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Interest Analysis and Choice of Law: The Dubious Dominance of Domicile[©]

John Bernard Corr*

*Between the idea
And the reality
Between the motion
And the act
Falls the shadow.
T.S. Eliot¹*

The last thirty years have witnessed a fundamental change in the landscape of choice of law doctrine. The traditional learning,² which previously dominated the approach of American courts to choice of law, was largely swept aside by a surge toward more modern approaches, particularly as exemplified by the groundbreaking work of Brainerd Currie.³ Currie and others opposed the traditional learning primarily because it was grounded in obsolete notions of "vested rights"⁴ and had little relation to many of the real world considerations that should bear on choice of law decisions.⁵

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I am indebted to my colleague, Doug Rendleman, for bringing the case of *Walters v. Rockwell Int'l Corp.*, 559 F. Supp. 47 (E.D. Va. 1983), to my attention. I am also grateful to him and to another colleague, Fred Schauer, for their thoughtful criticisms of this article.

1. T.S. ELIOT, *The Hollow Men*, in *COLLECTED POEMS* 101 (1936).

2. For the purposes of this article, the "traditional learning" is that laid out in the *RESTATEMENT (FIRST) OF CONFLICT OF LAWS* §§ 377-390 (1934) [hereinafter cited as *RESTATEMENT OF CONFLICTS*]. That approach was recently described in the following manner:

According to this theory, each state possesses full power to bind persons and property within its territory, but the force that a state's laws receive elsewhere depends solely on whether other jurisdictions choose to defer to those laws. This territorial perspective became known as the vested rights theory because it deems a right of action acquired within the territory and under the law of one state to be fixed and vested as against the law of any other jurisdiction.

Rendleman, *McMillan v. McMillan: Choice of a Law in a Sinkhole*, 67 VA. L. REV. 315, 316 (1981) (footnotes omitted).

3. B. CURRIE, *On the Displacement of the Law of the Forum*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 3 (1963).

4. See Rendleman, *supra* note 2, at 316.

5. See Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 392 (1980) (noting that Currie promoted interest analysis "as an antidote to the

By contrast, the proponents of the modern approaches offered a system based on assumptions that at first glance were more realistic and less prone to the abstractions associated with the traditional learning.⁶ The modern approach's logical appearance was imposing—so much so, in fact, that the diminishing band of defenders of the traditional learning was unable to establish an intellectual barrier to Currie and his allies that could attract general support. But as Eliot knew, an idea needs to be more than logical if it is to be useful; it also must be realistic. The correspondence of Currie's thought to everyday reality long went unexamined.⁷

The modern approaches usually begin with a specific criticism of the traditional learning. The old ways mandate choice of law results that often are arbitrary and only occasionally consistent with either the expectations of affected parties or the interests of states that ultimately might have to bear the consequences of a judgment.⁸ The state's interests in the outcome of the judgment are most easily identified when the consequences are financial. For example, a state may make increased welfare payments to a domi-

pernicious metaphysical assumptions that afflicted Beale and the *First Restatement*"). Currie seemed to think that those who promoted the traditional learning had somehow fallen out of touch with reality. See B. CURRIE, *supra* note 3, at 614. He stated that opponents of modern approaches "are uncomfortably aware that this is not yet one world, and that perverse legislative bodies will go on provincially adopting conflicting policies; but in their own realm they are determined to pretend that this is not so." *Id.* at 708.

