A CRITICAL ANALYSIS OF NEW JERSEY'S DOMICILE-DRIVEN CHOICE OF LAW METHODOLOGY

*Marc S. Klein**

* B.A., Swarthmore College, 1976; J.D., University of Pennsylvania Law School, 1979. Mr. Klein is a member of the New Jersey and Pennsylvania bars and a partner in the Newark, New Jersey law firm of Sills Beck Cummis Zuckerman Radin Tischman & Epstein, P.A.

Mr. Klein served as an advocate on behalf of a defendant in three cases discussed in this article: George R. Darche Assoc., Inc. v. Beatrice Foods Co., 538 F. Supp. 429 (D. N.J. 1981), *aff'd mem.*, 676 F.2d 685 (3d Cir. 1982); Pine v. Eli Lilly & Co., 201 N.J. Super. 186, 492 A.2d 1079 (App. Div. 1985), *certif. and leave to appeal denied* (unpublished order, July 23, 1985); and Axelrod v. CBS Publications, 185 N.J. Super. 359, 448 A.2d 1023 (App. Div. 1982). The views expressed in this article are his alone.

Copies of all unpublished materials cited in the article, including opinions and record references, are on file with the Seton Hall Law Review and may be inspected there or obtained directly from the author.

I. INTRODUCTION

New Jersey joined the nationwide revolution in conflicts law twenty years ago.[1] Following New York's lead,[2] the Supreme Court of New Jersey, in *Mellk v. Sarahson*,[3] overthrew the traditional conflicts regime and adopted "interest analysis" in its place.[4] While the court suggested that this development was a linear outgrowth of earlier decisions,[5] the shift to interest analysis actually transformed the "implicit body of theoretical and methodological beliefs" underlying New Jersey conflicts law.[6]

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1 *See* Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967).

2 *See* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

3 49 N.J. 226, 229 A.2d 625 (1967).

4 For tort actions the court abandoned the *lex loci delicti* rule, which provides that the law of the jurisdiction in which a wrong occurs governs the rights and liabilities of those involved. *Id.* at 228, 229 A.2d at 626. In contract actions, the court abandoned the traditional paradigm's *lex loci contractus* rule in State Farm Mut. Auto. Ins. Co. v. Estate of Simmons, 84 N.J. 28, 417 A.2d 488 (1980). Although there is a close coincidence between the modern tests governing tort and contract choice of law issues, *id.* at 43 n.2, 417 A.2d at 496 n.2, this article focuses on the former.

5 The *Mellk* court posited that it had:

> already recognized that the *lex loci delicti* should not be applied mechanically, but that courts should give attention to other factors which are relevant to the choice of law process. . . . And even where we have applied the law of the place of the wrong, we have done so only after full consideration of the policies and purposes of the rules of the states involved.

Mellk, 49 N.J. at 229, 229 A.2d at 626-27 (citation omitted).

6 The transformation of theoretical and methodological beliefs lies at the core of any true "intellectual revolution." *See* T. KUHN, *The Structure of Scientific Revolutions*, in 2 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE 16-17 (2d ed. 1970). In other words, a revolution entails a shift in "the particular loci of commitment" brought to the subject at hand. *See id.* at 43.

Intellectual revolutions are not a product of the "common law method." Under that method, courts create new rules incrementally, "by developing limited propositions through the resolution of particular controversies in the light of past solutions of related problems." G. CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 120-21 n.7 (1985). These limited propositions fit within a pattern that ultimately emerges as a "rule" of law. *See* J. ELY, DEMOCRACY AND DISTRUST 54 (1980)

New Jersey's choice of law revolution[7] promised greater efficiency through a methodology of elegant simplicity. The law of a foreign state would no longer be applied "mechanically;"[8] rather, it would be considered only if that state had "a *real interest* in having its rules . . . apply to the conduct of the parties."[9] If only one state had a real interest, the case would present a "false conflict,"[10] and a court would simply apply the law of that state

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(common law method is "one of reaching what instinctively seem the right results in a series of cases, and only later . . . enunciating the principle that explains the pattern — a sort of connect-the-dots exercise.") (footnote omitted). Conflict of laws traditionally evolved through common law incrementalism. *See* RESTATEMENT OF CONFLICT OF LAWS § 5 comments b, d (1934) [hereinafter RESTATEMENT].

The shift to interest analysis was revolutionary, not evolutionary, because it represented a complete "transformation in the corpus of the law. . . ." RESTATEMENT (SECOND) OF CONFLICT OF LAWS vii (1971) [hereinafter RESTATEMENT SECOND]. To an extent never before experienced in a major sector of the law, the courts "determinedly proceeded in a nonincremental mode." Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1601 (1985) (footnote omitted) [hereinafter Hill, *The Judicial Function*]. *See also State Farm*, 84 N.J. at 45, 417 A.2d at 497 (Pashman, J., dissenting) ("more drastic changes have recently been made in the common law rules of Conflict of Laws than in most other areas of the law") (quoting RESTATEMENT SECOND § 5, comment c).

7 Commentators generally have ascribed New Jersey's version of interest analysis to the works of Professor Brainerd Currie. *See, e.g.*, Kay, *Theory into Practice: Choice of law in the Courts*, 34 MERCER L. REV. 521, 544 (1983) [hereinafter Kay, *Theory into Practice*]; Note, *The Application in New Jersey of the Governmental Interest Analysis Approach to Choice-of-Law Problems of Tort Liability*, 3 RUT.-CAM. L.J. 165, 169 (1971) ("The governmental interest analysis approach adopted in New Jersey is the product of Professor Brainerd Currie."). In 1983, Professor Herma Hill Kay found that only California and New Jersey "claim to be following Currie's version of governmental interest analysis." Kay, *Theory into Practice*, *supra*, at 544. Research discloses no decision, however, in which New Jersey courts have literally "claim[ed]" to follow Currie's version of interest analysis. While the terminology derives from Currie's scholarship, New Jersey courts actually apply their own eclectic version of interest analysis. *Id.* at 548-51.

8 *Mellk*, 49 N.J. at 229, 229 A.2d at 626.

9 *Id.* (emphasis added).

10 A "false conflict" exists when (1) "the laws of both states relevant to the set of facts are the same, or would produce the same decision in the lawsuit. . . ." R. LEFLAR, AMERICAN CONFLICTS LAW § 93, at 188 (3d ed. 1977) [hereinafter LEFLAR]; or (2) "one law—by its own terms or underlying policies—is not intended to apply to a situation such as the one in issue." E. SCOLES & P. HAY, CONFLICT OF LAWS § 2.6, at 17 (1982) (footnote omitted) [hereinafter E. SCOLES & P. HAY]. To determine whether the first type of false conflict (a "Type I" false conflict) exists, a court need only compare the respective outcomes under the competing black letter rules of law. *See State Farm*, 84 N.J. at 50, 417 A.2d at 500 (Pashman, J., dissenting). To determine whether the second type of conflict (a "Type II" false conflict) exists, however, a court must consider the relevant choice of law factors. *Id.* Courts frequently avoid an extended analysis of those factors by determining that, in fact, the case presents a Type I false conflict. *See* George R. Darche & Assoc., Inc. v. Beatrice Foods Co., 538 F. Supp. 429, 433 (D. N.J. 1981), *aff'd mem.*, 676 F.2d 685 (3d Cir. 1982).

with the real interest.[11] If two or more states had a real interest, a court would resolve the true conflict by weighing the real interests and choosing the law of the state with the "greatest concern for the specific interest raised in the litigation."[12] With interest analysis, in contrast to the singular focus of *lex loci delecti*, every "real interest" would be "relevant to the choice of law process."[13]

The *Mellk* decision left open some key features of the new methodology, including, among others, how courts are to identify "real interests," and, in the event of a "real conflict," to weigh them one against the other. For almost twenty years, New Jersey courts proceeded on an ad hoc basis.[14] The results were not entirely unsatisfactory because most cases presented "false conflicts" that were easily resolved.[15] In a trilogy of recent cases, however, New Jersey courts were called upon to resolve true conflicts.[16] In the process of doing so, these courts may have com-

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[11] Interest analysts maintain that most inquiries will end on this note. As Professor Ely has observed:

> The modern learning's proudest boast—one joined by virtually every contemporary writer on the subject—is that in a significant percentage of the cases (many say most), analysis of the interests of the states apparently involved will generate the conclusion that in fact only one state is interested (and the conflict therefore dismissable as "false") or if not that, the interests of one state will so overwhelmingly predominate that there can be no serious doubt that its law should be applied.

Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 175-76 (1981) (footnote omitted) [hereinafter Ely, *Choice of Law*].

[12] *Mellk*, 49 N.J. at 231-32, 229 A.2d at 628 (quoting Babcock v. Jackson, 12 N.Y.2d 473, 481, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749). Both *Mellk* and *Babcock* involved Type II "false conflicts" because the courts found no "real interest" favoring the foreign law. *See Mellk*, 49 N.J. at 230, 229 A.2d at 627; *Babcock*, 12 N.Y.2d at 483, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 752. Consequently, the suggestion in both opinions that courts would weigh "real interests" and choose between them was dicta. Indeed, interest analysts disagree on the fundamental question whether courts could or should weigh real interests in deciding "true conflict" cases. *See infra* notes 72-96 and accompanying text.

[13] *Mellk*, 49 N.J. at 229, 229 A.2d at 626.

[14] *See, e.g.*, Rose v. Port of New York Auth., 61 N.J. 129, 140, 293 A.2d 371, 376-77 (1972); Beckwith v. Bethlehem Steel Corp., 185 N.J. Super. 50, 59-60, 447 A.2d 207, 212 (Law Div. 1982).

[15] These cases presented choice of law issues easily resolved by the core principles of the new paradigm. The theoretical assumptions implicit in interest analysis enabled the courts to readily identify the issues in "false conflict" terms. Consequently, the methodological issue left open—how to weigh "real interests"—did not have to be addressed.

[16] *See* Seals v. The Langston Co., 206 N.J. Super. 408, 502 A.2d 1185 (App. Div. 1986); Pine v. Eli Lilly & Co., 201 N.J. Super. 186, 492 A.2d 1079 (App. Div. 1985);

mitted New Jersey's version of interest analysis to some very startling theoretical and methodological premises.

This article examines New Jersey's choice of law revolution to determine whether the judicial product that has emerged "commands respect in its own right — wholly apart from the merits of the theories bandied about on the academic plane."[17] Accordingly, the discussion will primarily focus on "what the courts have *done*, rather than upon the description they have given of the reasons for their action."[18] The objective is to determine whether or not interest analysis better advances the policies "relevant to the choice of law process."[19]

This article demonstrates that interest analysis has not made good on its promise. Indeed, New Jersey's experience with the doctrine suggests that interest analysis is incapable of doing so. The inability of interest analysis to better serve the choice of law process derives from at least three fundamental flaws.

First, interest analysis fails because it abandons the principle of litigant neutrality. Instead, it rests on the simplistic and impermissible view that, in making choice of law decisions, New Jersey courts should favor their own citizens.[20] Thus, in most cases involving a "real conflict" in which New Jersey has a "real interest," a New Jersey plaintiff will prevail over a foreign defendant, and a New Jersey defendant will prevail over a foreign plaintiff. In short, New Jersey residents have the home court advantage.

Second, interest analysis fails because it abandons the principle of result neutrality. Instead, it favors the compensatory and cost shifting objectives of tort law over its regulatory and normative objectives.[21] Thus, in those "true conflict" cases not deter-

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Deemer v. Silk City Textile Machinery Co., 193 N.J. Super. 643, 475 A.2d 648 (App. Div. 1984).

17 Hill, *The Judicial Function*, *supra* note 6, at 1599.

18 Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L. J. 457, 460 (1924) (emphasis in original).

19 *Mellk*, 49 N.J. at 229, 229 A.2d at 626.

20 *See infra* notes 248-55 and accompanying text. The argument made there is that this organizing principle cannot serve as the doctrinal underpinning of New Jersey conflicts law if the goal is to have a body of coherent, fair, and efficacious choice of law rules.

21 *See infra* notes 235-40 and accompanying text. While the conflicts revolution unfolded, tort law—particularly product liability law—itself experienced a radical transformation. *See* Home Warranty Corp. v. Caldwell, 777 F.2d 1455, 1462 (11th Cir. 1985) (tracing "rapid and radical" transformation of product liability law); Migues v. Fibreboard Corp., 662 F.2d 1182, 1189 (5th Cir. 1981) (noting "novel, startling and revolutionary" changes in tort law that have broadened opportunities for compensation); Ghiardi, *Tort and Insurance Law: How Times Have Changed!*, THE

minable on the basis of the home court advantage, the plaintiff will recover and the defendant (or more accurately, the defendant's insurer) will pay.

Third, interest analysis fails because it remains an ill defined "approach" without rules.[22] When the focus again is shifted from *what* the courts have done to the *reasons* given for their actions, sufficient "reasons" appear in virtually all cases to choose the law of any state with some connection to the parties or the occurrence.[23] Professor Trautman, a leading advocate of the modern approach, has stated the problem most eloquently:

> Even those of us most sympathetic to the [revolution] are uneasy; rule and order, principle and system do not seem to be even on the horizon, and we wonder whether our field of the law is law at all — whether we are on or even near a path leading to what is ultimately indispensable to law: *neutral principles that apply equally to like cases.*[24]

II. THE CHOICE OF LAW PROCESS

Choice of law doctrine determines whether domestic or foreign law should govern the rights and liabilities of parties arising out of an occurrence involving foreign elements.[25] Thus, the

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BRIEF, May, 1983, at 7 [hereinafter Ghiardi, *Tort and Insurance Law*] ("The most dramatic development in tort law in recent decades has been the so-called product liability 'revolution.' "). In light of interest analysis emphasis on compensation, it may be that the choice of law revolution itself was driven by the broader tort law revolution. In other words, courts modifying substantive tort principles to expand the availability of compensation may have also modified choice of law principles to further that objective.

[22] Judge Fuld, the author of *Babcock*, later acknowledged that interest analysis:

> is not, and does not profess to be, a talisman of legal certainty, nor does it of itself provide a formulary means for resolving conflicts problems. What it does provide is a method, a conceptual framework, for the disposition of tort cases having contacts with more than one jurisdiction.

Dym v. Gordon, 16 N.Y.2d 120, 129, 209 N.E.2d 792, 797, 262 N.Y.S.2d 463, 470 (1965) (Fuld, J., dissenting).

[23] *See infra* notes 265-365 and accompanying text. Thus, the theory of interest analysis fails as a theory because it lacks predictive power.

[24] Trautman, *Rule or Reason in Choice of Law: A Comment on* Neumeier, 1 VT. L. REV. 1, 1 (1976) (emphasis added).

[25] RESTATEMENT SECOND, *supra* note 6, § 2, comment (a)(3). The Restatement speaks of the law which "shall be applied." *Id.* Describing the choice of law process in those terms, although common, is not quite correct. A forum court does not "apply" foreign law. Rather, as part of its own law, it may defer to foreign law and reach a result consistent with it. As Learned Hand noted:

> It is indeed commonly said that, when a court must consider the legal effect of events happening elsewhere, it enforces foreign law. That I conceive is a compressed statement, which it is at times useful to expand. Of necessity no court can enforce the law of another place. It is,

doctrine comprises "the body of law dealing with the questions of *when* and *why* the courts of one jurisdiction take into consideration the elements of law . . . or consider the prior determination of another state or of a foreign nation in a case pending before them."[26]

Conflicts of law doctrine developed in response to the necessities of international trade and commerce.[27] To do business across jurisdictions, businessmen needed some measure of certainty, predictabilty, and uniformity. Courts recognized that their "domestic rules" could not be applied in every suit—regardless of its foreign elements—without discouraging international as well as interstate commerce. Consequently, courts responded with the doctrine of comity.[28]

New Jersey courts have historically analyzed conflict of law

> however, the general law of all civilized peoples that, in adjusting the rights of suitors, courts will impute to them rights and duties similar to those which arose in the place where the relevant transactions occurred.

Direction Der Disconto-Gesellschaft v. United States Steel Corp., 300 F. 741, 744 (S.D.N.Y. 1924) (citation omitted), *aff'd*, 267 U.S. 22 (1925). Thus, in the absence of constitutional constraints (which are beyond the scope of this article), whether or not foreign law influences the result reflects a policy determination implicit in the forum's choice of law process. *See generally* E. SCOLES AND P. HAY, *supra* note 10, § 2.1, at 5 (outlining states' options "to ignore the foreign element and to treat the case as arising under local law, or to seek an accommodation between the forum and the foreign legal system. . .").

[26] E. SCOLES AND P. HAY, *supra* note 10, § 1.1, at 1 (1982) (emphasis in original). The Supreme Court of New Jersey has identified seven general considerations relevant to the analysis of a conflict-of-law issue:

> (1) the needs of the interstate and international system, (2) the relevant policies of the forum, (3) the relevant policies of other affected states and the relevant interests of those states in the determination of the particular issue, (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, (6) certainty, predictability, and uniformity of result, and (7) ease in the determination and application of the law to be applied.

State Farm Mut. Auto. Ins. Co. v. Estate of Simmons, 84 N.J. 28, 34, 417 A.2d 488, 491 (1980) (quoting RESTATEMENT SECOND, *supra* note 6, § 6(2)).

[27] W. W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 338 (1942).

[28] *See, e.g.*, Northern Pacific R.R. Co. v. Babcock, 154 U.S. 190, 197 (1894); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918).

Early conflicts law in the United States was rooted in the doctrine of "comity." The first comprehensive American conflicts treatise, J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN & DOMESTIC (1834), explained that:

> The true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.

Id. § 35, at 34 (footnote omitted). Another treatise notes that:

issues in terms of comity.[29] The conflicts revolution did not change that orientation; to the contrary, New Jersey courts continued to express conflict of law principles in terms of comity.[30] Consequently, the pre- and post-revolutionary paradigms ostensibly share the same operative principle.

A. The Operative Principle of Comity

Comity is a voluntary principle[31] frequently equated with "principles of propriety,"[32] "good neighbor regard for the foreign policy" in question,[33] and "judicial statesmanship."[34]

> "Comity" sought to reconcile the territoriality (sovereignty) of states with the need for consideration of foreign law in appropriate cases. The doctrine was generally accepted as an operational theory in the courts during the half century from 1850-1900; references to comity can still be found in judicial decisions in the United States.

E. SCOLES & P. HAY, *supra* note 10, § 2.4, at 13 (footnote omitted).

[29] *See, e.g.*, O'Brien v. Virginia-Carolina Chemical Corp., 44 N.J. 25, 206 A.2d 878 (1965), *cert. denied*, 389 U.S. 825 (1967); Wilson v. Faull, 27 N.J. 105, 141 A.2d 768 (1958); Zurich Gen. Accident and Liab. Ins. Co. v. Ackerman Bros., Inc., 124 N.J.L. 187, 11 A.2d 52 (1940); Masci v. Young, 109 N.J.L. 453, 162 A. 623 (N.J. 1932), *aff'd*, 289 U.S. 253 (1933); Flagg v. Baldwin, 38 N.J. Eq. 219 (N.J. 1884).

[30] *See, e.g.*, City of Philadelphia v. Austin, 86 N.J. 55, 429 A.2d 568 (1980); IAC, Ltd. v. Princeton Porsche-Audi, 75 N.J. 379, 382 A.2d 1125 (1978); Caribe Hilton Hotel v. Toland, 63 N.J. 301, 307 A.2d 85 (1973); Buckley v. Huston, 60 N.J. 472, 291 A.2d 129 (1972); Seckular v. Celotex, 209 N.J. Super. 242, 507 A.2d 290 (App. Div. 1986); Mercandino v. Devoe & Raynolds, Inc., 181 N.J. Super. 105, 436 A.2d 942 (App. Div. 1981).

[31] *See* City of Philadelphia v. Austin, 86 N.J. 55, 64, 429 A.2d 568, 572 (1981) ("Comity is not a binding obligation on the forum state, but a courtesy voluntarily extended to another state for reasons of 'practice, convenience and expediency.' ") (citation omitted); Polyckronos v. Polyckronos, 17 N.J. Misc. 250, 255, 8 A.2d 265, 269 (Ch. Div. 1939) ("It is upon the principle of the voluntary act of comity that contracts valid where made, but invalid in the state of the forum, will be enforced in the latter state if not contrary to the established policy of that state."); Receiver of the State Bank v. First Nat'l Bank, 34 N.J. Eq. 450, 454 (Ch. Div. 1881).

[32] Hatch v. Hatch, 15 N.J. Misc. 461, 464, 192 A. 241, 244 (Ch. Div. 1937).

[33] King v. Klemp, 26 N.J. Misc. 140, 151, 57 A.2d 530, 536 (Ch. Div. 1947).

[34] Mrowczynski v. Mrowczynski, 142 N.J. Super. 312, 322, 361 A.2d 554, 559 (App. Div. 1976).

Judicial statesmanship is one manifestation of comity that precludes one state's courts from interfering with arguably lawful or appropriate proceedings in another. *See* O'Loughlin v. O'Loughlin, 6 N.J. 170, 174, 78 A.2d 64, 68 (1951) ("Considerations of comity forbid interference with the prosecution of a proceeding in a foreign jurisdiction capable of affording adequate relief and doing complete justice . . . ."); *see also* Lehigh Valley R.R. Co. v. Andrus, 91 N.J. Eq. 225, 109 A. 746 (Ch. Div.), *aff'd*, 92 N.J. Eq. 238, 112 A. 307 (N.J. 1920); von Bernuth v. von Bernuth, 76 N.J. Eq. 177, 73 A. 1049 (Ch. Div. 1909); Bigelow v. Old Dominion Copper Mining & Smelting Co., 74 N.J. Eq. 457, 71 A. 153 (Ch. Div. 1908); Margarum v. Moon, 63 N.J. Eq. 586, 53 A. 179 (Ch. Div. 1902); New Jersey Zinc. Co. v. Franklin Iron Co., 29 N.J. Eq. 422 (Ch. Div. 1878); Home Insurance Co. v. Howell, 24 N.J. Eq. 238 (Ch. Div. 1873) (all demonstrating exercise of judicial statesmanship).

The doctrine contemplates reciprocity.[35]

Comity is considered essential to commercial confidence and therefore is necessary to the interstate and international systems.[36] Indeed, principles of comity are rooted in the full faith and credit clause of the United States Constitution,[37] which orders "submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."[38]

Comity, in sum, is extended when one state's course of action might "frustrate the legitimate interests" of another state.[39] Comity will not be extended if the enforcement or recognition of another state's interests will offend a fundamental public policy of the forum state.[40] If the enforcement or recognition of an-

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35 As one court stated:

> [C]omity implies reciprocity. Whether the action which is based on comity be that of the judicial, or the administrative or the legislative agency, that action is taken either as an actual reciprocation for similar action previously taken by the other state or in the expectation that the other state will similarly reciprocate.

