's solution, to "split the infant," does not appear to the authors to foster the interests of either jurisdiction. It does not address the policy goals that the conflicting rules seek to accomplish. It is possible, however, to create a multistate substantive rule that could significantly advance the goals of both jurisdictions.

The conflicting rules in the dog-bite case pit a strict liability standard against one of ordinary negligence. The imposition of strict liability may reflect a shift toward a new standard of liability in which fault is not relevant. Recent developments in the law of products liability, however, tend to indicate that the shift from negligence toward a strict liability standard was motivated by a concern that plaintiffs were being forced to carry the burden of proof on issues where control of the crucial evidence was in the hands of the defendant.⁴⁷ A possible resolution of this problem would be to shift to the defendant the burden of proving that he was not negligent. It is arguable that, in practice, the strict liability rule does just that.⁴⁸ But even if a new standard of liability has been adopted, the impetus for change may have been proof-oriented.

The dog-bite case may be an occasion for creating a multistate rule that shifts the burden of proof on the negligence issue to the defendant. If the strict liability rule was motivated by the need to free the dog-bite victim from proving the defendant's state of knowledge as to the dangerous propensities of his dog,⁴⁹ then to retain the negligence rule with a formal shifting of burden of proof is an acceptable multistate solution to the conflict. The negligence rule of state *A* is fostered by retention of the liability standard, yet the desire of state *B* that the plaintiff not be

⁴⁶ *Id.* at 366.

⁴⁷ Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 301 n.16 (citing *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973)). There, the court argued for strict liability, stating, "In today's world it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose." 32 N.Y.2d at 340-41, 298 N.E.2d at 627, 345 N.Y.S.2d at 468. See also Noel, *supra* note 11 at 110 n.78, 111 n.81. The court in *Powers v. Hunt-Wesson Foods, Inc.*, 64 Wis. 2d 532, 219 N.W.2d 393 (1974), *rev'd sub nom. Greiten v. La Dow*, 70 Wis. 2d 589, 235 N.W.2d 677 (1975) interpreted the definition of strict liability in the RESTATEMENT (SECOND) OF TORTS § 402A (1965) to mean that the burden of proof shifts from the plaintiff to the defendant to establish nonnegligence. 64 Wis. 2d at 536, 219 N.W.2d at 395.

⁴⁸ See *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

⁴⁹ In its approach to dog-bite cases, Wisconsin has treated strict liability as analogous to negligence *per se*. In *Nelson v. Hansen*, 10 Wis. 2d 107, 102 N.W.2d 251 (1960), the court construed the Wisconsin strict liability statute, WIS. STAT. ANN. § 174.02 (West 1974), as having "dispensed with the necessity of proving *scienter* . . ." *Id.* at 119, 102 N.W.2d at 258. Where negligence can be shown by an owner's neglect to properly control a dog, proof of *scienter* is not necessary. The court indicated that the statute was intended to relieve the plaintiff of the burden of proving facts within the knowledge of the defendant. See *Wurtzler v. Miller*, 31 Wis. 2d 310, 143 N.W.2d 27 (1966).

burdened with proving the state of defendant's knowledge as to the viciousness of his dog is also accommodated. To be sure, state *B* in a domestic setting has decided that a shift in the liability standard is appropriate, thus making irrelevant any testimony as to defendant's knowledge about the dog. Nonetheless, the multistate rule goes a long way toward furthering the goals of state *B*. Indeed, an argument can be made that everything state *B* sought to accomplish by imposing strict liability is effected by the multistate rule. If the major concern of state *B* was, in truth, the allocation of proof to the proper party, its decision to shift to strict liability may have been done as a matter of judicial convenience. Although state *B* may have determined that, as a matter of justice, the burden of persuasion of nonnegligence should be shifted to the defendant, it may also have decided that, as a practical matter, it would be exceedingly difficult for the defendant to carry this burden. Thus, state *B* may have imposed strict liability for the sake of judicial economy. If this is the case, the policy of state *B* favoring strict liability over shifting the burden of proof is principally procedural and is designed to erase from the court calendar domestic cases in which litigation of the negligence issue is likely to result in a verdict against the defendant. This policy simply is not compelling in a multistate case that is idiosyncratic and that requires another state's legitimate policy to be taken into account.

APPROPRIATE OCCASIONS FOR UTILIZATION OF MULTISTATE RULES

The availability of a multistate rule that can accommodate the conflicting interests of concerned jurisdictions still demands an inquiry into whether the fact pattern reveals a true conflict-of-laws situation. Thus, one must honestly confront basic choice-of-law theory; one cannot merely jump to a comfortable compromise simply because it is available for the asking. As von Mehren correctly noted, basic principles of equality require that a legal order not distinguish between domestic and multistate situations unless the circumstances clearly justify departing from the domestic norm.⁵⁰ The authors believe, for example, that there are no grounds for engaging a multistate substantive rule for host-guest cases in a situation like *Babcock*. That case is so clearly a false conflict from both an interest and neoterritorial analysis⁵¹ that the domestic common law rule of New York ought to govern.