6. For a discussion of the modern approaches and their assumptions, see *infra* notes 8-14 and accompanying text.

7. That feature no longer goes unexamined. See Brilmayer, *supra* note 5, at 393.

8. See, e.g., B. CURRIE, *supra* note 3, at 77-127; Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1584-85 (1966); Rendleman, *supra* note 2, at 326-27. Perhaps the archetypal example of the apparent arbitrariness of the old ways is *Alabama Great So. R.R. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892), in which the plaintiff, an Alabama domiciliary, employed by the defendant, an Alabama corporation, under an employment contract made in Alabama, was injured in Mississippi as the result of a fellow employee's negligence that had occurred in Alabama. Alabama would have permitted the plaintiff to recover under its workers' compensation statute, while Mississippi—using its older common law approach—would have denied recovery for injuries that were the product of a fellow employee's negligence. The court, reasoning that there had been no tort until the injury had occurred in Mississippi, used the traditional approach of applying the law of the place of the tort. 11 So. at 809. The result was that notwithstanding Alabama's extensive relationship with the case and its presumably overriding interest in the outcome, the law of a state with only a fortuitous relationship with—and no apparent interest in—the dispute was applied. Advocates of the modern approaches are particularly scathing in their comments about the reasoning and result in *Carroll*. See, e.g., R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS* 13 (3d ed. 1981) ("[A]bsent any rational grounds for choosing one course rather than another, the court could decide in the same manner used for the selection of draftees—by chance. Why not flip a coin?").

ciliary tort victim who was uncompensated as the result of a court's decision to apply the law of another jurisdiction that favored the defendant, or a state may lose tax revenues occasioned by the bankruptcy of a domiciliary corporation forced to pay a major judgment as the result of a judicial decision to apply a law favoring a plaintiff. A state's interests, however, need not be only financial; it is clear that states also enact laws intended to protect citizens. To the extent that a judicial choice of law decision strips citizens of those protections by applying the differing law of another state, the first state's interest in affording protection is frustrated.⁹

The modern approaches, on the other hand, attempt to identify the respective interests of those states that might seek to have their particular laws applied to a matter and use the law of the state with the greatest interest. For that reason, much of the work Currie and others undertook has come to be grouped loosely under the rubric of "interest analysis."¹⁰ A variety of factors is taken into account in assessing both the existence and relative importance of state interests. Although the traditional learning relied heavily on the place where an event occurred in determining the choice of law,¹¹ interest analysis assumes that states have special interests in litigation that affects persons who are domiciled or residing within their borders.¹² Other factors, such as the place where an event occurred or even the place where the litigation is being heard, also

9. The classic example of such a nonfinancial interest is the restriction states once imposed on the capacity of married women to enter into contracts. That restriction theoretically protected women from the unfavorable consequences of certain contracts. See B. CURRIE, *supra* note 3, at 77.

10. For the purposes of this article, "interest analysis" is the umbrella term used to describe more modern choice of law approaches in which courts identify those states with interests in a particular issue before the court and then determine which of the competing states should have its law applied to the issue. The court makes that determination by identifying the state with the greatest interest in the matter. R. LEFLAR, *AMERICAN CONFLICTS LAW* § 92, at 185-86 (3d ed. 1977).

11. See *supra* note 2.

12. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 175-76 (1981); see also Sedler, *Rules of Choice of Law Versus Choice of Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 1032-41 (1977). Professor Sedler's work shows the strong bias of interest analysis toward adopting the law of the domicile of one of the parties. When the parties have a common domicile, the preference for domiciliary law becomes so strong that it may be overridden only where the forum has a law it perceives to be "better" and when the events in question occurred within the forum. *Id.* at 1035. Evidence of the strength of the preference for the law of the common domicile is no more dramatic than in Dean Ely's work. Although Ely, for the most part, is a critic of interest analysis, when the interested parties have a common domicile, even Ely aligns with interest analysis. Ely, *supra*, at 217.

may be taken into account, but the asserted link between domicile (or residence) and state interests clearly is the pivot on which interest analysis usually turns.¹³ In fact, over the past two decades, that linkage has become so strong that the relationship between interest analysis and domicile seems to have fused the two concepts into a single entity. In a given case, the interest of a state other than that in which a party is domiciled may prevail, but it is far more common for the interest of a domiciliary state to dominate.¹⁴