In re Fisher, 119 N.J. Eq. 217, 223, 181 A. 875, 878 (Prerog. Ct. 1935). *See also* Rutledge v. Krauss, 73 N.J.L. 397, 401, 63 A. 988, 990 (N.J. 1906) ("Comity means that we do by courtesy what [other states] would do under like circumstances with a citizen of our state."); Caruso v. Caruso, 103 N.J. Eq. 487, 492, 143 A. 771, 773 (Ch. Div. 1928) (rule precluding one state's courts from interfering with proceedings ongoing in another state "is, of course, one of reciprocity, and is, or ought to be, recognized by the courts of all countries."), *rev'd on other grounds*, 106 N.J. Eq. 130, 148 A. 882 (N.J. 1930); Bull v. International Power Co., 86 N.J. Eq. 275, 278, 98 A. 382, 383 (Ch. Div. 1916) (courts should "return comity for comity"); *Fisher*, 119 N.J. Eq. at 224, 181 A. at 878 (request to decline jurisdiction based on comity denied because "there appears no reason to suppose that the New York courts would refuse to entertain such a suit in converse circumstances").

36 RESTATEMENT SECOND, *supra* note 6, § 6, comment (2)(d).

37 The full faith and credit clause of the United States Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. IV, § 1.

38 Estin v. Estin, 334 U.S. 541, 546 (1948).

39 Mrowczynski v. Mrowczynski, 142 N.J. Super. 312, 322, 361 A.2d 554, 559 (App. Div. 1976). The traditional and modern choice of law analyses differ, of course, in the theoretical premises that define "the legitimate interests" of other states and the methodologies for reconciling them.

40 *See, e.g.*, Lobek v. Gross, 2 N.J. 100, 65 A.2d 744 (1949) (declining to enforce agreement in restraint of marriage even though valid where made); Minzesheimer v. Doolittle, 60 N.J. Eq. 394, 396-97, 45 A. 611, 611 (N.J. 1900); Flagg v. Baldwin, 38 N.J. Eq. 219, 224 (N.J. 1884); Polyckronos v. Polyckronos, 17 N.J. Misc. 250, 255, 8 A.2d 265, 269 (Ch. Div. 1939) ("if a foreign-made contract violates the established policy of this state, comity will not persuade its enforcement although the

other state's law would not offend the forum state's public policy, and circumstances otherwise warrant the application of foreign law, the forum state will give effect to the laws of the other state.[41]

B. The Loci of Commitment in the Competing Paradigms

Many articles briefly describe the origins and operations of the traditional and modern regimes. This article does not retread those well worn paths. Rather, the article compares the key intellectual and methodological commitments of the two systems and their relationship to the choice of law process.[42] Consequently, a greater degree of historical and analytical perspective is essential.

1. Territorial or Personal Law

At one time, wherever citizens of the British Empire went, they took their law with them. The conflicts scholar Joseph Beale noted that:

> The result of the English doctrine is to extend to a plaintiff a right to recover damages for an act which was no legal injury to him, and to impose on the defendant, a burden which the law of the place where he committed his act or caused events to happen did not impose. It is opposed to what seems an obvious requirement of justice; that a person may rely upon the law of the place of the wrong where he acts or in which he causes events to happen and may expect no legal consequence of his act except such as the law at that place attaches to it.[43]

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contract may be valid according to the laws of the state wherein it was made"); Union Locomotive & Express Co. v. Erie Ry. Co., 37 N.J.L. 23, 25 (N.J. 1874) ("A contract valid elsewhere, will not be enforced [in the forum state] if it is condemned by positive law, or is inconsistent with the public policy [of the forum state].").

41 *See, e.g.*, City of Philadelphia v. Austin, 86 N.J. 55, 64, 429 A.2d 568, 573 (1981) ("public policy of New Jersey is to effectuate the laws of sister states"); *cf.* Wright v. Remington, 41 N.J.L. 48, 52 (N.J. 1879), *aff'd*, 43 N.J.L. 451 (N.J. 1821) ("Whatever may be our opinion of the policy of legislation beyond our state, we are bound by the principles of comity to recognize its validity unless it clearly contravenes the principles of public morality or attacks the interests of the body of the citizens of our state.").

42 The objective is to set the stage for a critical examination of New Jersey's choice of law methodology without getting lost in what Justice Cardozo aptly termed "one of the most baffling subjects of legal science." B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 67 (1928). *Cf.* AUGROS & STANCIV, THE NEW STORY OF SCIENCE 1 (1986) ("A revolution overthrows an old regime and initiates a new order. Therefore, to comprehend the significance of any revolution, it is necessary first to understand the old regime.").

43 *See* J. BEALE, TREATISE ON THE CONFLICT OF LAWS § 378.5, at 1292-93 (1935).

Speaking of the American attitude toward this recognition of "personal law," Benjamin Cardozo noted "[t]hat is certainly not the rule with us . . . . There is little doubt about the wisdom of the departure."[44]

American courts departed from the personal law principle for *terra firma*. They grounded conflicts doctrine in principles of territorial sovereignty: "No law exists as such except the law of the land."[45] Thus, at the turn of the century, it was said that "the foundation principle of the Conflicts of Laws is Situs. Every element in every transaction known to the law has a situs somewhere, and the law of that situs will regulate and control the legal effect of that element."[46] The territorial paradigm thus called for the enforcement, by the forum state, of rights recognized by the "situs" of the decisive event.[47]

Because rights were created on the basis of *where* an incident occurred, not *who* was involved, the traditional regime did not consider the domiciles of the parties. That factor was simply irrelevant. Therefore, the plaintiff in an action could not, in theory, choose to sue in his home state and expect a better outcome than had he sued elsewhere. Under the traditional regime, "[t]he purpose of the conflict-of-laws doctrine [was] to assure that a case [would] be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum."[48] To attain that goal, choice of law rules had to be "content blind."[49] In short, the traditional paradigm was committed to "urbane neutrality."[50]

Interest analysis, by contrast, presupposes that each state's law expresses a unique interest in the welfare of *its* citizens.[51] In other words, the focus has shifted from *where* the wrong occurred to *who* was wronged.[52] Consequently, interest analysis cannot meaning-

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44 Loucks v. Standard Oil Co., 224 N.Y. 99, 107, 120 N.E. 198, 200 (1918). Justices Holmes and Cardozo were leading advocates of this departure. *See infra* text accompanying notes 110-20.

45 H. GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS § 8, at 14 (1949) [hereinafter GOODRICH].

46 R. MINOR, CONFLICTS OF LAWS § 17, at 51 (1901).

47 *See* RESTATEMENT SECOND, *supra* note 6, ch.7, introductory note at 412.

48 Lauritzen v. Larsen, 345 U.S. 571, 591 (1953).

49 Comment, *Choice of Law: Statutes of Limitation in the Multistate Products Liability Case*, 48 TUL. L. REV. 1130, 1146 (1974).

50 Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 12-13 (1984) [hereinafter Juenger, *Conflict of Laws*].

51 *See* Twerski, *Neumeier v. Kuehner: Where are the Emperor's Clothes ?*, 1 HOFSTRA L. REV. 104, 107 (1973).

52 *See* State Farm Mut. Auto. Ins. Co. v. Estate of Simmons, 84 N.J. 28, 43 n.2, 417 A.2d 488, 496 n.2 ("The governmental interest test focuses upon whether a

fully proceed until the parties' domiciles are known. Indeed, as it has evolved, domicile has come to be the most important factor in defining a state's interest in the outcome of a lawsuit.[53]

2. Regulation or Compensation

Historically, tort law has served two primary social objectives: to compensate those who are injured by wrongful conduct and to regulate by deterring further instances of that conduct.[54] Like compensation, regulation remains a bedrock principle of strict liability.[55] New Jersey courts have consistently emphasized the regulatory function of product liability law.[56] By requiring

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state has a legitimate concern with the resolution of the particular controversy, placing special emphasis upon the status of the parties and their connections with the state.").

[53] Professor Juenger has noted that:

> The crucial step in Currie's analysis is the determination of the circumstances that make it reasonable to allow a local policy to control issues posed by a multistate transaction. Currie would let that determination hinge on the state's relationship to the parties and to the transaction. But what kind of relationship? Here Currie's prose become vague. But while his attempts to generalize may be unsatisfactory, his discussion of specific cases, real and hypothetical, gives us a clue: In almost all instances he deduces the legitimacy of an interest from the fact that one of the parties is domiciled in the forum state, a conclusion he derived from the consideration that governments are primarily concerned with the welfare of their citizens and residents.

Juenger, *Conflict of Laws*, *supra* note 50, at 9. *See also* Ely, *Choice of Law*, *supra* note 11, at 175 (interest analysis presupposes that "states are interested in protecting their own residents in a way they are not interested in protecting others. . .").

[54] W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 20, 25-26 (5th ed. 1984).

[55] *Id.* Products liability law intentionally seeks to regulate conduct by encouraging each manufacturer to "do what he can to see that there are no . . . defects" in his products. *Id.*

[56] *See, e.g.*, Fischer v. Johns-Manville Corp., 103 N.J. 643, 657, 512 A.2d 466, 473 (1986) ("The overriding goal of strict products liability is to protect consumers and promote product safety."); O'Brien v. Muskin Corp., 94 N.J. 169, 184, 463 A.2d 298, 306 (1984); Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 398, 451 A.2d 179, 185 (1982) ("While the commercial market may not always generate a safety stimulus, courts can contribute to that end."); Beshada v. Johns-Manville Prod. Corp., 90 N.J. 191, 206-07, 447 A.2d 539, 548 (1982).

Federal and state courts in other jurisdictions have similarly recognized the regulatory nature and effect of products liability law. *See, e.g.*, Reyno v. Piper Aircraft Co., 630 F.2d 149, 167 (3d Cir. 1980) (products liability law "seeks to make manufacturers more careful in production and design. . ."), *rev'd on other grounds*, 454 U.S. 235 (1981); Lewis v. Timco, Inc., 716 F.2d 1425, 1429 (5th Cir. 1983) (products liability law enhances "the manufacturer's incentive to produce safe products"); DeLuryea v. Winthrop Laboratories, 697 F.2d 222, 228 (8th Cir. 1983) (products liability law assumes that "the manufacturer of mass-produced goods is motivated by economic self-interest to make the product safer"); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 452 (9th Cir. 1983) (courts impose strict liabil-

that there be a defect in the product before compensation is available, New Jersey courts have retained the regulatory component of tort law as a critical element.[57]

The traditional regime, premised on a set of jurisdiction selecting rules, explicitly accounted for the regulatory power of tort law. By selecting the law of the jurisdiction in which the tort occurred, the system had each state regulating the consequences of activities conducted within its borders.[58] The scheme thus operated on the principle that a state's regulatory power should be co-extensive with its borders:

> Each state has legislative jurisdiction to determine the legal effect of acts done or events caused within its territory . . . . If any state having legislative jurisdiction so to do imposes a right-duty relation delictual in character, other states will recognize the existence of such relation. . . .[59]

The modern scheme, at least the domicile-driven version of interest analysis utilized in New Jersey, essentially divorces compensation from regulation and focuses almost exclusively on the former. Thus, to sustain an award of compensation to a New Jersey domiciliary although all events occurred elsewhere, or to deny compensation to a foreign plaintiff even though the wrongful conduct occurred in New Jersey, the courts of the state would come to characterize the regulatory objectives and power of tort law as "incidental" to its compensatory purpose.

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ity in tort "to deter manufacturers from marketing unsafe products. . ."), *cert. denied*, 464 U.S. 1043 (1984); Daly v. General Motors Corp., 20 Cal. 3d 725, 737-38, 575 P.2d 1162, 1169, 144 Cal. Rptr. 380, 387 (1978) (strict liability imposes upon manufacturers an "incentive to produce safe products . . . to avoid and correct product defects . . . [and an] incentive toward safety in both design and production. . ."); Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854, 860-61 (W. Va. 1982) ("Strict liability places an obligation on manufacturers . . . to market safe products.").

57 Compensation is available only if the plaintiff proves that his injury was caused by a defect in the product. This is not an arbitrary limitation on the right to compensation for product related injuries. Rather, by maintaining the defect requirement, courts have insured that products liability law does not operate primarily as a compensation system, but rather as a deterrence system. G. CALABRESI, THE COST OF ACCIDENTS 26-27 (1970). *See also* Walsh & Klein, *The Conflicting Objectives of Federal and State Tort Law Drug Regulation*, 41 FOOD DRUG COSM. L.J. 171, 171-73 (1986) (discussing regulatory nature of tort law).

58 The traditional paradigms went far beyond the proposition that "a State [may] impose responsibility for injuries within its borders." Young v. Masci, 289 U.S. 253, 258 (1933). Rather, it assumed that a state has the greatest legislative interest in defining the parameters of responsibility for wrongful conduct within its borders. *See* Note, *Choice of Law Problems in Direct Actions Against Indemnification Insurers*, 3 UTAH L. REV. 490, 498-99 (1953).

59 RESTATEMENT, *supra* note 6, § 377 comment a.

3. Rules or Approaches

Choice of law determinations under the traditional paradigm were rule-based. The applicable rule, in turn, depended on the "conceptual box" that fit the problem. A court first had to determine whether the conflict involved procedural or substantive law.[60] Procedural issues were invariably governed by the law of the forum and only a foreign state's substantive law would be considered.[61] In theory, that was sufficient to engender urbane neutrality because differences in procedural law are not usually outcome-determinative.[62] Furthermore, differences in procedural law are often arcane and therefore impractical to ascertain.[63]

A court confronting a substantive choice of tort law question[64] had to make essentially four determinations. First, it had to ascertain the "place of the wrong."[65] Second, it had to decide whether the law of the place of the wrong afforded a civil remedy

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60 GOODRICH, *supra* note 45, § 80, at 226.

61 *Id.* § 80, at 227-28. *See, e.g.*, Marshall v. George M. Brewster & Son, Inc., 37 N.J. 176, 180, 180 A.2d 129, 131 (1962); Ferguson v. Central R.R. Co., 71 N.J.L. 647, 651, 60 A. 382, 384 (N.J. 1905); Bullock v. Bullock, 51 N.J. Eq. 444, 450-51, 27 A. 435, 437-38 (Ch. Div. 1893), *aff'd*, 52 N.J. Eq. 561, 30 A. 676 (N.J. 1894); Wood v. Malin, 10 N.J.L. 208, 210-11 (N.J. 1828).

62 *See* Twerski & Mayer, *Toward a Pragmatic Solution of Choice-of-Law Problems—At the Interface of Substance and Procedure*, 74 N.W.U. L. REV. 781, 784 (1979).

63 The Supreme Court of New Jersey, in Heavner v. Uniroyal, Inc., 63 N.J. 130, 136, 305 A.2d 412, 415 (1973), explained this rationale in these classic terms:

> Sound sense and practical reasons dictate that a suit on a foreign cause of action should be processed and tried according to the procedural rules of the forum state. It would be an impossible task for the court of such a state to conform to procedural methods and diversities of the state whose substantive law is to be applied. The determination of that law is a difficult enough burden to impose upon a foreign tribunal.

Id. See also Marshall v. George M. Brewster & Son, Inc., 37 N.J. 176, 180, 180 A.2d 129, 131 (1962) ("the New Jersey court will apply its own rules of procedure in the action pending here rather than the rules of procedure which the [foreign] court would have applied if the action had been instituted there") (citations omitted).

64 Other major categories of substantive law, each with a separate set of jurisdiction selecting rules, include corporations, RESTATEMENT, *supra* note 6, §§ 152-207, property, *id.* at §§ 208-310, and contracts, *id.* at §§ 311-76.

65 This was most commonly governed by the "last events" test, which fixed the situs of the wrong, and selected the law of that situs, where the last event occurred that gave rise to the claim. *See* RESTATEMENT, *supra* note 6, § 377; GOODRICH, *supra* note 45, § 93, at 263-64 ("The tort is complete only when the harm takes place. It is the law of the state where this happens which determines whether the harm suffered by the plaintiff is the sort for which he may recover in an action for damages.").

to victims of that wrong.[66] Third, if the law of the place of the wrong afforded a civil remedy, the court had to ascertain the nature, extent of, and limitations on that remedy.[67] Fourth, the court had to determine whether the enforcement of that remedy, as prescribed by the law of the place of the wrong, would offend an important public policy of the forum.[68] Once these determinations had been made, a rule that fit the categorizations directed the outcome of the conflicts question.

Interest analysis, by contrast, condemns choice of law rules as arbitrary. Instead, interest analysis assumes that every competing rule has a discernible policy or complex of policies underlying it. A state has a "real interest" in having its rule applied in a litigation if those policies would be advanced as a result.[69] Thus, in approaching a choice of law question, a court utilizing interest analysis may not simply consider the "black letter" of the competing rules. Instead, it must come to grips with the *policies* underlying the competing rules and determine whether those policies truly conflict.[70]

While "interest analysts" by definition agree with this broad premise, they have formulated a variety of alternative approaches to the resolution of true conflicts. Since these approaches all share the essential premise of interest analysis, their points of departure essentially involve the subtlest and most esoteric aspects of their shared paradigm.[71] In broad terms, the alternative techniques for true conflict reconciliation, each of which had been in

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66 The theory held that, at the moment the last event occurred, the parties acquired "vested rights" or liabilities under the law of the place of the wrong that would be enforced everywhere. As Justice Holmes explained:

> [W]hen . . . a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little [sic] means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found.

Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904) (citations omitted).

67 *See* RESTATEMENT, *supra* note 6, § 412.

68 *See id.* § 412, comment a.

69 *See* E. SCOLES & P. HAY, *supra* note 10, § 17.11, at 565.

70 *See id.* § 17.11, at 566.

71 Theories based on a shared paradigm, in this case interest analysis, "seldom evoke overt disagreement over fundamentals." T. KUHN, *supra* note 6, at 11. Rather, disagreement typically arises over the "subtlest and most estoteric aspects" of the paradigm. *Id.* at 20.

circulation when New Jersey adopted interest analysis in 1967, fall within three categories: *lex fori* approaches, result-oriented approaches, and center of gravity approaches.

a. *Lex Fori Approaches*

Professor Brainerd Currie[72] maintained that the law of the forum should invariably control in cases of "real conflict" between forum and foreign law.[73] Under Currie's methodology, foreign law should be applied only if (1) the forum state has no real interest in having its rule applied to the parties' conduct; and (2) the foreign state has a real interest in having its rule applied to the parties' conduct.[74] If neither state has a real interest, or both do, the forum court is obliged to apply its own law.[75] Thus, Currie's methodology has no place for judicial "weighing" of

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72 Professor Currie is widely considered the chief architect of interest analysis. His work on the theory is collected in B. CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS (1963) [hereinafter CURRIE].

73 Professor Currie suggested the following five-step methodology:

> 1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.
>
> 2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.
>
> 3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.
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> 4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.
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> 5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.

Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L. J. 171, 178 [hereinafter Currie, *Notes on Methods*].

74 *Id.*

75 *See* CURRIE, *supra* note 72, at 184. Currie felt that cases in which no state had a real interest in the outcome would be rare and suggested that a forum court, to the extent possible, avoid exercising its jurisdiction in those cases through doctrines like forum non conveniens. *See id.* at 606-09.

competing real interests.[76]

Professor Albert Ehrenzweig also espoused an explicit *lex fori* approach.[77] Ehrenzweig's theory proceeds from the correct premise that a forum court always "applies" its own law, even when its own law adopts a foreign rule as its own to resolve the case at hand.[78] The theory, however, takes that premise one step further. It maintains that, in the absence of a constitutional or statutory requirement to the contrary, a foreign substantive rule should be followed only when the forum's substantive rules so direct.[79] Therefore, under Ehrenzweig's theory, local substantive law is *always* applied.

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[76] Professor Currie felt that judicial weighing of competing real interests would run afoul of the separation of powers doctrine:

> [W]here several states have different policies, and also legitimate interests in the application of their policies, a court is in no position to "weigh" the competing interests, or evaluate their relative merits, and choose between them accordingly.
>
> * * *
>
> [A]ssessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy.

Currie, *Notes on Methods*, *supra* note 73, at 176. *Cf.* Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 161 A.2d 705, (1960) (separation of powers doctrine vests lawmaking power in legislative branch while courts are charged with "solemn duty to interpret the laws.").

[77] *See* Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965) [hereinafter Ehrenzweig, *A Proper Law*]; Ehrenzweig, *The Lex-Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960) [hereinafter Ehrenzweig, *The Lex-Fori*]; Ehrenzweig, *Guest Statutes in the Conflict of Laws*, 69 YALE L.J. 595, 603 (1960) [hereinafter Ehrenzweig, *Guest Statutes*]. Professor Ehrenzweig's early views on contractual choice of law issues are discussed in Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 1171 (1959) [hereinafter Ehrenzweig, *Contracts*].

[78] *See* E. SCOLES & P. HAY, *supra* note 10, § 2.7, at 20-23.

[79] For example, if the law where the conduct had been committed does not hold its consequences actionable, whereas the forum's law would permit a recovery, the forum might decline to permit a recovery based on its own principle of fairness, not by "applying" the foreign state's law. As one treatise summarized Ehrenzweig's theory:

> where the substantive law of the forum is not expressly applicable to foreign-related causes and the application of a foreign rule is not required by a Constitutional "superlaw" or a choice of law rule of the forum, then any choice of law must be based on an interpretation of the substantive rule of the forum which a party seeks to displace. If the interpretation does not result in the application of the foreign rule, then the substantive rule of the forum applies as the "residuary" law.

Id. § 2.7, at 20-21 (footnotes omitted).

b. *Result-Oriented Approaches*

Professor Robert Leflar[80] advised courts to consider "the better rule of law" as one of five "choice-influencing" factors.[81] Leflar maintained that the "[s]uperiority of one rule over another . . . is without question one of the relevant considerations" in a choice-of- law determination.[82] Leflar furnished no specific criteria to channel judicial evaluations of superiority and inferiority. He simply felt that courts should do openly what they had done for years *sub silentio*, reasoning there was "no need at all for any cover-up."[83]

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80 Professor Leflar has written extensively regarding his ideas on choice of law problems. *See, e.g.*, LEFLAR, *supra* note 10; Leflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080 (1981) [hereinafter Leflar, *The Nature*]; Leflar, *Choice of Law: States' Rights*, 10 HOFSTRA L. REV. 203 (1981) [hereinafter, Leflar, *Choice of Law*]; Leflar, *The "New" Choice of Law*, 21 AM. U. L. REV. 457 (1972) [hereinafter, Leflar, *The "New"*]; Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966) [hereinafter Leflar, *More on Choice-Influencing*]; Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966) [hereinafter Leflar, *Choice-Influencing*].