On the other hand, we should not permit ourselves the delusion that identification of state interests is an easy matter.⁵² When cases

⁵⁰ Von Mehren 1974, *supra* note 12, at 357.

⁵¹ Other commentators have identified Professors Cavers and Twerski as leading exponents of neoterritorialism in choice-of-law theory. See R. CRAMTON, D. CURRIE, & H. KAY, *supra* note 16, at 339-45; J. MARTIN, *CONFLICT OF LAWS* 276-87 (1978).

⁵² Twerski, HOFSTRA, *supra* note 3, at 111; Rosenberg 1967, note 5 *supra*. Commenting on *Kell v. Henderson*, 26 A.D.2d 595, 270 N.Y.S.2d 552 (A.D. 1966), Professor Rosenberg stated:

present a mix of questionable interests and difficult territorial fact patterns, we should not hesitate to employ the kind of multistate rule that furthers the interests of the concerned jurisdictions. For example, in a case like *Milkovich v. Saari*,⁵³ where a host and guest, each from a state that limited recovery to gross negligence, had an accident in a common law negligence state, a court need not agonize over whether the interests of the accident state in providing recovery should take precedence over the liability-negating rule of the state in which the relationship arose. The multistate rule, which permits the cause of action for negligence but raises the burden of proof to "clear and convincing evidence," resolves the problem in a fair manner.

The authors would go further, however. In *Tooker v. Lopez*,⁵⁴ the New York Court of Appeals was faced with the confrontation between interest analysis and a fact pattern that was territorially dominated by one state. In that case, three students at Michigan State University were visiting in Detroit when the driver lost control of the car; one passenger was killed and another seriously injured. In a suit on behalf of the New York guest against the driver, also a New York domiciliary, for the death of the passenger, a split court decided that the New York rule of ordinary negligence should apply rather than the Michigan guest statute. Resolution of this conflict through application of the suggested multistate substantive rule would have avoided the doctrinal split that set interest analysis in opposition to a territorial approach. The court could have recognized the New York interest and still have given substantial effect to the territorial demands of the fact pattern by giving credence to Michigan concerns utilizing the suggested technique of raising the burden of proof.

CONCLUSION

Multistate substantive rules are not a panacea for all choice-of-law problems. Many areas remain where the policy differences between states raise a genuine conflict regarding the proper way to resolve a problem. For example, a state that refuses to impose civil liability on a tavern owner for selling liquor to an inebriated person who is later involved in an auto accident may be in direct conflict with the policy of

Searching for governmental interests presupposes that the purposes behind substantive rules are so clear, so singular, so univocal that we can hope to discover them with some certainty and some consensus. This is at odds with reality. Even the simple rules that raise rights and duties with regard to personal injuries are a composite of thrusts and counter-thrusts of many kinds. For instance there are many substantive rules favoring recovery for negligent injuries; but contributory negligence, assumption of risk, workmen's compensation exclusions and other rules are opposed to recovery. To try to bring all the huffing and puffing together into a policy that runs clearly in one direction and that has a measurable intensity that permits comparing it with some contrary policy is, in my judgment, pure fantasy.

Rosenberg 1967, *supra* note 5, at 464.

⁵³ 295 Minn. 155, 203 N.W.2d 408 (1973).

⁵⁴ 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

the plaintiff's home state that grants such recovery and does so both as a matter of justice to the injured party and as a deterrent to that kind of activity on the part of tavern keepers.⁵⁵ Similarly, a state that refuses to enforce gambling contracts may be in irreconcilable conflict with a state that encourages that activity on the part of its business enterprises.⁵⁶ Conflict theory will have to resolve these kinds of problems. That multistate substantive rules do not purport to resolve all conflicts questions, however, is hardly grounds for disregarding them. Only doctrinaire choice-of-law thinkers will reject them out of hand. A judiciary that is fact-sensitive and willing to experiment with practical solutions to heretofore intractable problems should give them serious attention.

⁵⁵ *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976). *See Bars Have Hangover From Big Judgments in Drinkers' Mishaps*, Wall St. J., Aug. 23, 1978, at 1, col. 4, for a recent assessment of the strength of the policy clash and resultant effects on tavern keepers. *But see* von Mehren 1977, *supra* note 12, at 42.

⁵⁶ *See Ciampittiello v. Campitello*, 134 Conn. 51, 54 A.2d 669 (1947); *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 203 N.E.2d 210, 254 N.Y.S.2d 527 (1964).