That a state should assert a strong interest in those domiciled or residing within its borders seems obvious. Moreover, an examination of the relationship between a state's interest and the domicile of the parties appears to offer a superior insight into the considerations necessary to a just choice of law decision than can be obtained from the obfuscations of the traditional learning's musing on vested rights. Intellectual appeal certainly is something with which interest analysis is well endowed. But however appealing the idea, however much satisfaction the idea may offer to our logic, it is always another step from idea to reality. If life's experience has taught us anything, it is that our most foolish errors often derive from unquestioning acceptance of the "obvious." In the case of interest analysis, for example, is it really that clear, on closer reflection, that domicile correlates closely with state interest? Should the traditional reliance on the law of the place of the event be cast away with the much criticized theory of vested rights? Indeed, does interest analysis really afford a superior insight into choice of law solutions, or is it just more obfuscation cast in the guise of reasonableness? Those are unpleasant questions, but they require satisfactory answers if we are to continue our now preponderant reliance on interest analysis in resolving choice of law matters.

Such issues, of course, could be discussed in the abstract, but a recent case provides a concrete setting for analysis. At the same time, the case offers a chance to compare interest analysis with the traditional learning. Such an examination may expose weaknesses in both approaches, but it also may identify choice of law techniques that draw on the strengths of both while avoiding some of their weaknesses.

13. Currie was the strongest advocate for applying forum law, but his arguments on behalf of that position generally have not been adopted. See B. CURRIE, *supra* note 3, at 3-76.

14. See Sedler, *supra* note 12, at 1032-41.

*Walters v. Rockwell International Corp.*¹⁵ involved a wrongful death action arising from a car-truck collision in North Carolina. The action was brought in federal court in the Eastern District of Virginia and was based on North Carolina's wrongful death statute. Because the plaintiff-executrix and the beneficiaries of the action all were citizens of Virginia, and the defendant was a Delaware corporation with its principal place of business in Pennsylvania,¹⁶ the case fell within the diversity jurisdiction of the federal court.¹⁷ The decedent, Allen Walters, also had been a citizen of Virginia, but at the time of his death he was employed in North Carolina and was making plans to move his family to North Carolina.¹⁸

Shortly after suit was commenced, the case took an unusual turn. The parties reached a settlement on the amount of damages the defendant should pay, but the court was uncertain about the distribution of the settlement proceeds. The only plausible recipients were the decedent's widow and two minor children, but North Carolina law and Virginia law differed as to the respective shares the beneficiaries should receive. The wrongful death statute of North Carolina, under which the action had been brought, provided that subject to certain exceptions, money recovered in a wrongful death action was to be distributed as though the decedent had died intestate "as provided in the [North Carolina] Intestate Succession Act."¹⁹ The North Carolina Intestate Succession Act provided that where a decedent died intestate with a surviving spouse and two minor children, the surviving spouse would take the first \$15,000 in personalty plus one-third of the balance.²⁰ The

15. 559 F. Supp. 47 (E.D. Va. 1983).

16. Judge Warriner's opinion discloses that the decedent's wife and two children (who together comprised the beneficiaries) were citizens of Virginia at the time of the accident. *Id.* at 48. The opinion does not identify the citizenship of the defendant, but the complaint alleged that Rockwell International Corp. was a Delaware corporation, and the defense never disputed that contention. Plaintiff's Complaint at 1, *Walters*. Curiously, the plaintiff failed to allege that the defendant's principal place of business was in a jurisdiction other than Virginia, but it appears that the corporate headquarters of Rockwell International Corp. was in Pennsylvania. 1 STANDARD & POOR'S REGISTER OF CORPORATIONS, DIRECTORS & EXECUTIVES (1983).

17. See 28 U.S.C. § 1332(a) (1976) (federal district courts have original jurisdiction when the litigants are citizens of different states and the amount in controversy exceeds \$10,000).

18. 559 F. Supp. at 48. The decedent's citizenship and his plans to move the family were, of course, not relevant to the court's diversity jurisdiction, but such factors may have some relevance to choice of law analysis. See *infra* notes 73-82 and accompanying text.

19. N.C. GEN. STAT. § 28A-18-2(a) (1976 & Supp. 1981).

20. *Id.* § 29-14(b)(2).