81 In a 1966 law review article, Professor Leflar articulated the five factorial methodology, which requires the consideration of:

A. Predictability of results;
B. Maintenance of interstate and international order;
C. Simplification of the judicial task;
D. Advancement of the forum's governmental interests; and
E. Application of the better rule of law.

Leflar, *Choice-Influencing*, *supra* note 80, at 282. With the exception of the fifth factor — the "better rule of law" — Leflar quite accurately noted that he could "make no claim to originality nor much to new insight." *Id.*

82 LEFLAR, *supra* note 10, § 107, at 212.

83 Leflar, *More on Choice-Influencing*, *supra* note 80, at 1588. Thus, "courts can replace with statements of real reasons the mechanical rules and circuitously devised approaches which have appeared in the language of conflicts opinions, too often as cover-ups for the real reason that underlay the decisions." *Id.* at 1585.

The "better rule" invariably means the rule better for the plaintiff:

> Examples of laws that have been displaced by better laws include spousal immunity rules, guest statutes, the failure to hold tavern owners liable for damages caused by persons to whom they had furnished alcoholic beverages, the validity of a family exclusion clause in an automobile insurance policy, and the failure to permit stacking of uninsured motorist coverage in automobile liability insurance policies.

Kay, *Theory into Practice*, *supra* note 7, at 571 (footnotes omitted). It was obvious to Leflar that these pro-recovery results are required of "a justice dispensing court in a modern American state." Leflar, *Choice-Influencing*, *supra* note 80, at 295. At least one jurisdiction has adopted the "better law" approach expressly. *See* Clark v. Clark, 107 N.H. 351, 355, 222 A.2d 205, 209 (1966) ("We prefer to apply the better rule of law in conflicts cases just as is done in nonconflicts cases, when the choice is open to us. . . .Courts have always done this. . .but have usually covered up what they have done by employing manipulative techniques. . . .").

Professor David Cavers[84] also advocated a result-oriented approach for essentially the same reasons.[85] Cavers' methodology would have courts choose between the competing states' rules "from the standpoint of justice between the litigating individuals or . . . broader considerations of social policy."[86] Consequently, the choice would not result from the automatic operation of a rule, but would instead be the product of a "search for a just decision."[87]

c. *Center of Gravity Approaches*

The *Restatement (Second) of Conflict of Laws* (*Second Restatement*) directs courts to consider basic choice of law principles[88] in light

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84 For a sampling of Professor Caver's published works, see CAVERS, THE CHOICE OF LAW PROCESS (1965) [hereinafter CAVERS]; Cavers, *The Value of Principled Preferences*, 49 TEX. L. REV. 211 (1971) [hereinafter Cavers, *Principled Preferences*]; Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933) [hereinafter Cavers, *A Critique*].

85 *See* Cavers, *A Critique*, *supra* note 84, at 189 ("The court is not idly choosing a law; it is determining a controversy. How can it choose wisely without considering how that choice will affect that controversy?").

86 *Id.* at 192-93.

87 *Id.* at 193. In response to a great deal of criticism concerning the arbitrary and ad hoc nature of decisionmaking by those criteria, Cavers later expressed his belief that broad rules would someday emerge to guide judges in effectuating individualized choice of law justice:

> If we are to avoid slipping into a chaos of essentially meaningless ad hoc decisions or, instead, reverting to our inherited apparatus of mechanical, jurisdiction-selecting rules, I believe courts and scholars must recognize that there is need for the development of rules and principles of appropriate breadth to resolve the hard cases, those cases in which legislative purposes are unclear or conflicting, cases which cannot be disposed of as posing either false conflicts or situations in which the claims of one state's law to application are plainly preponderant. We may have to accept the adequately articulated ad hoc decision as an interim substitute, but we should persevere in the search for rules or principles which would determine when the law of a state which served one purpose should be preferred to the law of another state which served a different purpose. Such a rule or principle of preference would, of course, have to delimit the range of circumstances under which the choice it called for would be made. Its protagonists would have to justify it not only as a desirable accommodation of the conflicting laws of the states involved, but also as fair to the parties affected by the choice.

CAVERS, *supra* note 84, at 121-22.

88 Section 6 of the RESTATEMENT SECOND delineates the "basic" principles:

> Choice of Law Principles
>
> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,

of the "contacts" between the involved jurisdictions and both the parties and the occurrence.[89] Courts were counseled to set aside their "closed set of rules" and instead decide cases based on "the broad principle that rights and liabilities with respect to a particular issue are determined by the local law of the State which, as to that issue, has the most significant relationship to the occurrence and the parties."[90] Its "basic norms consist of standards [that are] largely open-ended in their content . . . . What is exemplified is thus the analysis and method of inquiry . . . rather than the simple answers to simplistic questions."[91] Thus, the *Second Restatement* suggested that courts should disregard the categorical imperatives of the traditional paradigm to confront the policy issues at hand.[92]

(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

RESTATEMENT SECOND, *supra* note 6, § 6.

89 Section 145 of the RESTATEMENT SECOND provides that:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. at § 145.

90 *Id.* at vii-viii.

91 *Id.* at viii-ix. Professor Willis Reese, Reporter of the RESTATEMENT SECOND, has repeatedly acknowledged that it does not specify a "formula which once applied will lead the court to a conclusion." Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 315 (1972). Rather, it delineates factors relevant to choosing the rule of law that applies, "but neither states how a particular choice of law question should be decided in light of these factors nor what relative weight should be accorded them." *Id.* (footnote omitted). Consequently, the Restatement's approach will "frequently fail to detail exactly when some other state will be that of [the] most significant relationship and hence the state of the applicable law." *Id.*

92 The drafters of the RESTATEMENT SECOND made plain that even the cardinal distinction between substance and procedure no longer remained vital:

Substance — procedure dichotomy. The courts have traditionally approached

The *Second Restatement*'s grouping of contacts or center of gravity approach necessarily "leaves the answer to specific problems very much at large."[93] It does not explicitly address the relative importance of specific contacts,[94] or even specify an order of processing its open-ended standards.[95] Nevertheless, the *Second Restatement* expresses a clear preference for the *lex loci delicti* and would have courts begin most choice of law inquiries with a general presumption in its favor.[96]

> issues [relating to judicial administration] . . . by determining whether the particular issue was "procedural" and *therefore* to be decided in accordance with the forum's local law rule, or "substantive" and *therefore* to be decided by reference to the otherwise applicable law. These characterizations, while harmless in themselves, have led some courts into unthinking adherence to precedents that have classified a given issue as "procedural"or "substantive". . . . To avoid encouraging errors of that sort, the rules stated in this Chapter do not attempt to classify issues as "procedural" or "substantive." Instead they face directly the question whether the forum's rule should be applied.

RESTATEMENT SECOND, *supra* note 6, § 122 comment b (emphasis in original).

93 *Id.* at viii.

94 Thus, while §§ 6 and 145 require a synthesis of factual contacts (territoriality) and relevant policies (governmental interests), the RESTATEMENT SECOND tells us almost nothing about the relevance of specific factual contacts to specific governmental interests that may be implicated. This task is left to the reader. *See id.* at § 145 ("These contacts are to be evaluated according to their relative importance with respect to the particular issue.").

Courts have recognized that contact counting cannot be done in a vacuum. Thus, a court must first have a specific policy or set of policies in mind before it goes looking for "relevant contacts." *See, e.g.*, Miller v. Miller, 22 N.Y.2d 12, 15-16, 237 N.E.2d 877, 879, 290 N.Y.S.2d 734, 737 (1968) ("While this approach has been denominated under. . .various headings. . .the law of the jurisdiction having the greatest interest in the litigation will be applied and . . . the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict.").

95 As Professor Kay has noted of the Restatement approach, even the order of processing can be determinative:

> If one is dealing with a torts conflicts case, and if one begins the analysis with section 6, and if emphasis is placed on factors 6(b) [the relevant policies of the forum] and 6(c) [the relevant policies of other interested states], the problem may be solved without any need to consult the general principle of section 145. On the other hand, if the contacts in section 145(2) point to a particular state, such as the place of conduct and injury when that place is also the domicile of one of the parties, the court may conclude that the place of injury has the most significant relationship without consulting the section 6 factors.

Kay, *Theory into Practice*, *supra* note 7, at 556.

96 Section 146 of the RESTATEMENT SECOND deals with torts involving "personal injuries" and is therefore germane to the subject of this article. Section 146 provides:

> In an action for a personal injury, 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

III. THE NEUTRAL PRINCIPLES OF THE TRADITIONAL PARADIGM

The logic of the traditional paradigm—that "no law exists as

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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.

RESTATEMENT SECOND, *supra* note 6, § 146.

The RESTATEMENT SECOND endorses the principle of depeçage, *see id.* § 145, which directs an independent choice of law for each issue and thus permits the rules of more than one state to resolve different issues in the same case. R. CRAMTON, D. CURRIE AND H. KAY, CONFLICT OF LAWS, CASES—COMMENTS—QUESTIONS 383-84 (3d ed. 1981). Thus, the RESTATEMENT SECOND speaks of determining "[t]he rights and liabilities of the parties with respect to an issue in tort . . . ." RESTATEMENT SECOND, *supra* note 6, § 145. With respect to certain "important issues" frequently recurring in tort cases, the RESTATEMENT SECOND sets forth presumptions (the choice of law courts will "usually" make in given situations) subject to reconsideration under the principles of § 6. *See id.* at viii ("These formulations are cast as empirical appraisals rather than purported rules to indicate how far the statements may be subject to reevaluation in a concrete instance in light of the more general and open-ended norm.").

The presumptions include the following:

Important Issue	Section	Presumption
Tortious Character of Conduct	§ 156	*lex loci delicti*
Standard of Care	§ 157	*lex loci delicti*
Interest Entitled to Legal Protection	§ 158	*lex loci delicti*
Duty Owed Plaintiff	§ 159	*lex loci delicti*
Legal Cause	§ 160	*lex loci delicti*
Defenses	§ 161	*lex loci delicti*
Specific Conditions of Liability	§ 162	*lex loci delicti*
Duty or Privilege to Act	§ 163	None (general reference to § 145)
Contributory Fault	§ 164	*lex loci delicti*
Assumption of Risk	§ 165	*lex loci delicti*
Imputed Negligence	§ 166	*lex loci delicti*
Survival of Actions	§ 167	None (general reference to § 145)
Charitable Immunity	§ 168	None (general reference to § 145)
Intra-Family Immunity	§ 169	Parties' domicil
Release or Covenant Not to Sue	§ 170	None (general reference to § 145)

such except the law of the land"[97]— is perhaps most easily comprehended in the sphere of criminal law. For example, in *State v. Carter*,[98] New Jersey sought to prosecute the defendant for homicide because his victim had *died* in New Jersey.[99] The indictment charged that the defendant had mortally beaten the victim while in New York City.[100] The court noted that

> [n]othing was *done* by the defendant in this state. When the blow was given, *both* parties were out of its jurisdiction, and within the jurisdiction of the State of New York. The only fact connected with the offense, alleged to have taken place within our jurisdiction, is, that *after* the injury, the deceased came into, and died in this state.[101]

As a result, the court held that the crime of homicide could not be "ambulatory at the option of the party injured, and become[] punishable, as such, wherever he may see fit to die."[102]

The territorial limitations of criminal law regulation carried over well into the domain of tort law. Like criminal law, choice of law tort rules built on a territorial paradigm derived from a series of logical postulates. The first is that "to have a wrong it is necessary to have a right which is injured by the wrong."[103] Second, "the place of wrong is the place where the person or thing harmed is situated at the time of the wrong."[104] Third, the right to recover for the wrong "can be given only by the law of the place where the tort was committed. If, therefore, there was no cause of action created at the place where the person or thing took harm . . . there can be no recovery for tort."[105] Fourth, if a right to recover is afforded by the law of the place of the wrong, that law governs all attributes of the

Damages	§ 171	None (general reference to § 145)
Joint Torts	§ 172	*lex loci delicti*
Contribution and Indemnity Among Tortfeasors	§ 173	None (general reference to § 145)

97 GOODRICH, *supra* note 45, § 6, at 10.

98 27 N.J.L. 499 (N.J. 1859).

99 *Id.* at 500.

100 *Id.* at 499-500.

101 *Id.* at 500 (emphasis in original).

102 *Id.* at 500-01.

103 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 377.1, at 1286 (1935) [hereinafter J. BEALE]. Beale served as reporter of the Restatement of Conflict of Laws (1934) and is generally considered "the main proponent of the vested-rights theory." E. SCOLES & P. HAY, *supra* note 10, § 2.4, at 13.

104 J. BEALE, *supra* note 103, § 377.2, at 1287.

105 *Id.* § 378.1, at 1288 (footnote omitted).

claim.[106]

A jurisdiction whose conflicts regime is built on the territorial paradigm grants or withholds relief based on the law of the place of the wrong without regard to the law of the forum.[107] Thus, two basic rules emerge. First, even if the forum does not recognize certain conduct as wrongful, or does so but does not afford victims of that conduct a remedy in tort, a victim may nonetheless sue in that jurisdiction and expect the same outcome as though he had sued at the place of the wrong.[108] Second, if the place of the wrong does not afford a civil remedy to victims of the conduct, the forum will not grant a remedy even though its domestic law would have afforded a remedy had the conduct occurred within its borders.[109]

The first rule is well illustrated by *Loucks v. Standard Oil Co.*[110] While traveling on a roadway in Massachusetts, the plaintiffs' decedent was killed due to the negligence of the defendant's employees.[111] The decedent was survived by his wife and two children, domiciliaries of New York, who brought suit there premised on Massachusetts' wrongful death act.[112] Writing for the New York Court of Appeals, Judge Cardozo concluded that the plaintiffs could recover in New York based on their rights under the Massachusetts statute.[113] He first invoked the rule, then generally accepted in the United States, that "[a] tort committed in one state creates a right of action that may be sued upon in another unless public policy forbids."[114] Addressing the question of "public policy" in the case at hand, Judge Cardozo wrote:

Our own scheme of legislation may be different. We may even

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106 *Id.* § 378.2, at 1289. Consequently, the law of the place of the wrong would control, among other things, the rules and standards of care, *id.* § 380.1, at 1294, issues of causation and imputed liability, *id.* § 383.1, at 1296-97, and affirmative defenses. *Id.* § 388.1, at 1302. *See, e.g.*, Western Union Tel. Co. v. Brown, 234 U.S. 542, 547 (1914) ("when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery.") (citation omitted).

107 *See, e.g.*, Stewart v. Baltimore & Ohio R.R. Co., 168 U.S. 445 (1897); Northern Pac. R.R. v. Babcock, 154 U.S. 190, 197 (1894); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918) (wrongful death action that arose in Massachusetts enforced in New York even though forum state, New York, had no wrongful death act).

108 J. BEALE, *supra* note 103, § 378.3, at 1290.

109 *Id.* § 378.4, at 1290-91.

110 224 N.Y. 99, 120 N.E. 198 (1918).

111 *Id.* at 101-02, 120 N.E. at 198.

112 *Id.* at 102, 120 N.E. at 198.

113 *See id.* at 112-13, 120 N.E. at 202.

114 *Id.* at 106, 120 N.E. at 200.

> have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. A right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. *We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.*[115]

Cardozo thus concluded that "[t]he fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained. At least, that is so among the states of the Union."[116]

The second rule is reflected in Justice Holmes' classic opinion in *Cuba Railroad Co. v. Crosby*.[117] In that case, the plaintiff sought to recover from his employer for a workplace injury he had sustained in Cuba.[118] Because no evidence was given regarding Cuban law, the trial court elected to "apply the law as it conceive[d] it to be, according to its idea of right and justice."[119] Justice Holmes condemned that approach, noting:

> [W]hen an action is brought upon a cause arising outside of the jurisdiction, it always should be borne in mind that the duty of the court is not to administer its notion of justice, but to enforce an obligation that has been created by a different law. . . . With very rare exceptions the liabilities of the parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time

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[115] *Id.* at 110-11, 120 N.E. at 201 (emphasis added). Cardozo made plain that the "public policy" exception was not an escape device to import individualized notions of justice or apply a better rule of law:

> The sovereign in its discretion may refuse its aid to the foreign right. From this it has been an easy step to the conclusion that a like freedom of choice has been confided to the courts. But that, of course, is a false view. The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.

Id. at 111, 120 N.E. at 202 (citations omitted). Laws which public policy would except have included ones allowing "prohibited marriages, wagers, lotteries, racing, contracts for gaming or the sale of liquor, and others." Howard v. Howard, 200 N.C. 574, 580, 158 S.E. 101, 104 (1931). Consequently, as our notions of "good morals" have evolved, so has the "public policy" exception. *Compare* Flagg v. Baldwin, 38 N.J. Eq. 219 (N.J. 1884) (declining to enforce an indebtedness arising out of securities speculation lawful where it had occurred) *with* Caribe Hilton Hotel v. Toland, 63 N.J. 301, 307 A.2d 85 (1973) (gambling where lawful is no longer so offensive to the public policy of New Jersey to justify denial of relief).

[116] *Loucks*, 224 N.Y. at 113, 120 N.E. at 202 (citations omitted).

[117] 222 U.S. 473 (1912).

[118] *Id.* at 477.

[119] *Id.* (citation omitted).

> of doing it. That, and that alone, is the foundation of their rights.[120]

Under either rule, the parties' domiciles were simply not relevant. In *Loucks*, for example, Judge Cardozo rejected the suggestion of an earlier New York decision[121] that, in a suit on a foreign claim, the forum *might protect its own residents* by applying a limitation on damages available under the forum's law:

> There was some suggestion that if the defendant were a non-resident, the restriction would not apply. The suggestion sounds like an echo of the theory of the statute personal, a body of national law which the citizen carries about with him. That is a theory which has yielded generally in this country to the principles of the territorial system and the doctrine of vested rights.[122]

In sum, the traditional scheme had three key intellectual commitments. First, under the commitment to litigant neutrality, choice of law depended on the location of the activity, not the parties' domiciles. Second, under the commitment to result neutrality, choice of law did not depend on a party's status as plaintiff or defendant. Third, under the commitment to *a priori* rules, a court was not free to apply its own "notion of justice." Rather, justice was administered through the rule of law. These were the essential ingredients of a scheme committed to urbane neutrality.

IV. INTEREST ANALYSIS IN NEW JERSEY: THE APOTHEOSIS OF DOMICILE

The *lex loci delicti* rule reigned for at least three quarters of a century in New Jersey.[123] As late as 1958, the Supreme Court of New Jersey observed that:

> This conflict of laws principle gives fair recognition to the for-

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120 *Id.* at 478 (citations omitted).

121 *Loucks*, 224 N.Y. at 108-09, 120 N.E. at 200-01 (citing Wooden v. Western N.Y. & Pa. R.R. Co., 126 N.Y. 10, 26 N.E. 1050 (1891)).

122 *Id.* at 108-09, 120 N.E. at 201 (citations omitted). *Accord* Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904) (law of plaintiff's domicile cannot grant recovery greater than that afforded by law of place of wrong).

123 *See, e.g.*, Clement v. Atlantic Cas. Ins. Co., 13 N.J. 439, 100 A.2d 273 (1953); Garris v. Kline, 119 N.J.L. 435, 197 A. 63 (N.J. 1938); Siegel v. Saunders, 115 N.J.L. 539, 181 A. 48 (N.J. 1935); Friedman v. Greenberg, 110 N.J.L. 462, 166 A. 119 (N.J. 1933); Harber v. Graham, 105 N.J.L. 213, 143 A. 340 (N.J. 1928); Ferguson v. Central R.R. Co., 71 N.J.L. 647, 60 A. 382 (N.J. 1905); Potter v. First Nat. Bank, 107 N.J. Eq. 72, 151 A. 546 (N.J. 1930); Culnen v. Public Serv. Interstate Transp. Co., 135 N.J.L. 363, 52 A.2d 163 (Sup. Ct.), *aff'd*, 136 N.J.L. 637, 57 A.2d 246 (N.J. 1948); Curry v. Delaware Lackawanna & W. R.R. Co., 120 N.J.L. 512, 1 A.2d 14 (Sup. Ct. 1938).

> eign state's legitimate interests and to the sound public policy which dictates that the incidents of a transaction should be determined by a significantly connected body of law. In addition, it well serves the ends of certainty, uniformity and predictability.[124]

Nine years later, the court sacrificed the advantages of certainty, uniformity, and predictability for another approach which, in theory, would also accommodate a foreign state's legitimate interests.[125]

A. The Indeterminate Approach

Like its forerunner *Babcock v. Jackson*,[126] *Mellk v. Sarahson*[127] involved claims between two residents of the forum state over injuries sustained in an automobile accident elsewhere.[128] The question presented was whether a guest statute of the state where the accident occurred should preclude the suit.[129] The court in *Mellk*, following the New York Court of Appeals' lead in *Babcock*, concluded that it should not.[130]

In *Mellk*, the plaintiff and the defendant, both residents of New Jersey, embarked on a one week drive to visit a friend in Wisconsin.[131] The defendant supplied the automobile, which his mother owned, and the plaintiff gave the defendant twenty-five dollars to help cover the expenses of the trip.[132] On their way home, the defendant's car hit the back of a parked vehicle in Ohio.[133] Under Ohio law, the plaintiff could not have recovered from his host unless he could prove willful or wanton miscon-

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124 Daily v. Somberg, 28 N.J. 372, 380, 146 A.2d 676, 681 (1958).

125 *See* Mellk v. Sarahson, 49 N.J. 226, 234, 229 A.2d 625, 629 (1967).

126 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

127 49 N.J. 226, 229 A.2d 625 (1967).

128 *Id.* at 227-28, 229 A.2d at 625-26.

129 *See id.* at 228, 229 A.2d at 626.

130 *Id.* at 235, 229 A.2d at 630. *Mellk* cited three decisions for the proposition that "[t]his Court has already recognized that the *lex loci delicti* should not be applied mechanically, but that courts should give attention to other factors which are relevant to the choice of law process." *Id.* at 229, 229 A.2d at 626-27 (citing Wilson v. Faull, 27 N.J. 105, 141 A.2d 768 (1958); Koplik v. C.P. Trucking Corp., 27 N.J. 1, 141 A.2d 34 (1958); and Stacy v. Greenberg, 9 N.J. 390, 88 A.2d 619 (1952)). The *Wilson*, *Koplik*, and *Stacy* cases were decided on grounds well within the traditional paradigm. Indeed, in *Wilson*, the supreme court rejected the appellate division's attempt to apply interest analysis to the choice at hand. Since these cases adequately reconciled the "other factors. . .relevant to the choice of law process," one might question the point of the revolution itself.

131 *Mellk*, 49 N.J. at 227, 229 A.2d at 625.

132 *Id.*

133 *Id.* at 227-28, 229 A.2d at 626.

duct; under New Jersey law, however, proof of ordinary negligence would have sufficed.[134]

The Supreme Court of New Jersey began its analysis by suggesting that it would simply recognize another limited exception to the *lex loci delicti* rule.[135] The court noted that in those cases involving a disability or immunity from suit

> where a foreign state has no real interest in having its law applied to a particular right or liability of parties to an event which occurred within its borders, a mechanical application of a disability or immunity imposed by the *lex loci delicti* may work an unjust result having no relation to the purposes and policies behind the foreign law.[136]

This was not a limited exception, however, because the traditional scheme presupposes that every state has a real interest (indeed, the predomiment interest) in defining the consequences of activities within its borders. Simply stated, it was a new approach.

Utilizing this new approach, the court proceeded to relate the question of host immunity between two New Jersey residents to the policies and purposes underlying Ohio's guest statute.[137] It first acknowledged that Ohio had "a real interest in having its rules of the road apply to the conduct of the parties in the operation of a motor vehicle on the highways of that state."[138] Consequently, "[u]nder principles of comity the courts of New Jersey will recognize and follow the Ohio laws relating to traffic safety."[139] Turning to the standard of care owed to the guest, the court concluded:

> However, we cannot find that Ohio has any real interest in having its guest statute apply to the present case to defeat recovery. The purposes and policies of the Ohio law are two fold: (1) to prevent collusive suits and (2) to preclude suits by

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134 *Id.* at 231, 229 A.2d at 627.

135 *See id.* at 229-30, 229 A.2d at 626.

136 *Id.* at 229, 229 A.2d at 626. The court cited Daily v. Somberg, 28 N.J. 372, 146 A.2d 676 (1958), as an example of a case "[w]here a foreign state [would have] a real interest in having its law apply to the rights and liabilities of parties to an event which occurred within its borders . . . ." *Mellk*, 49 N.J. at 229, 229 A.2d at 680-81. In *Daily*, the court indicated that the *lex loci delicti* rule should govern "where all of the tortious conduct and its consequences take place within a single foreign state. . . ." *Daily*, 28 N.J. at 379, 146 A.2d at 680-81. The opinion in *Daily* does not explicitly consider or even mention the parties' domiciles. Consequently, the court in *Mellk* certainly suggested that a foreign state would have "a real interest" in having its rules of conduct apply to conduct and consequences occurring solely within its borders regardless of the actors' domiciles.

137 *Mellk*, 49 N.J. at 230-31, 229 A.2d at 627.

138 *Id.* at 230, 229 A.2d at 627.

139 *Id.*

> "ungrateful" guests. New Jersey, on the other hand, has a strong declared policy of requiring a host to use at least ordinary care for the safety of his guest.[140]
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> * * *
>
> The present suit involves two residents of the State of New Jersey, whose host-guest relationship originated and was to terminate in our State, and the suit is in our courts. Automobile insurance, if any, carried by defendant would have been obtained under rates applicable to this State. The strong New Jersey policy of allowing an injured guest to sue his host for negligence under such circumstances is not diminished merely because the accident occurred in another state. The desire of Ohio to prevent collusive suits and suits by "ungrateful" guests applies to persons living in its state, defendants insuring motor vehicles there, and persons suing in its courts. Recovery for negligence in this action will not transgress these purposes in any way, will not frustrate the concerns which prompted the Ohio Legislature to enact a guest statute, and will not in the slightest impair traffic safety in Ohio.[141]

In this decisive passage, the court identified three factors that justified its departure from the traditional rule: (1) the parties common domicile (both were residents of New Jersey); (2) the seat of the relationship (the trip had originated and was to terminate in New Jersey); and (3) the locale of the insurance (the automobile insurance, if any, would have been obtained in New Jersey under rates applicable to New Jersey).[142] Without explaining the significance of

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140 *Id.* (citations omitted).

141 *Id.* at 231, 229 A.2d at 627. The court then noted that *Babcock* had been decided "[o]n facts similar to those in the present case." *Id.*, 229 A.2d at 628. The court stressed that, as in *Mellk*, *Babcock* involved two residents of the forum who had "beg[u]n an automobile trip from that state. . . ." *Id.* Justice Proctor later noted that "other courts in recent years have refused to apply the guest statute of the state where an automobile accident occurred when both plaintiff-guest and defendant-driver were residents of the forum state which did not have a guest statute and the guest-host relationship originated in the forum state." *Id.* at 232-33, 229 A.2d at 628 (citations omitted).

142 The New York Court of Appeals relied on the same three factors in *Babcock*, where it noted "[t]he present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there." *Babcock*, 12 N.Y.2d at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

The *Mellk* court also relied on some key assumptions — at the core of the modern paradigm — delimiting the extent of Ohio's valid legislative concerns. These included the propositions that Ohio was only interested in insuring that (1) no Ohio resident would be an "ungrateful guest," (2) no Ohio resident's insurer would have to compensate an "ungrateful guest," and (3) no Ohio court would be burdened by a "collusive" suit. *Mellk*, 49 N.J. at 231, 229 A.2d at 627. It is the first

these factors, or the significance of their interrelationship, the court simply noted that "[t]he great majority of commentators would support, for different reasons, the right of a guest to recover against his negligent host-driver for injuries received in a foreign state which has a guest statute. . . ."[143] The court cited five of these "reasons," each relevant to the peculiar theory of interest analysis espoused by its respective commentator, including (1) Professor Currie's view (shared by other commentators) that "the foreign state has no real interest in having its law applied whereas the forum state has a great concern to compensate its negligently injured residents;"[144] (2) Professor Ehrenzweig's consideration that "the defendant's car is insured and garaged in the forum state;"[145] (3) Professor Caver's view that "the seat of the relationship is in the forum state;"[146] (4) Professor Leflar's theory that "consideration of the five factors — predictability, maintenance of interstate order, simplification of the judicial task, advancement of the forum's government interest and application of the better rule of law — relevant to the choice of process directs application of the forum's law;"[147] and (5) the *Second Restatement*'s position that "the forum state has the most significant relationship with the parties."[148]

Because the court had already determined that Ohio had no "real interest" in the host immunity question, it had no need to adopt expressly any one of these methodologies for the reconciliation of "true conflicts." Nor did it need to prioritize the three factors or explain which one predominated. While the case law

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two assumptions that open interest analysis to serious question. *See infra* text accompanying notes 248-55.

143 *Mellk*, 49 N.J. at 233, 229 A.2d at 629.

144 *Id.* (citing Currie, *Notes on Methods*, *supra* note 73, at 178); *see also* Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 667-68 (1959); Weintraub, *A Method for Solving Conflicts Problems—Torts*, 48 CORNELL L. Q. 215, 220-21 (1963).

145 *Mellk*, 49 N.J. at 233, 229 A.2d at 629 (citing Ehrenzweig, *Guest Statutes*, *supra* note 77, at 603). In a series of prominent articles, including the article cited in *Mellk*, Professor Ehrenzweig argued that disabilities or immunities from suit should be controlled by the law of the defendant's domicile because his insurer most likely calculated premiums based on that law. *See, e.g.*, Ehrenzweig, *Products Liability in the Conflict of Laws*, 69 YALE L. J. 794, 801 (1960); Ehrenzweig, *Parental Immunity in the Conflict of Laws: Law and Reason Versus the Restatement*, 23 U. CHI. L. REV. 474, 477-78 (1956) (whether minor child may sue his parent "should realistically be determined by that law under which premiums based on the incidence of such suits is most readily calculable by the parent's. . .insurer. This test points unambiguously to the insured's domicile rather than to the fortuitous place of forum or accident.").

146 *Mellk*, 49 N.J. at 233, 229 A.2d at 629 (citing CAVERS, *supra* note 84, at 89, 166).

147 *Id.* (citing Leflar, *Choice-Influencing*, *supra* note 80, at 310-12).

148 *Id.* at 234, 229 A.2d at 629 (citing RESTATEMENT SECOND, *supra* note 6, § 379).

method calls for an opinion that only disposes of the particular controversy, in a very real sense the court wandered off into the jungle without a compass.

Mellk's imprecision soon bore its predictable fruit. Four lower courts concluded that the supreme court had actually adopted the *Second Restatement*'s "center of gravity" test,[149] while another held that it had selected Currie's "governmental interest" analysis.[150] A trial court also suggested that *Mellk* embraced Leflar's "better law" approach because courts using modern approaches really attempt to reach a selective result.[151] Lower courts naturally struggled to make sense of the various theories in play.

In *Maffatone v. Woodson*,[152] the Appellate Division of the Superior Court of New Jersey had to decide whether one New York resident could recover against another New York resident for injuries sustained in New Jersey. New York law had the more favorable recovery rule, a statute providing for the vicarious liability of automobile owner's.[153] Under New Jersey law at the time, a motor vehicle owner could be held liable for the negligent acts of its driver only if an agency relationship could be established.[154]

Facing "the *Mellk* situation in reverse,"[155] the court read that decision narrowly: New Jersey law "would no longer apply *lex loci delicti* mechanically, if such application would frustrate a strong public policy of this State while not serving the policy of the State where the accident occurred."[156] The court then decided the case without

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149 *See, e.g.*, Pfau v. Trent Aluminum Co., 106 N.J. Super. 324, 255 A.2d 792 (App. Div. 1969), *rev'd*, 55 N.J. 511, 263 A.2d 129 (1970); Maffatone v. Woodson, 99 N.J. Super. 559, 240 A.2d 693 (App. Div.), *certif. denied*, 51 N.J. 577, 242 A.2d 381 (1968); Dooley v. Metropolitan Life Ins. Co., 104 N.J. Super.429, 250 A.2d 168 (Law Div. 1969); Mullane v. Stavola, 101 N.J. Super. 184, 243 A.2d 842 (Law Div. 1968).

150 Van Dyke v. Bolves, 107 N.J. Super. 338, 258 A.2d 372 (App. Div. 1969).

151 Mullane v. Stavola, 101 N.J. Super. 184, 189, 243 A.2d 842, 845 (Law Div. 1968). As the court noted, "[o]ne might with more reason say 'what law does justice require be applied?' " *Id.*

152 99 N.J. Super. 559, 240 A.2d 693 (App. Div.), *certif. denied*, 51 N.J. 577, 242 A.2d 381 (1968).

153 *See id.* at 561, 240 A.2d at 695. The statute provided that:

> 1. Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with permission, express or implied, of such owner.

N.Y. VEH. AND TRAF. LAW § 388(1) (McKinney 1986).

154 *Maffatone*, 99 N.J. Super. at 561, 240 A.2d at 694-95.

155 *Id.* at 562, 240 A.2d at 695.

156 *Id.*

identifying any strong "public policy" of New Jersey that might even arguably have been frustrated by the use of *lex loci delicti*.[157] Yet, by focusing on the domiciliary factor, the court reached a compensatory result entirely consistent with interest analysis:

> New York unquestionably had the most significant contacts with the affected parties to this litigation and the specific issues raised therein. . . . New Jersey contacts were adventitous and limited. . . . There were no New Jersey residents with interests to be protected by the law of the forum State, whereas New York had an interest in the adequate compensation for the wrongful death of a New York resident.[158]

One year later, in *Van Dyke v. Bolves*,[159] a different panel of the appellate division addressed the applicability of the same New York statute under very different circumstances. In *Van Dyke*, the plaintiff was a New Jersey resident and the defendants were New York residents.[160] In other words, the plaintiff was a domiciliary of the nonrecovery state and the defendants were domiciliaries of the recovery state.[161] Presumably, New York had no real interest is having its more generous law applied in favor of a New Jersey domiciliary, and New Jersey clearly had the predominant interest in the compensation rights of its domiciliary. Unlike *Maffatone*, in *Van Dyke* there was a New Jersey resident "with interests to be protected by the law of the forum State" and there was no New York plaintiff for whom "New York had an interest in [receiving] adequate compensation."[162] Disregarding the domiciliary factor, and instead reverting to a territorial analysis, the appellate division concluded that New York law should control the action.[163]

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157 *Id.* at 564, 240 A.2d at 696.

158 *Id.* at 562-63, 240 A.2d at 695-96.

159 107 N.J. Super. 338, 258 A.2d 372 (App. Div. 1969).

160 *Id.* at 340-41, 258 A.2d at 373.

161 This is what interest analysts term the "unprovided for" case.

162 *Van Dyke*, 107 N.J. Super. at 344, 258 A.2d at 375 (quoting *Maffatone*, 99 N.J. Super. at 563, 240 A.2d at 696).

163 *Id.* at 344-45, 258 A.2d at 375. The court reasoned:

> The core issue in the present case was the question of implied permission, and it centered around the New York employment relationship involving New York parties and a New York business. The fact that New Jersey was the situs of the accident was purely fortuitous and had no bearing on that issue. New York had the paramount concern in governing the conduct and consequences of its local employment relationships, and New Jersey has evinced no express public policy to regulate such foreign interests in any way. Indeed, [the defendant] could reasonably have expected that his conduct would have been controlled by New York law.

Id.

In *Mullane v. Stavola*,[164] the plaintiff and defendant were college students from New Jersey temporarily residing in Florida, where a fatal automobile trip originated and terminated.[165] The automobile, however, had been registered and insured in New Jersey.[166] The Law Division of the Superior Court of New Jersey stressed the insurance and domiciliary factors and dismissed both the "seat of the relationship" and temporary Florida residences (where the trip had originated) in conclusory terms:

> Even though Florida's "contacts" may be quantitatively greater than New Jersey's they are qualitatively less significant. The salient consideration is that all the parties at the time of the accident were domiciled in New Jersey. Their Florida residences were temporary. New Jersey's interest and concern in the parties as domiciliaries was greater than Florida's interest in them as temporary residents.[167]

The New Jersey Supreme Court finally declared the appropriate choice of law test in *Pfau v. Trent Aluminum Co.*[168] The plaintiff, a Connecticut domiciliary, had been injured in Iowa while riding in an automobile driven by a New Jersey domiciliary and owned by a New Jersey corporation.[169] The plaintiff-guest and defendant-host were both students at an Iowa college and lived in college dormitories.[170] The defendants relied on an Iowa guest statute that immunized a host-driver from liability for ordinary negligence.[171] The trial court held that New Jersey law controlled the parties' relationship.[172] The appellate division reversed, noting that the seat of the parties' relationship had been Iowa, they were temporary residents of that state, and the law of the plaintiff's own domicile would have denied him a recovery by applying Iowa law as the *lex loci delicti*.[173] In short, "[t]he only alleged contacts of New Jersey were that defendants were domiciliaries of this state and that their vehicle was licensed in New Jersey and insured by a New Jersey corporation."[174] The appellate division therefore concluded that Iowa had more significant contacts

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164 101 N.J. Super. 184, 243 A.2d 842 (Law Div. 1968).

165 *Id.* at 186, 243 A.2d at 843.

166 *Id.*, 243 A.2d at 844.

167 *Id.* at 189, 243 A.2d at 845.

168 55 N.J. 511, 263 A.2d 129 (1970).

169 Pfau v. Trent Aluminum Co., 106 N.J. Super. 324, 325-26, 255 A.2d 792, 793 (App. Div. 1969), *rev'd*, 55 N.J. 511, 263 A.2d 129 (1970).

170 *Id.* at 325, 255 A.2d 793.

171 *Id.*

172 *Pfau*, 55 N.J. at 513-14, 263 A.2d at 130.

173 *Pfau*, 106 N.J. Super. at 328, 255 A.2d at 794-95.

174 *Id.*

with the litigants.[175]

The New Jersey Supreme Court reversed.[176] In doing so, it first abandoned the intellectual baggage of the grouping of contacts test, noting:

> While Iowa was the "seat of the relationship" in the instant case, this "contact" does not relate to any interest or policy behind Iowa's guest statute. Nor do we attach any importance to the temporary Iowa residence of plaintiff and defendant. Both parties were still permanently domiciled in other states which retained interests. Moreover, the insurer is a New Jersey corporation which issued its policy at rates applicable to New Jersey. Iowa's interest in these temporary residents is limited to enforcement of its rules of the road at least where the litigation is not in that state.[177]

The court concluded:

> It is clear . . . that Iowa has no interest in this suit. Recovery for negligence in this action will not transgress any of the purposes behind Iowa's guest statute as enunciated by that state's courts or legislature, and will not in the slightest impair traffic safety in Iowa. Nor do we believe that the reasons urged by defendants for applying Iowa law are valid. We are convinced that if the plaintiff were a New Jersey domiciliary Iowa's guest statute would be inapplicable.[178]

The court then noted that "we are faced with a more complex situation since plaintiff is a domiciliary of Connecticut."[179] The court found that any choice between Connecticut and New Jersey law was unnecessary because New Jersey's and Connecticut's substantive laws were in accord.[180] In dicta, however, the court suggested that, had a choice between Connecticut and New Jersey law been necessary, New Jersey law might have been applied to compensate a Connecticut plaintiff at the expense of a New Jersey resident.[181] Citing New Jersey's "real interest" in regulating the conduct of its domiciliaries, the court posited:

> It may well be that in this case . . . New Jersey has an interest.

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175 *Id.*, 255 A.2d at 795.

176 *Pfau*, 55 N.J. at 527, 263 A.2d at 137.

177 *Id.* at 521-22, 263 A.2d at 134 (citation omitted).

178 *Id.* at 522-23, 263 A.2d at 135.

179 *Id.* at 523, 263 A.2d at 135.

180 *Id.* Thus, the court found that "since Connecticut has the same policy of applying principles of ordinary negligence to the host-guest relationship as does New Jersey, this case presents a false conflict and it is unnecessary for use [sic] to decide whether this state has an interest sufficient to warrant application of its law." *Id.* at 525, 263 A.2d at 136.

181 *See id.* at 527, 263 A.2d at 137.

> We are not certain that a defendant's domicile lacks an interest in seeing that its domiciliaries are held to the full measure of damages or the standard of care which that state's law provides for.[182]

Furthermore, the court suggested that New Jersey's "real interest" in fairness required that a foreign plaintiff be treated as well as a resident of the state.[183] What remained to be resolved were those situations in which foreign plaintiffs would not be afforded the same protection available to New Jersey plaintiffs.

B. The Forum Shopping Foreigner

The New Jersey Supreme Court drew the first line to exclude forum shopping foreigners in *Heavner v. Uniroyal, Inc.*[184] In that case, the court utilized "interest analysis" to resolve a choice of limitations law question. Traditionally, statutes of limitation had been characterized as "procedural" based on the quaint notion that they only affected the "remedy" and not the "right" to pursue a claim.[185] The characterization itself was not irrational because statutes of limitation advance a forum's interest in "protect[ing] both the parties and the local courts against the prosecution of stale claims."[186] Consequently, courts at one time routinely applied the limitations law of the forum.[187]

In *Heavner*, the plaintiffs sued in New Jersey to recover the damages they had sustained in an accident caused by the blowout

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182 *Id.* at 524, 263 A.2d at 136.

183 The court reasoned that:

> A state should not only be concerned with the protection and self interest of its citizens. . . .It would not seem just to limit the imposition of this duty to instances where a New Jersey host negligently injures a New Jersey guest in the state which has a guest statute.
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> * * *
>
> In this situation the principles of comity, and perhaps the equal protection and privileges and immunities clauses of the Constitution, dictate that we should afford the Connecticut plaintiff the same protection a New Jersey plaintiff would be given.

Id. at 524-25, 527, 263 A.2d at 136, 137.

184 63 N.J. 130, 305 A.2d 412 (1973).

185 *See* RESTATEMENT, *supra* note 6, §§ 603, 604.

186 RESTATEMENT SECOND, *supra* note 6, § 142, comment (d).

187 The *lex fori* rule was well entrenched. *See, e.g.*, M'Elmoyle v. Cohen, 38 U.S. 312 (1839); Marshall v. Geo. M. Brewster & Son, Inc., 37 N.J. 176, 180 A.2d 129 (1962); Smith v. Smith, 90 N.J.L. 282, 286, 101 A. 254, 256 (N.J. 1917); Leek v. Wieand, 2 N.J. Super. 339, 349-50, 63 A.2d 828, 834 (Ch. Div. 1949); McClellan v. F. A. N. Co., 14 N.J. Misc. 760, 770, 187 A. 337, 342-43 (N.J. 1936), *aff'd*, 118 N.J.L. 168, 191 A. 753 (N.J. 1937); Jaqui v. Benjamin, 80 N.J.L. 10, 11, 77 A. 468, 468-69 (N.J. 1910); Summerside Bank v. Ramsey, 55 N.J.L. 383, 384, 26 A. 837, 837 (N.J. 1893).

of a defective tire.[188] The plaintiffs resided in North Carolina, purchased the tire there, and had the accident in that state.[189] Both defendants, the retailer and the manufacturer, did business nationally and were subject to nationwide service of process.[190] When the action was filed, all of the plaintiffs' claims were time-barred under North Carolina law.[191] A number of their claims, however, were timely under New Jersey law.[192] Under these circumstances, the court abandoned "the mechanical rule that the limitations law of this state must be employed in every suit on a foreign cause of action."[193] The court narrowly framed its holding:

> We need go no further now than to say that when the cause of action arises in another state, the parties are all present in and amenable to the jurisdiction of that state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied, and its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred. In essence, we will "borrow" the limitations law of the foreign state. We presently restrict our conclusion to the factual pattern identical with or akin to that in the case before us, for there may well be situations involving significant interests of this state where it would be inequitable or unjust to apply the concept we here espouse.[194]

Thus, just as it had in *Mellk*, the court applied interest analysis with-

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188 *Heavner*, 63 N.J. at 133, 305 A.2d at 413.

189 *Id.* at 132, 305 A.2d at 413.

190 *See id.* at 134, 305 A.2d at 414.

191 *Id.*

192 *See id.* at 133-34, 305 A.2d at 413-14.

193 *Id.* at 140-41, 305 A.2d at 418.