Virginia wrongful death statute, by contrast, made no reference to intestate succession law, but authorized the court to use its discretion to determine the shares the widow and children should receive.²¹

The court, therefore, was presented with a choice of law problem whose resolution would have important consequences for the beneficiaries. If North Carolina law applied, some sort of trust probably would be necessary to administer the portion of the proceeds set aside for the minor children. If Virginia law applied, the share any beneficiary might receive could range from the entire amount of the settlement to no money at all, depending on the court's decision.

I. *Walters* UNDER CLOSE SCRUTINY

A federal court sitting in diversity must use the choice of law rules of the state in which it sits.²² Accordingly, in *Walters*, the court turned to the rules of Virginia. Although Virginia continues to apply the traditional approach of the law of the place of the event (*lex loci*) in tort actions,²³ the district court noted that *lex loci* applies only when the question to be decided is a matter of substantive law: "[T]he law of *lex loci* does not deal with remedies."²⁴ Instead, as the court noted, remedial and procedural matters under Virginia law are governed by the law of the place where the action is brought (*lex fori*).²⁵ Therefore, the *Walters* court concluded that the real question in the case was "whether North Carolina's distribution scheme [was] substantive or remedial," *i.e.*, "whether the identity of a beneficiary [was] a part of the substantive law of distribution or whether beneficiary determination [could] be likened more to the law going to remedy."²⁶ The court concluded "that a Virginia court would find that while the right to recovery and the limits on recovery [were] substantive law, the distribution of the recovery [was] remedial law. Accordingly, the court ruled that distribution should be governed by Virginia law."²⁷

21. VA. CODE § 8.01-52 (1977 & Supp. 1983); *see also id.* § 8.01-54 (1977) (judgment to distribute recovery when verdict fails to do so).

22. *See Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

23. *McMillan v. McMillan*, 219 Va. 1127, 1131, 253 S.E.2d 662, 664 (1979).

24. 559 F. Supp. at 49.

25. *Id.* at 48 (citing *Willard v. Aetna Casualty*, 213 Va. 481, 193 S.E.2d 776, 778 (1973)).

26. *Id.*

27. *Id.* at 49-50.

In the eyes of the interest analyst, the court's analysis should not be as simple (or arbitrary) as that. More precisely, the interest analyst might say that the *Walters* court engaged in just the sort of simplistic, result-oriented analysis that lays bare the weakness as well as the potential injustice of the traditional approach. Specifically, the court sat in a state that followed the traditional rule of applying *lex loci*, which in this case meant North Carolina's law should apply. The traditional rule, however, also includes a number of exceptions. As the court noted, when an issue can be characterized as a matter of remedy, the traditional learning directs that *lex fori*, and not *lex loci*, be applied to that issue.²⁸ The effect of such characterization in the *Walters* case permitted the court to avail itself of Virginia's highly flexible approach to proceeds distribution.²⁹ The more general effect of such practices, at least as an interest analyst would see it, is to vest in a court almost unfettered discretion to determine which state's law should apply through the use or nonuse of characterization and other devices.³⁰

The result in *Walters* is not what arouses the ire of an interest analyst.³¹ Indeed, the conclusion of the court that Virginia law

28. *Id.* at 48; see also RESTATEMENT OF CONFLICTS, *supra* note 2, §§ 584-585. In addition to characterization, the following practices have been used as means of escape from the mandates of the traditional learning: (1) *renvoi*, in which a court decides to look at the law of another jurisdiction but also looks at the choice of law rules of that jurisdiction—and if those rules refer the court to its own law or the law of a third state, the forum law or the third state's law may be applied; (2) *depeçage*, in which a court applies one state's law to one issue in the case and a second state's law to another issue in the case; (3) public policy, in which a court concludes that its choice of law rules direct it to use the substantive law of another jurisdiction, but it rejects that law as contrary to the public policy of the forum; (4) penal laws, in which a court refuses to apply the law of another jurisdiction because that law imposes a penalty that would be collected by public authorities; and (5) revenue laws, in which a court refuses to apply the tax laws of other states. See R. CRAMTON, D. CURRIE & H. KAY, *supra* note 8, at 63-141.