194 *Id.* at 141, 305 A.2d at 418 (footnote omitted). As an example of a situation in which it might be "inequitable or unjust" not to apply the *lex fori* rule, the court cited Marshall v. Geo. M. Brewster & Sons, Inc., 37 N.J. 176, 180 A.2d 129 (1962).

In *Marshall*, the plaintiff's decedent had been killed by a train in Pittsburgh, Pennsylvania where the defendants, New Jersey entities, had been performing construction work at a railroad crossing. *Id.* at 178, 180 A.2d at 130. The plaintiff sued under Pennsylvania's Wrongful Death Act. *Id.* at 179-80, 180 A.2d at 131. The Act, however, prescribed a one-year limitation period, which had expired before she brought the suit. *See id.* at 178-79, 180 A.2d at 130. The technical question presented, within the traditional paradigm, was whether the limitation period in the Pennsylvania wrongful death act limited the right, or simply the remedy. *See id.* at 179, 180 A.2d at 130.

For the resolution of this question, the *Marshall* court deferred to the Pennsylvania Supreme Court's view that " '[t]he very language of the act marks it as a statute of limitation, not as one conditioning the right of action.' " *Marshall*, 37 N.J. at 185, 180 A.2d at 134 (quoting Rosenzweig v. Heller, 302 Pa. 279, 287, 153 A. 346, 348 (1931)). Thus, New Jersey's limitation period would be applied because

out specifying how courts might identify and weigh the specific governmental interests at stake.

Shortly after *Heavner* was decided, two federal courts markedly differed in predicting the answers to those questions.[195] In *Henry v. Richardson-Merrell, Inc.*,[196] the parents of a child with thalidomide birth defects sued the manufacturer of that drug in New Jersey, although the thalidomide had been prescribed by a Quebec physician and consumed there by the child's mother.[197] The defendant moved for summary judgment under Quebec's one year prescription statute, arguing, among other things, that Quebec's limitation law was substantive, not procedural, and thus barred the right and not merely the remedy.[198] The defendants also claimed that "by bringing their action to New Jersey plaintiffs [had been] merely 'forum-shopping' for a jurisdiction with a favorable statute of limitations in an effort to circumvent the law of Quebec, the jurisdiction most significantly connected with the parties, transactions, and alleged injuries involved in [the] law suit."[199] The district court rejected the defendant's argument grounded in the right-remedy

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Pennsylvania viewed the limitation in its wrongful death act "as nothing more nor less than a general statute of limitations." *Id.* at 186, 180 A.2d at 134.

The court devoted a considerable effort to rebutting commentators' criticisms of the *lex fori* rule stating:

> It is true that this approach may be criticized as permitting recovery by a litigant whose cause of action has been barred at the place it arose, but this may be counterbalanced by the thought that the litigant is merely seeking to assert a just claim within the reasonable though lengthier period of limitation of the state where the wrongdoing defendant is actually found and served. Affording a choice of forum may sometimes be disfavored but it is not invariably evil in purpose or effect.

Id. at 180-81, 180 A.2d at 131 (citations omitted). The court also found it noteworthy that, "unlike the legislatures of. . .other states, the New Jersey Legislature has not seen fit to adopt a so-called 'borrowing statute' under which the shorter limitation of the foreign state where the cause of action arose is always to be applied to the local action." *Id.* (citations omitted). The court therefore specifically rejected one scholar's view that, for conflict of law purposes, foreign limitations should be viewed "as either wholly substantive or both procedural and substantive." *Id.* at 187, 180 A.2d at 135 (citing Taintor, *Conflict of Laws*, 21 U. PITT. L. REV. 153, 160-61 (1959)).

195 Federal courts sitting in diversity are required to apply the choice of law rules followed by the courts of the forum state. Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487 (1941). The *Klaxon* rule derives from the landmark case, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

196 508 F.2d 28 (3d Cir. 1975).

197 *Id.* at 31.

198 Henry v. Richardson-Merrill, Inc., 366 F. Supp. 1192, 1195-97 (D.N.J. 1973), *rev'd*, 508 F.2d 28 (3d Cir. 1975).

199 *Id.* at 1194. Thus, the defendant essentially advanced two arguments, one rooted in the traditional *lex fori* paradigm (*Marshall*) and the other in the modern interest analysis paradigm (*Heavner*).

exception to the *lex fori* rule.[200] Instead, the court found that *Heavner* required interest analysis.[201] The trial court then performed an interest analysis and concluded that New Jersey's limitations law should govern the child's claims[202] on the ground, among others, that "Quebec could well take a positive view of an opportunity accorded a Quebec citizen to escape a harsh, if not archaic, prescription statute . . . ."[203]

The Third Circuit reversed, holding that New Jersey had no interest in preserving the plaintiffs' compensation rights because they were from Quebec.[204] In addition, the court observed that while one goal of tort actions is to deter future misconduct, New Jersey would have no deterrence interest if the wrongful conduct occurred outside of New Jersey.[205] Furthermore, New Jersey would have no interest in applying its longer limitation period in favor of a foreign plaintiff because that longer period "was probably enacted with a

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200 Judge Coolahan, writing for the district court, recognized that the "exception" to the traditional paradigm was no longer relevant because the paradigm itself had been overthrown, stating:

> I agree that the Quebec time-bar is substantive. Nonetheless, I also find that the "substantive nature" of the Quebec prescription statute is no longer a particularly relevant consideration in resolving the statute of limitations issue . . . given the choice-of-law principles announced in [*Heavner*].
>
> [*Heavner*] announces a new choice-of-law rule in New Jersey regarding the application of statutes of limitation in foreign-based causes of action brought in the courts of this State, and clearly holds that New Jersey has now "discarded" the traditional law-of-the-forum rule. Therefore, the decision must also be read as impliedly holding that New Jersey has also discarded the recognized "exception" of the law-of-the-forum rule, that a foreign statute of limitations should be applied in preference to that of the forum if it is characterized as "substantive" by the courts of the foreign jurisdiction.

Id. at 1197-98 (citations omitted) (footnote omitted).

201 The court, however, expressed its interpretation of *Heavner* with the language of the traditional paradigm: "the case directs that for choice-of-law purposes statutes of limitation *will be assumed to be substantive* and are therefore to be applied in the same manner as any other substantive law issues — by weighing the respective governmental 'interests' of the forum State and the foreign jurisdiction." *Id.* at 1198 (emphasis added).

202 The analysis included consideration of New Jersey's two year statute of limitations for personal injury, N.J. STAT. ANN. § 2A:14-2 (West 1952), subject to tolling for infancy pursuant to N.J. STAT. ANN. § 2A:14-21 (West 1952). *Henry*, 366 F. Supp. at 1202-04.

203 *Id.* at 1202-03. The court found, however, the parents' individual claims "timebarred regardless of whether Quebec or New Jersey law applie[d]." *Id.* at 1195 n.6. The court noted that these claims were also governed by the two year statutory period, but that the tolling for infancy provision did not "inure to the benefit of a parent." *Id.*

204 *Henry*, 508 F.2d at 33.

205 *Id.*

view toward protecting New Jersey citizens in whom the legislature had an interest."[206] The Third Circuit concluded that "a New Jersey court, confronted with these facts would deem itself a disinterested forum and apply the law of Quebec to dismiss this suit as time-barred."[207]

C. *The Apotheosis of Domicile*

The key questions left open in *Mellk* and its progeny were finally reached in the three recent decisions resolving "true conflicts." In *Deemer v. Silk City Textile Machinery Co.*,[208] the plaintiff's decedent, a resident of North Carolina, suffered a fatal injury in that state while servicing a machine designed and manufactured in New Jersey by a New Jersey corporation.[209] After filing an answer, the defendants moved to establish North Carolina law as

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206 *Id.*

207 *Id.* at 37. The Third Circuit actually predicted that *Heavner* would stand for this "rule": "Absent a finding that New Jersey substantive law applies, *Heavner* requires borrowing of the foreign limitation period." *Id.* This is commonly known as the "controlling state rule" analysis, which provides for the application of the limitations law "of the state whose substantive law controls the plaintiff's claims." *See* Note, *An Interest-Analysis Approach to the Selection of Statutes of Limitation*, 49 N.Y.U. L. REV. 299, 299 (1974) [hereinafter Note].

There is language in *Heavner* that supports the Third Circuit's view. The court in *Heavner* quoted, with approval, numerous authorities favoring the use of the limitations law of the state whose substantive law controls the outcome. *See Heavner*, 63 N.J. at 137-38, 305 A.2d at 415-16 ("[A]fter suit is barred by the law to which reference is made as governing the rights of the parties, the plaintiff's claim, now deprived of its most valuable attribute, should be unenforceable by action elsewhere." (quoting GOODRICH, *supra* note 45, § 85, at 241)); Lorenzen, *The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492, 496-97 (1919) ("[N]o court should enforce a foreign cause of action which is barred by the law governing the substantive rights of the parties."); Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U. L. REV. 813, 847 (1952) ("It has never been satisfactorily shown why a suit should be permitted if it cannot be maintained under the law to which the forum looks as a model.") (footnote omitted).

Busik v. Levine, 63 N.J. 351, 307 A.2d 571, *appeal dismissed*, 414 U.S. 1106 (1973), suggested in dictum that *Heavner* recognized yet a different "rule." There, Chief Justice Weintraub wrote that *Heavner*, like borrowing statutes found elsewhere, will foreclose an action pursuant to the limitations law of another state if "the parties were there throughout its period of limitations and the suit was brought after that period had run." *Id.* at 366-67, 307 A.2d at 579 (footnote omitted).

208 193 N.J. Super. 643, 475 A.2d 648 (App. Div. 1984).

209 *Id.* at 647-48, 475 A.2d at 650. Approximately three years after the accident, the defendant corporation sold its assets to a German corporation located in North Carolina and thereafter terminated its corporate existence. *Id.* at 648, 475 A.2d at 650. These events played no discernible role in the court's analysis.

the governing law of the case.[210] The trial court denied this motion on the ground that, "since the machine [had been] manufactured in New Jersey, "there was a most substantial connection between this case and the law of the State of New Jersey. . . ."[211]

The appellate division disagreed.[212] The court first noted that the "governmental interest approach to choice of law questions . . . requires a two-step analysis in resolving conflicts questions: the court determines first the governmental policies evidenced by the laws of each related jurisdiction and second the factual contacts of the parties with each related jurisdiction."[213] Before engaging in this two-step analysis, the court reasoned that, since the plaintiff and the plaintiff's decedent were from North Carolina, "New Jersey ha[d] no interest in protecting [their] compensation rights. . . . Indeed, our Supreme Court's decision in [*Heavner*] appears to evidence a policy of discouraging forum shopping where, as here, the contacts with the State are at best tenuous."[214]

Despite these observations, the court found that, unlike *Heavner*, there remained a "true conflict" to resolve.[215] The court found the "true conflict" existed between the two principal objectives of product liability law, compensation and regulation, and concluded that a choice had to be made between those policies.[216] The court observed:

> Here there are competing policies that bear on this issue: (1) those relating to the defect-free design and manufacture of a product, and (2) those that regulate the full and fair compensation of the injured party. The former would militate in favor of New Jersey law, the latter for North Carolina's. Whatever

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210 *Id.* North Carolina had not adopted strict liability as a theory of recovery in products liability actions. *Id.* at 651, 475 A.2d at 652.

211 *Id.* at 648, 475 A.2d at 650.

212 *Id.*

213 *Id.* at 649, 475 A.2d at 650 (citations omitted).

214 *Id.*, 475 A.2d at 651 (citation omitted).

215 *Id.* at 650, 475 A.2d at 651-52. The court noted:

> In *Heavner* the Court did not examine the governmental policies evidenced by the laws of each jurisdiction, but rather stated merely that New Jersey did not possess "any sufficient interest" in the action and determined that North Carolina law was to be applied since the only contact with this state was that defendant was incorporated here.
>
> Since here the product was both designed and manufactured in New Jersey, we are called upon to apply the full two-step analysis noted earlier. This procedure was not required in *Heavner*, where the only New Jersey contact was the chance incorporation of the defendant.

Id.

216 *Id.* at 650-51, 475 A.2d at 652.

> incidental benefits a liability judgment may contribute towards the correction of a defective design or the deterrence of wrongful conduct with respect to the future distribution of a product, the principal aim of a product liability or other personal injury claim is fairly to compensate the injured party. We therefore determine that the second of the two noted policies must control.[217]

The court concluded that, since the plaintiff came from a state less inclined to compensate an injured party, a New Jersey court could fairly deny her the benefits of strict liability.[218]

The principle of domiciliary-preference expressed in *Deemer* was soon tested in the choice of limitations law context, with a result unprecedented in American conflicts law. In *Pine v. Eli Lilly & Co.*,[219] the plaintiff alleged that as the result of his prenatal exposure to the drug Diethylstilbestrol (DES) in 1953, twenty-six years later he developed testicular cancer.[220] The plaintiff's in utero exposure to the drug occurred in New York in April 1953, approximately five months prior to his birth there in September 1953.[221] The plaintiff was raised in New York and had received his elementary, secondary, and college educations there.[222] After graduating from Boston College Law School, he returned to New York City, where he lived with his parents and practiced law.[223] The plaintiff's cancer was diagnosed and treated in New York City.[224] In the course of treatment, one of his physicians suggested that his cancer might have been caused by his prenatal exposure to DES.[225]

In March 1980, the plaintiff consulted a law firm in New York

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217 *Id.*

218 *Id.* at 651, 475 A.2d at 652. The court reasoned that:

> North Carolina having chosen not to afford its own residents the protection of strict liability, there is no compelling reason for us to extend to such non-domiciliary plaintiffs the benefit of our decisional law. Furthermore, the effect of holding New Jersey law to be applicable in a matter of this kind is to subject any corporation conducting manufacturing activities in this state against whom a product liability claim is asserted to suit in New Jersey under New Jersey law. Such a holding would have the undesirable consequence of deterring the conduct of manufacturing operations in this state and would likely result in an unreasonable increase in litigation and thereby unduly burden our courts.

Id.

219 201 N.J. Super. 186, 492 A.2d 1079 (App. Div. 1985), *certif. and leave to appeal denied* (unpublished memorandum order, July 23, 1985).

220 *Id.* at 188-89, 492 A.2d at 1080-81.

221 *Id.*

222 *Id.* at 189, 492 A.2d at 1081.

223 *Id.*

224 *See id.*

225 *See id.*

concerning the institution of a law suit regarding his medical condition.[226] Later that year, the plaintiff consulted an attorney in New Jersey.[227] After the successful treatment of his cancer, the plaintiff allegedly became a resident of New Jersey. Six months later, he filed suit in New Jersey.[228]

The defendants moved for summary judgment under the New York statute of limitations governing personal injury actions.[229] The defendants argued that, consistent with the "interest analysis" choice of limitations law made in *Heavner*,[230] the trial court was required to apply New York's statute of limitations, which, as applied, barred the plaintiff's claims as a matter of law.[231] In an unpublished opinion,[232] the trial court held in favor of the New Jersey limitations law.[233] The court acknowledged that the "plaintiff established a New Jersey domicile only after he had discovered that his potential claim against defendants was time-barred under New York law."[234] It nevertheless held that "New Jersey's overriding and predominant governmental interest in compensating domiciliaries for injuries caused by the tortious conduct of others *was alone sufficient* to apply our statute of limitations and liberal 'discovery rule.' "[235]

The appellate division agreed[236] and thus rejected the defendants' contentions that the " 'absence of factual contacts' between

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226 *Id.*

227 *Id.*

228 *See id.* at 188, 492 A.2d at 1080.

229 *See id.*

230 63 N.J. 130, 305 A.2d 412 (1973).

231 *See Pine*, 201 N.J. Super. at 188, 492 A.2d at 1080. Under N.Y. CIV. PRAC. L. & R. 214 (McKinney 1972), which is not subject to any statutory or common law "discovery doctrine," *see* Manno v. Levi, 94 A.D.2d 556, 465 N.Y.S.2d 219 (1983), *aff'd sub nom.* Fleishman v. Eli Lilly & Co., 62 N.Y.2d 888, 467 N.E.2d 517, 478 N.Y.S.2d 853 (1984), the plaintiff's claims would have become time-barred in 1974. Under N.J. STAT. ANN. § 2A:14-2 (West 1952), which is subject to the common law discovery rule of Lopez v. Swyer, 62 N.J. 267, 300 A.2d 563 (1973), the plaintiff's claims might not have been time-barred. The issue is an equitable one and the determinative factors in any case may include "the availability of witnesses and written evidence, the length of time that has elapsed since the alleged wrongdoing," and "whether the delay may be said to have peculiarly or unusually prejudiced the defendant." *Id.* at 276, 300 A.2d at 568. The burden of proof rests on the party "claiming the indulgence of the rule." *Id.* The issue "is for the trial judge to decide," based on a consideration of "[a]ll relevant facts and circumstances. . . ." *Id.* at 275-76, 300 A.2d at 567-68.

232 *See* Pine v. Eli Lilly & Co., No. L-65163-80, slip. op. at 1-9 (N.J. Super. Ct., Law Div., Oct. 25, 1983).

233 *Id.* at 8-9.

234 *Pine*, 201 N.J. Super. at 190, 492 A.2d at 1081-82.

235 *Id.*, 492 A.2d at 1081 (emphasis added).

236 *Id.*

New Jersey and the controversy, as well as [New Jersey's] significant policy against forum shopping as expressed in *Heavner*, compels the 'borrowing' of New York's statute of limitations."[237] After interpreting the *Deemer* decision to hold generally that a state's interest in compensating its domiciliaries outweighs another state's interest in regulating conduct within its borders,[238] the court held that New Jersey's limitations law should be applied because:

> In most instances, our courts, as well as the Third Circuit, have favored applying New Jersey law in tort actions when the plaintiff is domiciled in New Jersey. If compensation of New Jersey domiciliaries is the overriding state governmental interest, it makes little sense to focus on the expiration date of the foreign limitations statute . . . as the operative date in determining which domiciliaries may avail themselves of the New Jersey statute of limitations and "discovery rule," and which may not, since our interest would be to compensate all domiciliaries, uniformly and without exception. Moreover, choosing the respective statute based on timing of the domicile is arbitrary and unfair. While this "drawing-the-line somewhere" approach may ease the burdens of judicial administration and reduce the danger of forum shopping, it unreasonably deprives the plaintiff who, not knowing that his right of action in

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237 *Id.* The court first addressed the relevance of the two policy objectives underlying tort law:

> New Jersey has a clearly recognized governmental interest in the compensation of its domiciliaries. . . .That "compensation" policy reflects the underlying governmental interest that the injured domiciliary "not become a charge on its society and that he be restored, if possible, to productivity."
>
> * * *
>
> A second governmental interest, one of deterrence, is expressed in [*Pfau*]. That policy is based on the assumption that exacting compensation from a wrongdoer will deter his future misconduct, and is ordinarily associated "with the sovereignty in which past misconduct took place and in which future misconduct may occur."

Id. at 192, 492 A.2d at 1082-83 (quoting Schum v. Bailey, 578 F.2d 493, 501 (3d Cir. 1978) (Gibbons, J., concurring)).

The court then concluded that the compensation of domiciliaries is the paramount interest:

> We have little doubt that application of the "factual contacts" prong of the governmental interest test alone would require the "borrowing" of New York's limitations statute, thus barring plaintiff's claim. We are, however, completely in agreement with the trial court that New Jersey's interest in compensating its domiciliaries is paramount, that it outweighs our policy of discouraging forum shopping, and thus here tips the scales in favor of applying the New Jersey statute and "discovery rule."

Id. at 193, 492 A.2d at 1083.

238 *Id.* at 193, 492 A.2d at 1083.

> the foreign state has been barred, becomes domiciled in New Jersey as a result of factors over which he has little control, such as a job transfer, or for other reasons totally unrelated to his injury and potential cause of action.[239]

For good measure, the court then suggested that New York did not have a "compelling interest in having its statute of limitations apply" to defeat the plaintiff's claims.[240]

The plaintiff in *Seals v. The Langston Co.*[241] met a different fate because she, unlike the plaintiff in *Pine*, did not have the foresight or wherewithal to move to New Jersey before she filed suit in the state.[242] In *Seals*, the court addressed the question "whether Louisiana's one-year statute of limitations or New Jersey's two-year statute governs a New Jersey action for damages for injuries and death of a Louisiana resident allegedly caused in Louisiana by a defective machine manufactured in New Jersey by a New Jersey corporation."[243] The case was the factual equivalent of *Heavner* except that "in *Heavner* New Jersey was not the place of manufacture of the allegedly defective tire. Here, on the other hand, the allegedly defective machine was made in New Jersey."[244] Relying on *Deemer's* logic, and holding that the substantive law of Louisiana governed the action,[245] the court effectively concluded that there was no place in a conflicts analysis for the regulatory interests "tentatively suggested in *Pfau*."[246] The court reasoned:

> We see no significant New Jersey interest in exposing New Jersey manufacturers to greater jeopardy in our courts than

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239 *Id.* at 193-94, 492 A.2d at 1083 (citations omitted).

240 *Id.* at 194, 492 A.2d at 1083. The court observed:

> New York's rejection of the "discovery rule" is not out of insensitivity to the need for compensating those wrongfully injured, but is rather based on the "countervailing considerations of . . . social tranquility" afforded by a limitations statute and the observation that the issue is best addressed by the legislature, since its courts are ill-equipped to inquire into the incidents of hardship associated with application of the rule. Since the matter will be tried in our courts, New York need not be concerned with that hardship.

Id. at 194, 492 A.2d at 1083-84 (citations omitted) (footnote omitted).

Curiously, the court relied solely on the *procedural* concerns underlying statutes of limitations and did not address the "countervailing considerations of social tranquility" or, for that matter, the parties' reasonable expectations. Yet, New Jersey and New York courts have emphasized that these are the two principal concerns underlying statutes of limitation. *See infra* text accompanying notes 340-45.

241 206 N.J. Super. 408, 502 A.2d 1185 (App. Div. 1986).

242 *See id.* at 409, 502 A.2d at 1185.

243 *Id.*

244 *Id.* at 411, 502 A.2d at 1186.

245 *Id.* at 413, 502 A.2d at 1187.

246 *Id.* at 412, 502 A.2d at 1187.

> they would face where a cause of action against them arose, or in a disinterested forum provided by another state. Such a course would encourage forum shopping. . . and would require us to treat local manufacturers more rigorously than foreign manufacturers sued in our courts by foreign plaintiffs.[247]

Thus, rigorous common law regulation of New Jersey's manufacturers is unwarranted to protect residents of other states. The reason does not derive from some conception of comity, efficiency, or justice. It lies instead with New Jersey's concerns for its competitive edge.

V. THE DISGRACE OF A DOMICILE-DRIVEN METHODOLOGY

A. The Corrupting Influence of Self-Interest

Tort law is perhaps the most normative area of the law.[248] Normative judgments pervade New Jersey's analysis of virtually all issues in negligence and product liability cases. For example, in delimiting the parameters of proximate causation, New Jersey courts have long emphasized that "[t]he question is not simply whether a[n] . . . event is foreseeable, but whether a *duty* exists to take measures to guard against it. Whether a *duty* exists is ultimately a question of fairness."[249] Indeed, strict liability may ultimately be grounded in basic considerations of fairness.[250]

When New Jersey courts formulated the doctrine of strict liability, did they really mean only that it is unfair for the distributors of a defective product not to compensate its *New Jersey* victims?—obviously not. Clearly, a state's interest in seeing that justice is done should be unrelated to any party's domicile.[251] In-

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247 *Id. Compare* Tomlin v. Boeing Co., 650 F.2d 1065, 1071 (9th Cir. 1981) (applying forum state's longer statute of limitations in favor of foreign plaintiffs because forum state "would be interested in deterring the wrongful conduct of its most prominent corporate citizen") *with* Baird v. Bell Helicopter Taxtron, 491 F. Supp. 1129, 1140-41 (N.D. Tex. 1980) (applying forum state's strict liability doctrine in favor of foreign plaintiffs on grounds of fairness and regulatory interests).

248 Brown, *The Natural Law Basis of Juridical Institutions in the Anglo-American Legal Systems*, 4 CATH. U. L. REV. 81, 84 (1954).

249 Goldberg v. Housing Auth., 38 N.J. 578, 583, 186 A.2d 291, 293 (1962) (emphasis in original). *Accord* Stracham v. John F. Kennedy Memorial Hosp., 209 N.J. Super. 300, 320, 507 A.2d 718, 728 (App. Div. 1986).

250 *See* Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 209, 447 A.2d 539, 549 (1982) ("We impose strict liability because it is unfair for the distributors of a defective product not to compensate its victims.").

251 Interest analysts made this point from the outset. Professor Currie observed that:

> [T]here is no need to exclude the possibility of rational altruism: for example, when a state has determined upon the policy of placing upon

deed, domicile-driven paternalism is unjust because it subsidizes citizens of states with more liberal recovery rules at the expense of citizens elsewhere.[252] Thus, when looked at solely from the justice criterion, the provincial approach seems indefensible.[253]

Similarly, when New Jersey courts observed that strict liability is designed to furnish manufacturers with an incentive to make safer products, did they mean safer products only for residents of New Jersey? The answer is likewise self-evident. Moreover, domicile-driven paternalism actually undermines the safety incentives that protect New Jersey residents. Since this approach shelters domestic industries, residents of the state are more likely to purchase those products than residents of any other state.

Thus, New Jersey's domicile-driven methodology is incompatible with the fairness and economic efficiency criteria of New Jersey tort law. Perhaps most importantly, however, is the self-evident proposition that this methodology cannot accomplish the primary objective of a conflicts of law regime. What gets lost in the "protect your own" attitude of *Deemer*, *Pine*, and *Seals* is the

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local industry all the social costs of the enterprise, it may well decide to adhere to this policy regardless of where the harm occurred and who the victim is.

CURRIE, *supra* note 72, at 186. Professor Scoles noted:

> State interest is not only a selfish, provincial, self-protecting interest: it is an interest in seeing justice done, including an interest. . .in seeing that [a] policy of full compensation is not frustrated. The policy of full compensation is part of [a state's] concept of justice and [that state] is even more interested in seeing justice done [when the defendant is from that state] than in a case where both parties were non-residents. The policy of a state may be furthered by doing justice even when a resident's personal interest is defeated.

Scoles, *Comment on* Reich v. Purcell, 15 UCLA L.REV. 551, 567 (1968).

252 THE FINAL REPORT OF THE INTERAGENCY TASK FORCE ON PRODUCT LIABILITY (Jan. 1977) found that product liability insurance rates are written on a nationwide basis. *See id.* at 70-71. Likewise, most product prices are set on a nationwide basis. *See id.* Thus, citizens of states denying recovery in product liability actions under circumstances where other states would permit recovery are, in effect, subsidizing the price of goods for the benefit of those in the more liberal jurisdictions. *See* LEGAL STUDY REPORT OF THE INTERAGENCY TASK FORCE ON PRODUCT LIABILITY 70 (Jan. 1977); *see also* Comment, *Choice of Law: Statutes of Limitation in the Multistate Products Liability Case*, 48 TUL. L. REV. 1130 (1974).

253 Ely, *Choice of Law*, *supra* note 11, at 197-99. *Cf.* Currie, *Comments on* Reich v. Purcell, 15 UCLA L. REV. 551, 599 (1968) ("Must we fall back on the unconvincing notion that Missouri legislators can be presumed to be trying to please Missouri voters and therefore have acted for their exclusive benefit ?"); Leflar, *Comments on* Reich v. Purcell, 15 UCLA L. REV. 551, 639 (1968) ("[A] state's interest in the administration of justice under law favors the welcome visitor equally with the resident, and. . .it is wrong to say that a state's protective laws are promulgated only for the benefit of domiciliaries.").

very mission of choice of law — a mission well served by the neutral rules of the traditional paradigm.[254] It seems quite obvious that, whatever else may be said about the rule of self-interest, it is certainly not one calculated to advance good feelings and commerce between the states.[255]

B. *The Incompatibility of Interest Analysis and the Rule of Law*

One of the more disturbing implications of interest analysis is its infidelity to the rule of law. A judicial system can dispense justice without the rule of law. To be consistent with the rule of law, however, a judicial system requires *rules of law* — fixed standards established in advance of their application.[256] The requirement of a fixed standard furthers at least two fundamental values:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented,

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254 Professor Trautman was undoubtedly correct when he observed that:

> Surely the domestic rules of a state are not solely designed to further the interests of its residents as against non-residents, any more than they may be to "advance" the interests of the state as against other states. State judges, in making choice-of-law decisions, are facing up to multistate problems as to which strictly local views, especially in view of our federal polity, should hardly be regarded analytically as determinative. [A] state's policy includes policies deriving from the fact that the state is a member of a community of states and that domestic-law policies may have to be subordinated to these larger considerations.

Trautman, *Comments on* Reich v. Purcell, 15 UCLA L. REV. 551, 623 (1968) (footnote omitted).

One key to making the interstate system work well is the perception of fairness, a factor that led to the creation of diversity jurisdiction. *See* Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOKLYN L. REV. 197, 199-210 (1982). The founding fathers were concerned that "litigants who were disappointed by judicial decisions in courts of distant states might ascribe their losses to the incompetence or the prejudice of the state courts and would bear ill-will toward the forum state." *Id.* at 201 (footnotes omitted). Consider how the plaintiffs in *Deemer* and *Seals* would feel if they were told that they might have won substantial verdicts if only they first had become residents of New Jersey.

255 *See* Hill, *The Judicial Function*, *supra* note 6, at 1607.

256 The requirement of legally fixed standards prescribed in advance of their application has been said to be "of the very essence of the law." Connally v. General Constr. Co., 269 U.S. 385, 392 (1926) (citation omitted). Thus, *ad hoc* justice has long been considered incompatible with the rule of law. *See* Terminiello v. Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting) ("We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."). *See generally* L. FULLER, THE MORALITY OF LAW 63 (rev. ed. 1969) (fixed standard "represents one of the most essential ingredients of legality").

> laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[257]

In the context of the courtroom, meaningful choice of law standards are essential to the justiciability of a conflicts question. As Professor Henderson has observed, "[t]he most basic limit of adjudication is that it requires substantive rules of sufficient specificity to support orderly and rational argument on the question of liability."[258] Furthermore, legal standards of sufficient specificity are essential to the integrity of the choice of law process for at least two reasons. First, a clear legal standard minimizes the likelihood of arbitrariness by supplying the decision maker with an analytical structure.[259] In the absence of a fixed standard, the decision-maker's attention "would be free to wander at large over the manifold elements of the case so that the ultimate decision might be reached on the basis of any factor or factors which for the time being loomed

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257 Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (footnotes omitted). *Cf.* Meyer v. Housing Auth., 44 N.J. 567, 577, 210 A.2d 617, 623 (1965) (jury must be "given a yardstick against which to determine [liability]. Common knowledge, so called, upon which the jury would have to rely to solve such questions, is nothing more than speculation.").

258 Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L. J. 467, 468 (1976) [hereinafter Henderson, *Expanding the Negligence*]. *See also* Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 551-52 (1982) [hereinafter Twerski, *Seizing the Middle Ground*] ("The hallmark of a justiciable case is that . . .[e]ach party's claim is supported by proof and argument under established legal rules which allegedly entitle that person to a favorable result as of right."). Indeed, Professor Henderson has noted that the distinction between adjudication and other forms of social decision-making rests on the availability of specific legal standards ultimately governing the determination of liability:

> Adjudication is a social process of decisionmaking in which the affected parties are guaranteed the opportunity of presenting proofs and arguments to an impartial tribunal which is bound to find the relevant facts and to apply recognized rules to reach a reasoned result. It is certainly not the only process of decision in which interested parties are afforded the opportunity to participate—elections call for participation through voting, and contracts involve participation through negotiation. But adjudication is unique in that each affected party's participation takes the form of a claim, supported by proof and argument, that established legal rules entitle him to a favorable result as a matter of right. The dominant mood with which a judicial tribunal approaches its task of decision is that of seeking, in accordance with applicable rules, the single right result in each case.

Henderson, *Expanding the Negligence*, *supra*, at 469 (footnotes omitted).

259 *See* Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 849 (1931).

largest to [his or her] mind."[260] Second, ascertainable standards enable the litigants to exercise their right to participate meaningfully in the resolution of their dispute. With legally fixed standards, the parties can rely on established rules and argue for a decision in their favor as a matter of right.[261]

The traditional conflicts regime honored the rule of law because it operated through choice of law rules. In a tort action, for example, the party invoking a state's rule basically had to establish only that the claim arose in that state.[262] The facts might have been in doubt, but the rules were relatively clear. Interest analysis, by contrast, disdains rules as a theoretical matter, and the results speak for themselves. At best, the results are emblematic of kadi justice, a form of "justice" antithetical to the rule of law.[263] In the final analysis, interest analysis has not resulted in a "rule of law" but rather a "reign of chaos."[264]

C. *The Inefficiencies of Interest Analysis*

Interest analysis was designed to replace a cumbersome body of jurisdiction-selecting rules with a simple technique utilized by judges every day: statutory or common law rule con-

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260 *Id.* New Jersey courts have at least implicitly recognized this function of legal standards. *See, e.g.*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 176, 406 A.2d 140, 153 (1979) (legal standards must be sufficiently specific in order to "assist a jury's comprehension of the issues which it must resolve").

261 Henderson, *Expanding the Negligence*, *supra* note 258, at 470. In the absence of such rules, the litigants:

> would still take part in the proceedings, but only in the limited sense of making speeches—not as litigants offering proofs and arguments for a decision according to law. Their posture before the court would become very much like that of a supplicant before a manager, appealing to the latter's discretion. And the courts. . .would inevitably be forced to resort to bases for decision bearing little, if any, relation to the presentation of the legal issues. Were such a denial of the litigants' rights to meaningful participation to become commonplace, the adjudicative process would become nothing more than an elaborate masquerade.

Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1539 (1973).

262 *See, e.g.*, Quillen v. International Playtex, Inc., 789 F.2d 1041, 1044 (4th Cir. 1986).

263 The concept of "Kadi justice" derives from the instructions which Khalif Omar gave to his first kadi (a Moslem judge) around 900 A.D.: "If thou seest fit to judge differently from yesterday, do not hesitate to follow the truth as thou seest it; for truth is eternal and it is better to return to the true than to persist in the false!" Scarborough v. Granite School Dist., 531 P.2d 480, 483 n.5 (Utah 1975) (Maughan, J., dissenting).

264 In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 739 (C.D. Cal. 1975).

struction.[265] Courts would have to consider only the policies underlying the competing rules to determine which ought to govern. We know from *Mellk* and its progeny that it has not worked out that way.[266]

Because interest analysis rejects fixed rules as a matter of principle, precedents, which are ordinarily read to establish "rules," are virtually meaningless. Consequently, each court is forced to construct a decision anew from its foundation. This process imposes costs apart from the simple injustice of kadi-like justice. Since interest analysis does not serve the interests of certainty, uniformity, and predictability as well as the traditional regime, interest analysis actually makes litigation more likely.[267] It

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265 It remains unclear, however, whether the first rule of the traditional scheme, premised on the dichotomy between substance and procedure, has survived the revolution. *Compare* Busik v. Levine, 63 N.J. 351, 365, 307 A.2d 571, 578 (1973) (indicating that RESTATEMENT SECOND "correctly discards that approach and goes directly to the question whether the law of the forum should be applied with respect to each particular subject") (footnote omitted) *with* Axelrod v. CBS Publications, 185 N.J. Super. 359, 366, 448 A.2d 1023, 1026 (App. Div. 1982) ("In applying the law of a foreign jurisdiction to resolve an issue in this State, we are controlled by the law of the other state for *substantive* determinations only. For procedure, the law of this, the forum state, still controls.") (emphasis in original). In view of this confusion, a trial court faced with a simple question regarding the validity of unsigned depositions taken in another jurisdiction evidently felt compelled to both engage in a lengthy "interest analysis" and invoke the rule allocating procedural issues to forum law. *See* Beckwith v. Bethlehem Steel Corp., 185 N.J. Super. 50, 447 A.2d 207 (Law Div. 1982).

266 The question, at this level, is whether we can afford the individualized justice that interest analysis offers for each automobile accident involving some foreign elements:

> The idea that judges can be turned loose in the three-dimensional chess games we have made of these cases, and can be told to do hand-tailored justice, case by case, free from the constraints or guidelines of rules, is a vain and dangerous illusion. It tries to dispose of law's ancient dilemma—the one or the many?—by exhorting courts to think deeply and decide justly. It elevates local substantive law policies to complete dominance and shockingly neglects policies concerned with making the federal system function smoothly. Above all, the idea that we need only a method, not rules, overlooks the key point: the present concern is with high-volume problems in the *administration* of justice, not in its inspired divination.

Rosenberg, *Comments on* Reich v. Purcell, 15 UCLA L. REV. 551, 644 (1968) (emphasis in original).

267 As Professor Twerski has noted, "[w]hen a legal dispute, if litigated, is resolved through application of precise rules rather than by reference to general, open-ended standards, it is easier for the parties to predict the outcome." Twerski, *Seizing the Middle Ground, supra* note 258, at 534 n.36. Parties who are better able to predict the outcome are, of course, more likely to settle or avoid litigation altogether. *See* Cheatham, *Comments on* Reich v. Purcell, 15 UCLA L. REV. 551, 629 (1968).

also makes the litigation of a choice of law question far more complex and costly.[268] Professor Gorman summarized it well when he asked: "Is this judicial burden really commensurate with the fruits brought forth when, for example, in a seemingly simple three-state wrongful death case, convincing arguments can be made for and against the respective state interests at every turn?"[269]

An analysis of New Jersey's domicile-driven results shows that, in fact, convincing arguments *can* be made at every turn. For instance, the Supreme Court of New Hampshire, in *Gordon v. Gordon*,[270] used interest analysis to reach the same result in *Pine* based on a reverse mirror image of *Pine*. In *Gordon*, a wife sued her husband for damages arising out of an automobile accident in New Hampshire.[271] At the time of the accident, the spouses had been domiciled in Massachusetts.[272] During the time between the accident and the institution of the suit, they moved to Maine and remained domiciled there.[273] Maine recognized an interspousal immunity rule that precluded the suit, and the limitations law of Massachusetts, the parties' domicile at the time of the accident, would have barred the suit.[274] However, the law of the forum, New Hampshire, permitted interspousal suits and would have recognized the suit as timely.[275] The *Gordon* court declined the defendant's invitation to "make domicile at the time of suit a controlling consideration."[276] The court posited: "[w]e have rejected mechanistic approaches to choice of law problems such as the *lex loci delicti* approach . . . and have applied the balancing test of [interest analysis] to the choice of which state's spousal immunity rule will apply."[277] Thus, the court concluded that "deference to the domicile of the parties falls short of a controlling factor in our choice."[278]

It is enlightening to see how both the trial and appellate

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[268] New Jersey courts have in recent years expressed concern over "the subject of extended litigation and its attendant expenditure of resources." Vallillo v. Muskin Corp., 212 N.J. Super. 155, 158, 514 A.2d 528, 529 (App. Div. 1986) (citations omitted) (products liability action).

[269] Gorman, *Comments on* Reich v. Purcell, 15 UCLA L. REV. 551, 617 (1968).

[270] 118 N.H. 356, 387 A.2d 339 (1978).

[271] *Id.* at 357, 387 A.2d at 340.

[272] *Id.*

[273] *Id.*

[274] *Id.* at 357-58, 381 A.2d at 340.

[275] *Id.* at 357, 387 A.2d at 340.

[276] *Id.* at 359, 387 A.2d at 341.

[277] *Id.* at 359-60, 387 A.2d at 341 (citations omitted).

[278] *Id.* at 360, 387 A.2d at 342.

courts in *Pine* reasoned through the interests involved to reach precisely the opposite conclusion.[279] In *Pine*, all operative events occurred in New York.[280] The plaintiff was not only domiciled in New York *when* his claim arose, that is *where* his claim arose, and that is *where he remained* until it became time-barred under New York law.[281] Six years later, he moved to New Jersey and filed suit.[282] The courts held that the plaintiff's comparatively new residence furnished New Jersey with a governmental interest sufficient in and of itself to warrant the application of New Jersey's statute of limitations and its common law discovery doctrine.[283] In reality, the courts adopted a new "mechanical rule" that invariably requires the use of New Jersey's limitations law, and arguably its substantive law as well, whenever a plaintiff elects to become a New Jersey resident before he files suit in the state. The question, therefore, is how well this new mechanical rule rationalizes the policy considerations germane to the choice of law process.

1. Forum Shopping

New Jersey citizens maintain their judicial system, in part, for "the expeditious determination of local issues."[284] Given a court system long overburdened,[285] New Jersey can ill-afford to entertain suits over events that occurred elsewhere.[286] As the New

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279 Although the discussion focuses on *Pine*, many of the considerations pertain equally to *Deemer* and *Seals*.

280 In the language of N.J. CT. R. 4:5-2, all of "the facts on which the claim is based" occurred in New York. *Pine*, 201 N.J. Super. at 188, 492 A.2d at 1080.

281 *Pine*, 201 N.J. Super. at 188, 492 A.2d at 1080.

282 *See id.* at 189, 492 A.2d at 1081.

283 *Id.* at 191-93, 492 A.2d at 1082-83.

284 Gore v. United States Steel Corp., 15 N.J. 301, 313, 104 A.2d 670, 677 (1954).

285 *See, e.g.*, In re Hudson Cty. 1982 Judicial Budget, 91 N.J. 412, 416, 452 A.2d 202, 204 (1982); Brown v. Brown, 147 N.J. Super. 156, 157, 370 A.2d 895, 896 (App. Div. 1977); Collins v. Uniroyal, Inc., 130 N.J. Super. 169, 173, 325 A.2d 854, 856 (Law Div. 1974). The backlog and overcrowding has reached crisis proportions. Carter, *Study Urges Get Tough Policy on Court Backlog*, The Star-Ledger, Oct. 22, 1986, at 16; Wilson, *New Jersey's Crowded Courthouses: Displaced Judges and Folding Chairs*, N.J. Law Journal, Nov. 20, 1986, at 1.

286 *See Gore*, 15 N.J. at 313, 104 A.2d at 677. New Jersey residents will spend approximately $68,500,000, together with an additional $19,950,000 in federal funds, to operate the state's court systems. *See* State of New Jersey Budget, Fiscal Years 1986-1987, at D-355 to D-360 (Feb. 10, 1986). It costs approximately $607,000 per year for each sitting judge of the superior court. Letter from Theodore J. Fetter, Deputy Director of the Administrative Office of the Courts, State of New Jersey, to Marc S. Klein (Oct. 9, 1986) [on file with the Seton Hall Law Review]. The Rand Corporation's Institute for Civil Justice has estimated that, as of

Jersey Supreme Court has observed, "[a]ny opposing view would open our courts to extensive litigation which would deal exclusively with foreign issues and would necessarily retard the expeditious determination of local issues."[287]

The trial court in *Pine* recognized that "*Heavner* was designed to put a stop to forum shopping."[288] Nevertheless, the trial judge held that since the plaintiff had become a resident of the forum state, he could not possibly be a forum shopper and, therefore, *Heavner's* objective would not be advanced by the application of its rule in *Pine*.[289] The trial judge noted:

> From *Heavner* one perceives that what distinguishes a shopper from a non-shopper is that New Jersey has no governmental interest in a shopper's cause of action, while it does have an identifiable interest in the case of one who is not a shopper.
>
> Consequently, identifying whether one is a shopper or not requires making an interest analysis. If all five factors enumerated in *Heavner* are present the necessary conclusion is that New Jersey has no governmental interest in the matter. If not, the likelihood is New Jersey does have an interest.[290]

The analysis utilized in *Pine* rests entirely on one illogical assumption: so long as a plaintiff moves to the state *before* he files suit, he cannot, by definition, be a forum shopper. By definition, however, a forum shopper is one who seeks "to obtain the advantage of more favorable statutory or decisional law in the forum state."[291] Given the profound developments in the law and frequent reports of exorbitant settlements and verdicts,[292] it would be surprising to find many unwilling to relocate to another state in order to revive their otherwise time-barred claims. In short, the holding in *Pine* would not only encourage forum shopping, it would "encourage im-

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1982, the litigation of tort claims cost both state and federal governments approximately $320 million per year. J. KAKALIK & A. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES 69 (1982).

While the courts in *Pine* considered the potential expense to the state should the plaintiff become a "public charge," they did not consider the costs imposed by forum shopping. *Pine*, 201 N.J. Super. at 192-94, 492 A.2d at 1082-83.

287 *Gore*, 15 N.J. at 313, 104 A.2d at 677.

288 *Pine*, slip. op. at 4.

289 *See id.*, at 8-9.

290 *Id.* at 4-5 (footnote omitted).

291 Breslin v. Liberty Mut. Ins. Co., 125 N.J. Super. 320, 326, 310 A.2d 527, 530 (Law Div. 1973) *rev'd in part on other grounds*, 134 N.J. Super. 357, 341 A.2d 342 (App. Div. 1975), *aff'd*, 69 N.J. 435, 354 A.2d 635 (1976) (citation omitted).