29. See *supra* note 27 and accompanying text.

30. Referring to a California decision in which a similar characterization had been employed, Currie wrote:

[The court] characterized the problem differently, and the different characterization produced [a sound result]. This is a device that has long been used by the courts. It is far from an ideal way of dealing with such situations. Certainly it would be better if the courts could state explicitly the considerations that led them in the first place to determine what the result should be, and indicate clearly how those considerations will be appraised in other cases.

B. CURRIE, *supra* note 3, at 132-33 (footnotes omitted); see also Rendleman, *supra* note 2, at 317 ("The use of such conclusory labeling inevitably leads to capricious decisions").

31. See *supra* note 30; see also R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.10, at 288 (2d ed. 1980) (footnote omitted):

One matter over which it is clear that the place of impact as such has no interest is in the manner of distributing the proceeds of a wrongful death recovery. Any conflict in

should govern the distribution of settlement proceeds is not one with which many advocates of interest analysis would quarrel. Because the propensity of courts that have adopted interest analysis has been to apply either the law of the forum or, particularly, the law of the common domicile of the interested parties, an interest analyst probably would have reached the same result: The law of Virginia, as the common domicile of all potential beneficiaries, should apply.³² Rather, the criticism of *Walters*, from the interest analyst's viewpoint, would focus not on the result but on the approach used to achieve the result.

When the *Walters* court used an exception to the traditional rule of *lex loci* in what may have been a result-oriented manner, the court left itself open to the suspicion that the traditional approach may not be as predictable and easy to apply as its defenders contend.³³ On the one hand, when the traditional learning is applied without the use of such escape devices as characterization, the results may be unjust.³⁴ On the other hand, the escape devices often make possible a nearer approximation of justice but may reflect one judge's highly personal view of justice, largely devoid of any contribution to a body of doctrine that will help guide future decisionmakers. In those circumstances, the traditional learning seems vulnerable to the charge that all too often it forces a judge either to apply mechanically a particular law that seems unjust under the circumstances or to reach for an escape device that often does not explain, in any consistent way, why the judge has adopted that particular course.

The susceptibility of the traditional learning to manipulation has been the standard criticism of that approach.³⁵ Of greater interest, however, is whether interest analysis offers a superior alternative. How would the interest analysts approach *Walters*? Although the more modern approaches come in a variety of

regard to such distribution between the law of the place of impact and the law of the domicile of the decedent and his next of kin is spurious. The law of the domicile should control.

32. See *supra* notes 12-13.

33. See, e.g., *McMillan v. McMillan*, 219 Va. 1127, 1131, 253 S.E.2d 662, 664 (1979) (traditional rule provides "uniformity, predictability, and ease of application").

34. Cf. B. CURRIE, *supra* note 3, at 132-33. Currie applauded one court's characterization because it avoided an unjust result, but also noted that characterization was no more than an inarticulate escape, doing presumed good in one case without laying down a principle to follow in future cases. *Id.*

35. See *supra* note 30; *infra* note 96 and accompanying text.

permutations,³⁶ most or all of the variations still appear to swirl close to the mainstream of interest analysis.³⁷

The first step of the "mainstream approach" is to identify any factors that could give rise to a state's interest in having its law applied to the issue before the court.³⁸ One such factor might be that the accident (and presumably the death of Allen Walters) took place in North Carolina. Every reasonable person would agree that a state has an interest in regulating motor vehicle traffic within its borders. Further, the fact that the accident occurred in North Carolina makes it likely that in-state public service institutions such as police departments and hospitals incurred substantial expenses in trying to help the accident victims. To the extent that Walters' estate is unable to recover from the defendant, North Carolina institutions that expended resources in an effort to help Walters might be unable to obtain reimbursement from the estate, thereby increasing the burden on North Carolina taxpayers who will have to make up the shortfall.