292 *See, e.g.*, West, *Mass Product Litigation Strains Courts, Parties*, 9 LITIGATION NEWS no. 3, at 1 (1984).

migration".[293] Moreover, virtually all courts have rejected any assumption that they could consider a state's interests created by a plaintiff's post-occurrence change of domicile. This is true of courts that considered the question before interest analysis came into vogue and, far more frequently, since that time.[294]

In *Erie Railroad Co. v. Tompkins*,[295] the Supreme Court overruled *Swift v. Tyson*,[296] which held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not apply state common law, but could instead exercise independent judgment and apply federal "general law."[297] The *Erie* Court held that since forum shopping was one of the "mischievous results" of the *Swift* doctrine,[298] federal courts would be required in diversity cases to apply the substantive common law rules applicable in a state.[299]

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293 *See* Robinson v. Moore, 76 Miss. 89, 103, 23 So. 631, 633 (1898). Indeed, given the proximity of New York City to many Northern New Jersey cities, it is quite likely that residents of either state who would prefer the law of the other will "set sail across the Hudson River in search of a jurisdiction where the potential for [recovery] is built into its law." Wachsman v. Craftool Co., Inc., 77 Misc.2d 360, 361, 353 N.Y.S.2d 78, 80 (Sup. Ct. 1973) (citation omitted). The *Pine* case furnishes a perfect example of how easily that can be done. In *Pine*, the plaintiff rented an apartment in Jersey City under a "[p]eriodic tenancy." Deposition of Alfred Pine at T257-21, Pine v. Eli Lilly & Co., 201 N.J. Super. 186, 492 A.2d 1079 (App. Div.) (No. L-65163-80). While he had no "plans to move from that apartment in the near future," he admitted that he had "never signed a lease." *Id.* at T257-21 to -24. He commuted from Jersey City to his New York City law offices on the PATH commuter trains, which he found "reasonably convenient." *Id.* at T37-22 to -24, T259-7 to -22, T294-10 to -14.

Despite these "suggestive" facts, it might well be necessary to conclude that a plaintiff's motive for becoming a New Jersey resident is not material. A court should consider any plaintiff to be a forum shopper, for purposes of choice of law, where, as in *Pine*, *all* operative events occurred in another state and the plaintiff resided in that state when his cause of action arose and remained there throughout its period of limitations. *Cf. Busik*, 63 N.J. at 366, 307 A.2d at 579. Clearly, "decent judicial administration could not tolerate" a case-by-case determination of each such plaintiff's motivation for moving to New Jersey, since that too would "necessarily retard the expeditious determination of local issues." *Gore*, 15 N.J. at 313, 104 A.2d at 677.

294 Under the traditional choice of law paradigm, the issue would not have been addressed because, in theory, a party's domicile would be irrelevant. So too was his status as a plaintiff or defendant. As noted in the following text, however, federal choice of law was influenced by these considerations.

295 304 U.S. 64 (1938).

296 41 U.S. 1 (1842).

297 *Erie*, 304 U.S. at 71.

298 *Id.* at 74.

299 *Id.* at 78. Writing for the Court, Justice Brandeis observed:

> In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.
>
> The discrimination resulting became in practice far-reaching. This

The Supreme Court of New Jersey has also recognized, in a different context, that a "post-occurrence" change of domicile should be disregarded to deter forum shopping. In *Meeker v. Meeker*,[300] the plaintiff, a resident of New Jersey, instituted a declaratory judgment action seeking to have her spouse's Mexican divorce declared invalid.[301] The defendant argued that, since neither he nor his wife had been a bona fide resident of New Jersey at the time the divorce decree was entered, New Jersey courts lacked jurisdiction to entertain the action.[302] The court rejected that contention. To foreclose the possibility of New Jersey courts becoming " 'a mecca for disgruntled divorcees,' " however, the court held that in all such actions the governing law must be "the substantive law of the attacking spouse's domicile at the time of the decree."[303] The court reasoned:

> A spouse would then gain no advantage by choosing New Jersey as a forum; his status would be determined as though he had remained in his prior domicile. We adopt such choice-of-law rule as a practical and effective approach in cases like the present one.
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> * * *
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> To the extent that differences remain among state policies in recognizing sister state divorces, application of the choice-of-law rule just mentioned should prevent wholesale influx into

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resulted in part from the broad province accorded to the so-called "general law" as to which federal courts exercised an independent judgment. In addition to questions of purely commercial law, "general law" was held to include. . .the liability for torts committed within the State upon persons resident or property located there. . . .

* * *

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. *Through this jurisdiction individual citizens willing to remove from their own State and become citizens of another might avail themselves of the federal rule.*

Id. at 75-76 (footnotes omitted) (emphasis added).

Although beyond the scope of this article, the Supreme Court, in a number of cases, has recognized minimal due process limitations on choice of law rules. The Court did so most recently in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1984). *See also, e.g.*, Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934); Home Ins. Co. v. Dick, 281 U.S. 397 (1930). The Court has also invoked the full faith and credit clause for that purpose. *See, e.g.*, Order of United Commercial Travelers v. Wolfe, 331 U.S. 586 (1947). *See generally* Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976) (discussing due process and full faith and credit limitations).

300 52 N.J. 59, 243 A.2d 801 (1968).

301 *Id.* at 62, 243 A.2d at 802.

302 *See id.*

303 *Id.* at 68, 243 A.2d 806 (citation omitted).

our courts for declaratory judgments.[304]

There does not seem to be a way to reconcile *Meeker* with the logic of *Pine*. After all, why should a party's matrimonial rights depend on the law of the state that granted the divorce? Couldn't a new resident who had been granted inadequate alimony, child support, or property distribution in another state thereafter become a "charge" on the State of New Jersey?[305]

Those courts which have confronted a post-occurence change of domicile in the post-revolutionary world of interest analysis have essentially agreed that interests must be analyzed as of the date of the event in issue to prevent manipulation of outcomes. In *Gore v. Northeast Airlines, Inc.*,[306] a wrongful death action arising from an airline crash over Massachusetts, the decedent had lived with the plaintiff, his wife, in New York.[307] Shortly after the accident, she moved to Maryland. In holding that New York law would be applied in the action, the court stated:

> [I]t is clear that the time of death is the crucial time in the determination of a survivor's interest in a wrongful death action. Even if this were not the New York rule it would be the desirable rule for it prevents beneficiaries from forum-shopping by changing domiciles after the decedent's death prior to commencing a wrongful death action. We hold that the date of death . . . is the determinative date as to the beneficiaries' domiciles for the purpose of choosing the applicable state law in a wrongful death action.[308]

Similarly, in *Doiron v. Doiron*,[309] the Supreme Court of New Hampshire held that the question of interspousal immunity would be determined by the law of the parties' domicile at the time of the accident, as opposed to the law of the state to which they had moved

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304 *Id.* at 69, 243 A.2d 806 (citations omitted).

305 Thus, in *Meeker*, the "new" New Jersey resident could not take advantage of more favorable New Jersey law simply by moving to the state. Of course, the approach in *Meeker*, which determines a party's status "as though he had remained in his prior domicile," protects the legitimate expectations of New Jersey residents to the extent it is applied elsewhere. *See, e.g.*, Berle v. Berle, 97 Idaho 452, 546 P.2d 407 (1976) (spouse who remained in New Jersey entitled to equitable distribution under New Jersey's more generous law against former spouse who relocated to Iowa).

306 373 F.2d 717 (2d Cir. 1967).

307 *Id.* at 719.

308 *Id.* at 723. *Accord* Shenandoah v. City of Philadelphia, 438 F. Supp. 981, 989 n.10 (E.D. Pa. 1976); Tiernan v. Westext Transp., Inc., 295 F. Supp. 1256, 1264 n.6 (D.R.I. 1969).

309 109 N.H. 1, 241 A.2d 372 (1968).

after the accident but before filing suit.[310] The Supreme Court of California also has held that a plaintiff's subsequent change of residence to the forum state cannot be considered in making a choice of law.[311] In *Reich v. Purcell*,[312] the court held:

> Although plaintiffs now reside in California, their residence and domicile at the time of the accident are the relevant residence and domicile. At the time of the accident the plans to change the family domicile were not definite and fixed, and if the choice of law were made to turn on events happening after the accident, forum shopping would be encouraged. Accordingly, plaintiffs' present domicile in California does not give this state any interest in applying its law. . . .[313]

Most commentators also have recognized that the consideration of a plaintiff's after-acquired domicile would, in essence, lead to "arrant home-shopping."[314] At best, some would permit a post-transaction change of domicile to be considered "if, on the facts of the case . . . it is clear that the new residence had been selected and

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310 *Id.* at 4, 241 A.2d at 374. The court thus noted:

> The law of conflicts must remain flexible in an increasingly mobile society. However, such flexibility should not be achieved at the expense of the reasonable predictability which results from the establishment within reasonable certainty of the legal rights and liabilities between the parties upon occurrence of an accident. This principle "from a standpoint of certainty, insurability, and discouragement of forum shopping makes sense for the rule is not subject to change whenever the parties change their residence." Determining the applicable law of interspousal immunity by the domicile of the parties at the time the wrong occurred and the right of action arose, will prevent the expansion or contraction of the rights and liabilities of the parties by a subsequent removal from that state, whether for valid reasons or for the purpose of forum shopping.

Id. at 4-5, 241 A.2d at 374-75 (citations omitted).

311 *See* Reich v. Purcell, 67 Cal.2d 551, 432 P.2d 727, 63 Cal. Rptr. 31, (1967).

312 *Id.*

313 *Id.* at 555-56, 432 P.2d at 730, 63 Cal. Rptr. at 34, (citation omitted).

314 Cavers, *Comments on* Reich v. Purcell, 15 UCLA L. REV. 551, 647 n.1 (1968). *Accord* Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 872 (1983) [hereinafter Korn, *The Choice-of-Law Revolution*] ("There is considerable force to the view that a plaintiff's post-accident change of residence from a nonrecovery to a recovery state should be disregarded because of the danger it presents of 'shopping' for favorable law."); Brilmayer, *Legitimate Interests In Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1319 (1981) [hereinafter Brilmayer, *Legitimate Interests*] (noting there exist many "good reasons for reluctance to allow a plaintiff's after-acquired domicile to affect the choice of law"); *cf.* Note, *Post Transaction or Occurrence Events In Conflict of Laws*, 69 COLUM. L. REV. 843, 865 (1969) ("This question can be answered on a case by case basis . . . . [and] [c]onsiderations of fairness, predictability, and the existence of forum shopping should all be considered.").

was perfected without regard to its impact on choice of law."[315] Certainly, no scholar has endorsed the recognition of a post-occurrence change of domicile where, as in *Pine*, the plaintiff had not even formulated the idea of moving at the time of the occurrence.

2. New Jersey's "Substantial Interest" In the Post-Occurrence Domiciliary's Compensation

The courts in *Pine* concluded that New Jersey had a "predominant governmental interest" in the plaintiff's compensation based on the supposition that his cancer might reappear and make him a charge of New Jersey.[316] The trial judge reasoned that:

> Plaintiff here is a New Jersey resident, albeit a comparatively new one. If his illness were to make him a public charge, he would not become a public charge of New York simply because that is where the ingestion of DES by his mother occurred or because that is where he celebrated his 21st birthday. He would become a charge of New Jersey.[317]

This analysis demonstrates how courts generate hypothetical "interests" to reach a desired result. In *Pine*, the concern that someday the plaintiff's illness might "make him a public charge" was nothing more than rank speculation.[318] Moreover, even assuming that a plaintiff would ever need and qualify for public assistance, this possibility is likewise present whenever a personal injury claim is barred by a statute of limitations. That is the price society pays to grant repose.[319]

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315 Weintraub, *Comments on* Reich v. Purcell, 15 UCLA L. REV. 551, 562 (1968). In that regard, Professor Trautman would require proof of "significant intentions to join [the foreign] community . . .to have existed at the time of the accident." Trautman, *Comments on* Reich v. Purcell, 15 UCLA L. REV. 551, 622 n.15 (1968).

316 *See* Pine v. Eli Lilly & Co., No. L-65163-80, slip. op. at 8-9 (N.J. Super. Ct., Law Div., Oct. 25, 1983).

317 *Id.* at 8. The appellate division also tied the compensation interests of the state to its concern that the injured domiciliary not become a charge of society. *Pine*, 201 N.J. Super. at 192, 502 A.2d at 1083.

318 The record in *Pine* did not even suggest that this was a realistic possibility. To begin with, the plaintiff had been entirely free of his illness for several years and there was no medical evidence whatsoever indicating any likelihood of a recurrence. Brief for Appellant at 24 n.16, Pine v. Eli Lilly & Co., 201 N.J. Super. 186, 492 A.2d 1079 (App. Div. 1985) (No. A-3060-83-T5). Second, the plaintiff had health insurance. *Id.* Third, the plaintiff's means had not been explored. *Id.* It seems as if the courts were formulating a "rule" without considering the specific facts of the case and their role in defining the interests — an approach antithetical to the very methodological premise underlying interest analysis.

319 Indeed, it might be cheaper to have a forum-shopping resident become a public charge. As previously noted, each "judge-year" in New Jersey costs approxi-

Another striking example of interest fabrication is the appellate division's explanation in *Pine* that post-transaction domicile changes ought to be recognized because a rule to the contrary might "unreasonably deprive[] the plaintiff who, not knowing that his right of action in the forum state has been barred, becomes domiciled in New Jersey as a result of factors over which he has little control. . . ."[320] In that case, of course, the plaintiff came to New Jersey knowing full well that his claim had been time-barred in New York. Indeed, that is why he became a New Jersey domiciliary.[321]

The courts in *Pine* also concluded that a plaintiff's after-acquired New Jersey domicile warranted the application of its limitations law because "in virtually every instance where the *plaintiff* was a New Jersey domiciliary. . . New Jersey courts have uniformly applied that law which has offered to the plaintiff the opportunity to be compensated."[322] Thus, a pattern based on the fact-bound outcomes in earlier decisions now squarely stands for a rule of favoritism.

The rank preference of New Jersey residents compares poorly with the urbane neutrality of pre-revolutionary decisions. In that regard, the *Pine* courts ignored the very example cited in *Mellk* of an instance in which a foreign state would have the paramount interest in the application of its law. In *Daily v. Somberg*,[323] the Supreme Court of New Jersey held that New Jersey courts are to apply foreign law if all operative events occurred in a foreign jurisdiction.[324] The court stated:

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mately $607,000. *See supra* note 286. While most tort cases are disposed of with little significant judge-time, *see* J. KAKALIK & A. ROBYN, *supra* note 286, at 63, a complex products liability action—like *Pine*—often requires a month or more to try, not to mention vast amounts of pretrial judge-time. *See* Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 229 (1985). It is therefore conceivable, if not probable, that the *Pine* case will cost the taxpayers of New Jersey more than $50,000. Furthermore, should the plaintiff lose, he could still become a "public charge." Finally, if the public fisc is such an important consideration, courts should also consider the potential effects of a judgment in favor of the plaintiff. It might bankrupt a company, remove it from the tax rolls, and cause workers to collect unemployment insurance. Research discloses no "interest analysis" weighing in the balance these potential burdens on the public fisc.

320 *Pine*, 201 N.J. Super. at 194, 492 A.2d at 1083 (citation omitted).

321 *See id.* at 190, 492 A.2d at 1081-82.

322 *Pine*, slip. op. at 6 (emphasis in original) (citations omitted). The appellate division essentially agreed with this rationale, although it did not agree with the trial court's characterization of its "universality." *See Pine*, 201 N.J. Super. at 193, 492 A.2d at 1083 ("In most instances, our courts . . . have favored applying New Jersey law in tort actions when the plaintiff is domiciled in New Jersey.") (citations omitted).

323 28 N.J. 372, 146 A.2d 676 (1958).

324 *Id.* at 379, 146 A.2d at 680.

> It is well recognized that where all of the tortious conduct and its consequences take place within a single foreign state the law of that state—the place of the wrong—will control. This conflict of laws principle gives fair recognition to the foreign state's legitimate interests and to the sound public policy which dictates that the incidents of a transaction should be determined by a significantly connected body of law.[325]

In *Pine*, of course, none of the incidents of the transaction had any connection to New Jersey.[326] In applying this long-standing rule (before the advent of interest analysis, of course), New Jersey courts had not uniformly applied the state law that offered New Jersey residents an opportunity to be compensated.[327] The *Pine* courts also concluded that the "pivotal domiciliary-compensatory interest is to be viewed . . . as of the time the suit is started"[328] on the ground that:

> Once compensation for domiciliaries is identified as the predominant governmental interest in making a choice of law, it would be absurd to view that interest as of the time of the occurrence instead of as of the time of trial. A court dealing with compensation as of the time of the occurrence would be dealing with a non-existent interest.[329]

In *Raskulinecz v. Raskulinecz*,[330] which the New Jersey Supreme Court cited with approval in *O'Keeffe v. Snyder*,[331] two New Jersey res-

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325 *Id.* at 379-80, 146 A.2d at 680-81 (citations omitted).

326 *See Pine*, 201 N.J. Super. at 188-89, 492 A.2d at 1080-81.

327 *See, e.g.*, Wilson v. Faull, 27 N.J. 105, 141 A.2d 768 (1958) (applying Pennsylvania law to bar New Jersey plaintiff's common law claim otherwise cognizable under New Jersey law); Harber v. Graham, 105 N.J.L. 213, 143 A. 340 (N.J. 1928) (applying Massachusetts' invitee gross negligence rule against New Jersey plaintiff); Royal Store Fixture Co. v. New Jersey Butter Co., 114 N.J. Super. 263, 276 A.2d 153 (App. Div. 1971) (applying Pennsylvania law against New Jersey defendant); *In re* Estate of Damato, 86 N.J. Super. 107, 206 A.2d 171 (App. Div. 1965) (applying Florida law against New Jersey executor).

328 *Pine*, slip. op. at 6, 7-9.

329 *Id.* at 8. The appellate division concurred. *See Pine*, 201 N.J. Super. at 193, 492 A.2d at 1083 ("If compensation of New Jersey domiciliaries is the overriding state governmental interest, it makes little sense to focus on the expiration date of the foreign limitations statute . . . since our interest would be to compensate all domiciliaries, uniformly and without exception."). Apparently, this analysis can be reduced to the following syllogism: (1) the most important thing is that New Jersey residents win their lawsuits; (2) the plaintiff in this case is a New Jersey resident; and therefore (3) the plaintiff wins his lawsuit.

330 141 N.J. Super. 148, 357 A.2d 330 (Law Div. 1976).

331 83 N.J. 478, 416 A.2d 862 (1980). In *O'Keeffe*, the plaintiff claimed that certain paintings she owned had been stolen by the defendant from an art gallery in New York. *Id.* at 483, 416 A.2d at 864-65. The court found that New Jersey had the predominant interest in having its own limitations law applied because "none of the parties reside[d] in New York and the paintings [were] located in New Jersey." *Id.*

idents had been involved in an automobile accident in Ontario.[332] After the accident, both parties moved to other states.[333] The plaintiff moved from New Jersey two months before the complaint was filed; the defendant moved from the state after the complaint was filed but before it had been served.[334] Relying on *Heavner*, the defendant moved to dismiss on the ground that Ontario's statute of limitations barred the action.[335] The Law Division of the Superior Court of New Jersey rejected the defendant's claim noting: "[w]hile New Jersey may not now have any special interest in either of these parties, both of whom have moved from the State, it did have such an interest in them up to the time of the commencement of this action. Ontario had no interest in them."[336]

It is far from absurd to consider that New Jersey has an interest in assuring that its residents are compensated for injuries they sustain *while they are New Jersey residents*—even if they should later choose

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at 490, 416 A.2d 868. *See also* Freedom Fin. Co., Inc. v. Steeples, 140 N.J. Super. 449, 453-54, 356 A.2d 444, 446-47 (App. Div. 1976) (holding New York statute of limitations applicable to bar action where all events occurred in New York and New Jersey otherwise had "no substantial interest" in application of its own statute of limitations).

Some commentators have read *O'Keeffe* to hold that "*Heavner* does not apply unless all five preconditions, identified in *Heavner*, are met." E. SCOLES & P. HAY, *supra* note 10, § 3.12, at 66. This view is untenable. The court expressly stated in *O'Keeffe* that "[o]n remand, the trial court may reconsider this issue if the parties present other relevant facts." *O'Keeffe*, 83 N.J. at 490, 416 A.2d at 868. Since the New Jersey Supreme Court already knew that "none of the parties reside[d]" in New York, and that the art work at issue was "located in New Jersey," either of these facts alone would have been entirely dispositive of the conflicts issue if *Heavner* truly requires that all five preconditions be met before a foreign limitation may be applied to bar an action. There would have been no occasion for the trial court to "reconsider" the choice of law issue in the light of any "other relevant facts" if *Heavner* is, in fact, so demanding.

332 *Raskulinecz*, 141 N.J. Super. at 150, 357 A.2d at 331.

333 *Id.* at 153, 357 A.2d at 332.

334 *Id.*

335 *Id.* at 150, 357 A.2d at 331.

336 *Id.* at 153, 357 A.2d at 332. Consistent with interest analysis' disdain for rules, the appellate division in *Pine* condemned the "drawing-the-line somewhere approach" implicit in the use of the limitations law of the place of the wrong, even if the plaintiff remained there beyond the expiration of its statutory period. *See Pine*, 201 N.J. Super. at 194, 492 A.2d at 1083. Yet, the court then indicated that New Jersey law should be applied if the plaintiff "was domiciled here when his action was instituted." *Id.* at 195, 492 A.2d at 1084. The trial court, by contrast, indicated that the line should be drawn as of the date of trial. *See Pine*, slip. op. at 8. Clearly, even interest analysis cannot entirely escape the arbitrariness of line-drawing so implicit in the law. Thus, sooner or later, some line must be drawn. *Cf.* Dent v. Cunningham, 786 F.2d 173, 177-78 & n.1 (3d Cir. 1986) (noting that *Pine* draws line as of date complaint is filed but remanding action nonetheless to determine whether plaintiff's relocation to California after that date warranted application of California's shorter limitations period).

to move from the state. By contrast, it is absurd to suppose that New Jersey has a special interest in someone who moved here six years after his suit became time-barred elsewhere. Under the holding in *Pine*, unlike *Raskulinecz*, a tort plaintiff barred by the period in effect where he resides or where he was injured could shop for a forum with a lengthier period and sue there.