At the same time, the fact that all the beneficiaries of the estate were domiciled in Virginia creates an important Virginia interest in the litigation. If Walters' widow or either of his minor children was not compensated adequately from the settlement funds, it is possible that the beneficiaries would become a burden on the Virginia welfare system. Virginia also may assert an interest as the state in which the case was brought. All the lawyers in this litigation, as is often the case, were from the forum state³⁹ and therefore presumably were more familiar with Virginia law than with that of any other state. Moreover, it is likely that a federal judge sitting in Virginia also would be more comfortable with Virginia law. To the extent that a state has an interest in ensuring that justice is pro-

36. In his discussion of the modern approaches, Professor Leflar lists "forum preference," the "most significant relationship test," "governmental interest analysis," "false conflicts," "statutory construction," "principles of preference" and "choice-influencing considerations" among them. R. LEFLAR, *supra* note 10, §§ 90-96, at 180-95.

37. As one commentator, Leflar, has stated: "Essentially, [the modern approaches] are consistent with each other. Any one of them is likely to produce about the same result on a given set of facts as will another." *Id.* § 109, at 219.

38. The statements in the text following this footnote about what an interest analyst would do are consistent with the work of Professor Weintraub. See R. Weintraub, *supra* note 31, §§ 6.10-13, at 287-93. The statements also correspond with the four principal interests Currie identified: (1) the domicile, nationality or residence of the plaintiff; (2) the domicile, nationality or residence of the defendant; (3) the place of the transaction; and (4) the place where the action is brought. B. CURRIE, *supra* note 3, at 82-83.

39. All the attorneys of record in *Walters* were from Richmond, Virginia. Docket Sheet at 1, *Walters v. Rockwell Int'l Corp.*, 559 F. Supp. 47 (E.D. Va. 1983) (No. 82-0267-R).

vided by a competent application of the law, it follows that where a legal matter is difficult, lawyers and judges will do their best work if they use the law most familiar to them. Virginia's status as the forum, therefore, also creates an interest in having its law applied.⁴⁰

Interest analysts, on occasion, also have looked to the state where an individual was employed to determine if it has an interest in the litigation.⁴¹ Allen Walters had been employed in North Carolina prior to his death.⁴² While the United States Supreme Court has held that a state interest based on employment status is "less substantial" than an interest based on domiciliary status,⁴³ employment status nevertheless permits individuals to make demands on some state services and thereby at least creates a financial interest of a state in which a person is employed.

Other states that might conceivably have had an interest in the *Walters* litigation include those in which Rockwell International was incorporated or doing business. For example, if the court had awarded a massive money judgment against the defendant corporation, it is imaginable that the impact on the corporation would have been so great that it would have been forced to curtail its business activities. That, in turn, would have been detrimental to employment and tax revenues in states where the corporation did business. Similarly, if the litigation somehow affected the internal corporate structure of the company, it might be argued that Delaware, the state of incorporation,⁴⁴ would have an interest in the matter.

It is possible to conjure up more potential state interests in litigation such as *Walters*. It should be clear by now, however, that at some point the interests identified become more imagined (or imaginable) than real. When that point is reached, it is time for the interest analysts to try to separate the less realistic or less weighty interests from those that might bear importantly on litiga-

40. For different views of the way interest analysts explain forum interest in choice of law, see B. CURRIE, *supra* note 3, at 46-58; Sedler, *supra* note 12, at 977-83.

41. See, e.g., *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 47 (Minn. 1978) (decendent's employment in Minnesota for 15 years is a factor in favor of applying Minnesota law), *aff'd*, 449 U.S. 302 (1981). Curiously, when the United States Supreme Court affirmed the constitutionality of the Minnesota Supreme Court's decision to apply Minnesota law, it seemed to accord even greater weight to the decendent's employment in Minnesota than had the state court. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 314-15 (1981).

42. 559 F. Supp. at 48.

43. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 314 (1981).