Quite obviously, any rule that permits one party to choose his own law through unilateral action is conducive to "forum shopping of the worst sort."[337] *Pine* permits a unilateral choice of law because it holds that a plaintiff's after-acquired residence is sufficient in and of itself to control the choice of law. This mechanical rule which permits a party "to choose a state's law by changing domicile harks back to pre-*Erie* days,"[338] when plaintiffs "willing to remove from their own State[s] and become citizens of another [could] avail themselves" of the body of law which they preferred.[339] In short, *Pine's* outcome is incompatible with *Heavner's* policy against forum shopping.

3. Certainty, Uniformity, and Predictability of Result

The *lex fori* rule for choice of limitations law makes sense if statutes of limitation primarily advance procedural concerns. New Jersey courts have long emphasized, however, that "statutes of limitations are statutes of repose and the *principal* consideration underlying their enactment is one of fairness to the defendant."[340] After a statutory period has run, persons no longer need fear the unexpected enforcement of claims.[341] In the formation of these expectations, people naturally tend to look to the law of the state where the event occurred.[342] It stands to reason "that

337 Sedler, *supra* note 207, at 850.

338 Brilmayer, *Legitimate Interests*, *supra* note 314, at 1319 (footnote omitted).

339 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 76 (1938).

340 Lopez v. Swyer, 62 N.J. 267, 274, 300 A.2d 563, 567 (1973) (emphasis added); *accord O'Keeffe*, 83 N.J. at 491, 416 A.2d at 868 (statutes of limitation " 'promote repose by giving security and stability to human affairs.' ") (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)).

New York statutes of limitation serve these same ends. *See* Cerio v. Charles Plumbing & Heating, 87 A.D.2d 972, 972, 450 N.Y.S.2d 90, 91 (1982) ("Statutes of limitations are more than provisions or rules of practice, procedure, pleading or evidence. They embody 'an important public policy of giving repose to human affairs.' ") (quoting Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 429, 248 N.E.2d 871, 872, 301 N.Y.S.2d 23, 25 (1969)).

341 Kyle v. Green Acres at Verona, Inc., 44 N.J. 100, 108, 207 A.2d 513, 517-18 (1965).

342 Miller v. Miller, 22 N.Y.2d 12, 28, 237 N.E.2d 877, 886-87, 290 N.Y.S.2d 734, 747 (Breitel, J., dissenting).

people don't expect the law of a state which had no relationship to the significant event at the time it occurred to govern the subsequent litigation."[343]

Since New Jersey had no relationship at all to the significant events at the time they occurred, the choice of law rule adopted in *Pine* suffers from the same fatal flaw that led to the abandonment of the *lex fori* rule. It "denies the defendant a definitive indication as to when his potential liability has expired."[344] Since a defendant has no control over where a prospective plaintiff may ultimately settle, a defendant could never enjoy any repose if choice of law rules permit the application of the limitations law of a plaintiff's after-acquired domicile. Consequently, such a rule would necessarily frustrate the legislative purposes and policies that underlie statutes of limitation.[345]

4. Comity

In a wide variety of circumstances, New Jersey residents have enjoyed the reciprocity implicit in the traditional conception of comity. Thus, courts elsewhere have subordinated their states' interests in their residents to protect the interstate system and the legitimate expectations of the parties.[346] A conflicts system dedicated to the home court advantage could not produce those results.

In the context of modern products liability litigation, comity is vital because numerous states with only nominal interests in a controversy may lawfully exercise jurisdiction over the parties.[347]

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[343] Note, *supra* note 314, at 859. *See also* Currie, *Comments on* Reich v. Purcell, 15 UCLA L. REV. 551, 601 (1968) (recognition of post-occurrence change of domicile is even "more offensive" than retroactivity problem because "it is precipitated by the unilateral act of an interested party.") (footnote omitted).

[344] Note, *supra* note 207, at 302.

[345] *Id.*

[346] *See, e.g.*, Berle v. Berle, 97 Idaho 452, 546 P.2d 407 (1976) (applying New Jersey property distribution statute to marital assets even though interests of forum's resident favored application of forum law).

[347] The need for a meaningful measure of comity is particularly essential to accommodate the wide variety of legislative responses to the current tort law and insurance crises. Recently, many states have either initiated or adopted some form of product liability or general tort law reform. *See* Ghiardi, *Tort and Insurance Law*, *supra* note 21, at 7. The most common—adopted in approximately 22 states—is the statute of repose, which typically runs from the date of sale and extinguishes all claims several years later regardless when they were discovered or should have been discovered and whether or not they have even arisen. *See* Martin, *A Statute of Repose for Product Liability Claims*, 50 FORDHAM L. REV. 745, 749 n.25 (1982). Several states have adopted statutes recognizing compliance with governmental standards or the state of the art as an affirmative defense. *See* Walsh & Klein, *The Conflicting*

As one commentator has observed:

> The swift development of products liability law in the United States and among the industrial nations has presented an imposing challenge to the conceptual fabric of the conflict of laws. The very nature of mass production, marketing, and distribution, the increase in world trade and international economic interdependence virtually insures that a products liability suit will involve more than one jurisdiction. Both here and abroad, whether it is to place the costs of injury upon the profits of the enterprise that created it, thus distributing the loss, to protect the buying public, or to encourage the manufacturer to make safe products, products liability law has moved toward extending the rights of consumers and others against the manufacturer. Aside from threshold jurisdictional questions, variations in theories of recovery for damage caused by defective products cause the greatest confusion under almost any choice of law approach in use today.[348]

The court in *Heavner* essentially recognized that while New Jersey courts had the power to adjudicate the controversy, the state did not have a sufficient interest to apply its substantive law over that of North Carolina.[349] The court further noted that North Carolina had not yet "recognized strict liability in tort to the extent New Jersey" had done so.[350] Thus, *Heavner* implicitly recognizes that

> New Jersey's governmental interest . . . require[s] a higher quality of contact than the minimum contacts required for jurisdiction. Whereas *in personam* jurisdiction may properly be exercised over a defendant who is merely "caught" in the jurisdiction, governmental interest requires a nexus between the contact and some valid governmental policy.[351]

When defective products cause personal injury, it is New Jersey's policy to require that all product liability claims for that injury be pursued within two years.[352] To avoid harsh consequences,

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Objectives of Federal and State Tort Law Drug Regulation, 41 FOOD DRUG COSM. L. J. 171, 179 n.36 (1986). At least two states have modified the collateral source rule. *See* ALA. CODE § 6-5-520 (Supp. 1986); KAN. STAT. ANN. § 60-3402-03 (1986). Indeed, the New Jersey Assembly recently approved a package of tort law reforms. *See* A-2401, 2402, and 2403. If these measures are adopted, other states could negate the objectives of the New Jersey Legislature by manipulating the many states' interests typically involved in a products liability action.

348 Comment, *Choice of Law: Statutes of Limitation in the Multistate Products Liability Case*, 48 TUL. L. REV. 1130, 1140-41 (1974) (footnotes omitted).

349 *Heavner*, 63 N.J. at 134 n.3, 305 A.2d at 414 n.3.

350 *Id.*

351 Korn, *The Choice-of-Law Revolution*, *supra* note 314, at 970 n.860.

352 *Heavner*, 63 N.J. at 146, 305 A.2d at 420-21 (footnote omitted).

New Jersey courts have applied a "discovery rule" exception.[353] The Supreme Court of New Jersey first announced that rule in *Fernandi v. Strully*,[354] concluding that in certain instances "the considerations of individual justice" outweigh "the considerations of repose."[355]

In *Pine*, the pertinent New York statute of limitations was not subject to any discovery rule.[356] As the New York Court of Appeals has explained, the state has determined that its interest in repose outweighs any perceived advantages of a discovery rule:

> Considering the function of a Statute of Limitations as a device for repose, a potential defendant's equities are the same whether the plaintiff knows of his condition or not. Repose is as beneficial to society in the one case as in the other. While the plaintiff's equities are greater in one case, it was presumably pursuant to a determination that the interests of an occasional claimant were subordinate to society's interest in repose that resulted in the Statute of Limitations in the first place . . . . It is hard to say for certain, but perhaps the possibility of feigned cases against unprepared defendants and the difficulties of proof in meritorious cases led to a decision that society is best served by complete repose after a certain number of years even at the sacrifice of a few unfortunate cases. It is not without reason that change in this area has been thought by us to be the responsibility of the Legislature. Our court has no facilities, to inquire into the incidence of hardship cases under the statute, nor the peculiarly legislative prerogative to balance the result of such an inquiry against the countervailing considerations of prudence and social tranquility that are supposed to justify Statutes of Limitations.[357]

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353 *See O'Keeffe*, 83 N.J. at 491, 416 A.2d at 869.

354 35 N.J. 434, 173 A.2d 277 (1961).

355 *Id.* at 438, 173 A.2d at 279. The court noted that New Jersey courts had previously "declined to find the bar inapplicable though the plaintiff admittedly knew nothing about the cause of action until shortly before the institution of his action. . . ." *Id.* at 450, 173 A.2d at 285 (citing Sullivan v. Stout, 120 N.J.L. 304, 199 A. 1 (N.J. 1938)) (legal malpractice). The appellate division recently declined to follow the *Sullivan* decision. *See* Mant v. Gillespie, 189 N.J. Super. 368, 460 A.2d 172 (App. Div. 1983). In many cases, however, New Jersey courts still refuse to apply a discovery rule. *See, e.g.*, Lawrence v. Bauer Publishing & Printing Ltd., 78 N.J. 371, 396 A.2d 569 (1979) (libel); Evernham v. Selected Risks Ins. Co., 163 N.J. Super. 132, 394 A.2d 373 (App. Div. 1978) (breach of contract), *certif. denied*, 79 N.J. 479, 401 A.2d 235 (1979).

356 *See Pine*, 201 N.J. Super. at 190, 492 A.2d at 1081.

357 Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 218-19, 188 N.E.2d 142, 145, 237 N.Y.S.2d 714, 718-19, *cert. denied*, 374 U.S. 808 (1963).

As the *Schwartz* court noted, the New York Legislature had declined to enact a discovery rule even though it had been "strenuously advocated." *Id.* at 219, 188

Both courts in *Pine* decided, in essence, that it would be appropriate to disregard the policy judgments of the New York Legislature because it would be "unjust" and "inequitable" to bar the plaintiff's claim under the New York statute of limitations.[358] This result is not consistent with modern decisions recognizing a broader comity while enforcing rights created by legislatures of sister states. In *Henry v. Richardson-Merrell, Inc.*,[359] for example, the Third Circuit recognized that comity may require the application of a foreign statute of limitations to bar a New Jersey action— even when the statute might appear to be a "harsh one."

In *Buzzone v. Hartford Accident & Indemnity Co.*,[360] an automobile insurer denied liability for damages caused in New Jersey by its insured, a New York resident, on the ground that the insured had failed to comply with a New York statute requiring that such drivers have "certificated policies."[361] The plaintiffs asserted that New Jersey law should be applied on the ground that the New York statute contravened New Jersey public policy.[362] In rejecting that argument, the court held:

> The proposition is this in New York: An insurer will not be held absolutely liable upon its policy unless it is aware of its degree of liability. Is this so repugnant to New Jersey's attitude toward the insurer and the injured as to disallow a defense which the defendant would have in the New York courts? We think not.
>
> It is one thing to deny the enforcement of a foreign cause of action in our courts on the basis of "public policy." It is quite another thing to deny a defendant a defense given him by the foreign law which is clearly applicable under our conflict principles. We then become a favorite and fortuitous plaintiff's forum and mere jurisdiction over the defendant

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N.E.2d at 145, 237 N.Y.S.2d at 719. Instead, in medical and legal malpractice cases, New York courts applied the "continuous treatment" rule, which provides that a claim does not accrue during the course of any continuous treatment relating to " 'the conditions produced by the earlier wrongful acts and omissions.' " Greene v. Greene, 56 N.Y.2d 86, 93-94, 436 N.E.2d 496, 500, 451 N.Y.S.2d 46, 50 (1982) (citation omitted); *accord* McDermott v. Torre, 56 N.Y.2d 399, 437 N.E.2d 1108, 452 N.Y.S.2d 351 (1982). The New York Legislature most recently relented and adopted a discovery rule for injuries "caused by the latent effects of exposure to any substance." N.Y. CIV. PROC. LAW § 214-c(2) (McKinney Supp. 1987).

358 *See Pine*, 201 N.J. Super. at 194, 492 A.2d at 1084.

359 508 F.2d 28 (3d Cir. 1975).

360 23 N.J. 447, 129 A.2d 561 (1957).

361 *Id.* at 451, 129 A.2d at 563.

362 *See id.* at 458-59, 129 A.2d at 567.

foretells his doom.[363]

New Jersey's many precedents in the conflicts of law teach that its courts may not overlook or override the fundamental policy decisions made by sister states merely because New Jersey has chosen to strike a different balance or pursue different ends.[364] As New Jersey courts emphasized in the days of urbane neutrality:

> For purposes of determining choice of law we are not concerned with a comparison of the merits of the public policy of our own statute, in respect to the liability here asserted, with that of the Pennsylvania statute. In this connection we need not determine whether the result of the application of the Pennsylvania statute offends our own public policy. Our sole present concern is with a doctrinally correct choice of law.[365]

In the final analysis, any rule that permits a party to select his own law well after the events in dispute cannot be relied on to produce a "doctrinally correct choice of law." Clearly, New Jersey's interests in extending comity, discouraging forum shopping, and treating litigants fairly are incompatible with the extreme and unprecedented view to the contrary.

VI. CONCLUSION

Twenty years ago interest analysis seemed like an idea whose

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363 *Id. Accord* Wilson v. Faull, 27 N.J. 105, 141 A.2d 768 (1958). Justice Holmes had expressed the same thought:

> It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. . . . Therefore, we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught.

Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1903).

364 Indeed, in *Heavner* the New Jersey Supreme Court noted that:

> By granting relief which would not be available in the place of accrual, or in some other jurisdiction having intimate contact with the transaction or the parties, the forum is applying dual standards to the claim being presented. Whenever considerations call for the application of the contract, tort or other "substantive" law of a foreign jurisdiction, it would appear that its time bar should also be recognized. No special considerations of local policy are presented by the recognition of a foreign statutory bar.

Heavner, 63 N.J. at 138, 305 A.2d at 416-17 (quoting Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MTN. L. REV. 287, 291 (1960)).

365 Wilson v. Faull, 45 N.J. Super. 555, 568, 133 A.2d 695, 702 (App. Div. 1957), *rev'd*, 27 N.J. 105, 141 A.2d 768 (1958) (citations omitted). *Accord Mellk*, 49 N.J. at 228-30, 229 A.2d at 626-27.

time had come. Designed to rationalize the choice of law process, it promised to get directly to the heart of the matter—the policies at play in a choice of tort law—free of the cumbersome constraints of the traditional rule-based regime. At the price of some measure of certainty, uniformity, and predictability of result, interest analysis promised better results through mastery of the choice of law process. It now appears that this revolutionary conflicts methodology was doomed from the start.

Interest analysis was destined to fail because of its key theoretical assumption that a state's "interest" in the outcome of a litigation amounts to the best outcome possible for its citizens. Furthermore, the choice of law revolution was swept up in the broader tort law revolution ongoing during the same time period, and the courts decisively tilted the process in favor of compensation. These orientations ultimately led interest analysis to depart from two key intellectual commitments of the traditional regime: litigant neutrality and result neutrality. Interest analysis abandoned these primary principles essential to a federal system.

Even apart from the untenable theoretical assumptions that have driven New Jersey's interest analysis, it seems as though the methodology itself was destined to fail. Courts cannot identify and weigh the broad range of incommensurate interests at stake in every choice of law and somehow rationalize them with any degree of consistency approaching the rule of law. Simply put, free form conflicts analysis permits result-oriented decisionmaking to outweigh the more generalized interest in the needs of the interstate system.

At the very least, New Jersey courts must pour some content and structure back into the choice of law process. Courts might begin by carefully delimiting the roles of domicile and compensation as factors in an interest analysis. Certainly domicile-driven paternalism is unacceptable. If the outcome of an issue is properly governed by the law of the domicile of the plaintiff or the defendant, that law should be applied whether it favors or disfavors the party from that state and regardless whether it results in compensation or the denial of compensation. Ultimately, if New Jersey's version of interest analysis is to command respect in its own right, its courts must root out domicile-driven paternalism and substitute in its place neutral choice of law principles that apply equally to like cases.

APPENDIX

DI — opinion doesn't indicate F — foreign NE — choice of law appeared to have no effect on outcome

CASE (Citation)	YEAR	PLAINTIFF'S RESIDENCE	DEFENDANT'S RESIDENCE	STATE OF OCCURRENCE	LAW APPLIED	FAVORABLE TO RECOVERY	NATURE OF LAW IN ISSUE
Ferguson v. Central R.R. Co., 71 N.J.L. 647 60 A. 382 (N.J.)	1904	DI	N.J.	F	N.J.	NE	Procedural
Harber v. Graham, 105 N.J.L. 213, 143 A. 340 (N.J.)	1928	DI	DI	F	F	NE	Immunity
Friedman v. Greenberg, 110 N.J.L. 462, 166 A. 119 (N.J.)	1933	DI	DI	F	F	NO	Survival Action
Siegel v. Saunders, 115 N.J.L. 539, 181 A. 48 (N.J.)	1935	DI	DI	F	F	NE	Immunity
Garris v. Kline, 119 N.J.L. 435, 197 A. 63 (N.J.)	1938	N.J.	N.J.	F	F	NE	Immunity
Curry v. Erie Lackawanna & W. R.R. Co., 120 N.J.L. 512, 1 A.2d 14 (N.J.)	1938	DI	DI	F	F	NE	Standard of Care
Stacy v. Greenberg, 9 N.J. 390, 88 A.2d 619	1952	F	F	N.J.	F	NO	Immunity
Clement v. Atlantic Cas. Ins. Co., 13 N.J. 430, 100 A.2d 273	1953	N.J.	DI	F	F	NE	Standard of Care
Wilson v. Faull, 27 N.J. 105, 141 A.2d 768	1958	N.J.	N.J.	F	F	NO	Immunity

DI — opinion doesn't indicate F — foreign NE — choice of law appeared to have no effect on outcome

CASE (Citation)	YEAR	PLAINTIFF'S RESIDENCE	DEFENDANT'S RESIDENCE	STATE OF OCCURRENCE	LAW APPLIED	FAVORABLE TO RECOVERY	NATURE OF LAW IN ISSUE
Koplic v. C.P. Trucking Corp., 27 N.J. 1, 141 A.2d 34	1958	N.J.	N.J.	F	N.J.	NO	Immunity
Marshall v. Geo. M. Brewer & Son, Inc., 37 N.J. 176, 180 A.2d 129	1962	F	N.J.	F	N.J.	YES	Limitation of Action
Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625	1967	N.J.	N.J.	F	N.J.	YES	Immunity
Maffatone v. Woodson, 99 N.J. Super. 559, 240 A.2d 693 (App. Div.)	1968	F	F	N.J.	F	YES	Vicarious Liability
Mullane v. Stavola, 101 N.J. Super. 184, 243 A.2d 842 (Law Div.)	1968	N.J.* *(temp. college resid. in F)	N.J.*	F	N.J.	YES	Immunity
Dooley v. Metropolitan Life Ins. Co., 104 N.J. Super. 429, 250 A.2d 168 (Law Div.)	1969	N.J.	N.J.	F	N.J.	YES	Criminality of Conduct
Van Dyke v. Bolves, 107 N.J. Super. 511, 258 A.2d 372 (App. Div.)	1969	N.J.	F	N.J.	F	YES	Vicarious Liability
Pfau v. Trent Aluminum Co., 55 N.J. 511, 263 A.2d 129	1970	F* *(temp. college resid. in F2)	N.J.*	F2	N.J.	YES	Immunity
Rose v. Port of N.Y. Auth., 61 N.J. 129, 293 A.2d 371	1972	N.J.	F/N.J. (bi-state agency)	F	N.J.	NE	Procedural

DI — opinion doesn't indicate F — foreign NE — choice of law appeared to have no effect on outcome

CASE (Citation)	YEAR	PLAINTIFF'S RESIDENCE	DEFENDANT'S RESIDENCE	STATE OF OCCURRENCE	LAW APPLIED	FAVORABLE TO RECOVERY	NATURE OF LAW IN ISSUE
Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412	1973	F	N.J.	F	F	NO	Limitation of Action
Monsanto Co. v. Alden Leeds, Inc., 130 N.J. Super. 245, 326 A.2d 90 (Law Div.)	1974	N.J.* *(alignment of parties based on counterclaim)	F*	N.J.	N.J.	NO	Limitation of Action
Raskulinecz v. Raskulinecz, 141 N.J. Super. 148 357 A.2d 330 (Law Div.)	1976	N.J.* *(moved to F2 before filing suit)	N.J.** **(moved to F3 prior to service)	F	N.J.	YES	Limitation of Action and Immunity
Zweifel v. Morgan, 145 N.J. Super. 35, 366 A.2d 1003 (App. Div.)	1976	F	F	N.J.	F	NO	Immunity
Wuerffel v. Westinghouse Corp., 148 N.J. Super. 50, 372 A.2d 659 (Law Div.)	1977	N.J.	F	N.J.	F	YES	Charitable Immunity
O'Keefe v. Snyder, 83 N.J. 478, 416 A.2d 862	1980	F,F2	N.J.	F	N.J.	YES	Limitation of Action
Beckwith v. Bethlehem Steel Corp., 185 N.J. Super. 50, 447 A.2d 207 (Law Div.)	1982	N.J.	N.J.	F	N.J	NE	Procedural
Deemer v. Silk City Textile Mach. Co., 193 N.J. Super. 643, 475 A.2d 648 (App. Div.)	1984	F	N.J.	F	F	NO	Standard of Care
Pine v. Eli Lilly & Co., 201 N.J. Super. 186, 492 A.2d 1079 (App. Div.)	1985	N.J.* *(post-occurence)	F	F	N.J.	YES	Limitation of Action

DI — opinion doesn't indicate F — foreign NE — choice of law appeared to have no effect on outcome

CASE (Citation)	YEAR	PLAINTIFF'S RESIDENCE	DEFENDANT'S RESIDENCE	STATE OF OCCURRENCE	LAW APPLIED	FAVORABLE TO RECOVERY	NATURE OF LAW IN ISSUE
Veazey v. Doremus, 103 N.J. 244, 510 A.2d 1187	1986	F	F	N.J.	F	NO	Immunity