44. See *supra* note 16.

tion. Thus, on the facts of *Walters*, it was clear that the suit would not affect the corporate structure of the defendant in any significant way. Thus, any claim by Delaware to have its law applied because it was the place of incorporation could be eliminated. Moreover, there was no significant interest in any state whose claimed interest was based on the fact that the defendant did business in that state. Rockwell International agreed to a settlement amount that was fixed and certain. The issue that remained—determining who would share in that sum and to what extent—was of no particular interest to Rockwell, whose responsibilities were discharged,⁴⁵ nor to the states in which Rockwell did business.

Closer scrutiny of some of the other potential state interests also may cause an interest analyst to accord them less weight. For example, while under different circumstances the state where an individual is employed might have an interest in litigation affecting that person,⁴⁶ Allen Walters' employment in North Carolina appears to have created no North Carolina interest in proceeds distribution. The North Carolina workers' compensation fund apparently was not at issue in the case, and there is no suggestion in the court's opinion that Walters' North Carolina employer would otherwise be financially affected by determination of the proceeds distribution issue.

With those potential interests eliminated, the only factor remaining that could have given rise to a North Carolina interest was that the accident occurred in North Carolina. Interest analysts continue to say that the place where an event occurred is a factor

45. Although it seems clear that the defendant had no further interest in the case once the amount of the settlement had been established and paid, the *Walters* court nevertheless directed counsel for the defendant to participate in arguments about distribution of the settlement proceeds. Docket Sheet at 2, *Walters* (No. 82-0267-R). The defendant's counsel therefore continued to participate in the case until the court entered its order applying Virginia law to the distribution of the settlement proceeds. Defendant's Memorandum Regarding Distribution of Settlement Proceeds. Those events occurred notwithstanding the fact that the court also appointed a guardian ad litem to represent the interests of the minor children where their interests were adverse to those of their mother. Docket Sheet at 2. The guardian ad litem and counsel for Mrs. Walters as plaintiff-executrix, of course, also filed arguments on the choice of law issue. Plaintiff's Memorandum Regarding Distribution of Settlement Proceeds; Guardian Ad Litem's Memorandum Regarding Distribution of Settlement Proceeds.

46. In *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1978), *aff'd*, 449 U.S. 302 (1981), the Minnesota court held that employment within the state created an interest because the issue before the court was the applicability of an insurance contract that might help protect a Minnesota employee from the consequences of an accident. *Id.* at 47. In *Walters*, the liability of insurance carriers, if any, had been settled, and there was no longer a question of protecting the interests of a North Carolina employee by making an insurer pay.

to be given some weight.⁴⁷ In practice, however, that interest usually loses out when it competes with the interest created by the common domicile of interested parties, and in *Walters*, the beneficiaries were domiciled in Virginia.⁴⁸

In summary, an interest analyst's appraisal of *Walters* would proceed in the following way: When an automobile accident occurs in North Carolina, that state clearly may assert an interest in assuring that its public service organizations are able to obtain compensation, where appropriate, from individuals who use those services.⁴⁹ Allen Walters' accident was the type where many services typically are used. Walters' estate stands in his place if there is an obligation to pay for those services, so North Carolina arguably might have an interest in obtaining a share of the settlement proceeds.⁵⁰

The interest analyst, however, almost certainly would conclude that Virginia's interest in applying its law is stronger. After the loss of a parent who has been the major source of financial support for the family, the state of domicile may be faced with major long term support obligations if the proceeds distribution scheme adopted by the court is inconsistent with the state's obligations. To ensure that the family's support requirements are met first from money received from the tortfeasor, an interest analyst would reason that Virginia is entitled to have the preponderant voice in how that money is distributed. The Virginia statutes vest discretion in matters of proceeds distribution in the court.⁵¹ Because that is the view of the state with the stronger interest, the interest analyst would say that view should apply.⁵²

47. B. CURRIE, *supra* note 3, at 82.

48. See, e.g., Ely, *supra* note 12, at 217 (applying the law of a common domicile is "the only solid insight of interest analysis").

49. See *supra* text following note 38.

50. The North Carolina statute does not permit any creditors to reach the assets of a settlement of a wrongful death action, "except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding one thousand five hundred dollars." N.C. GEN. STAT. § 28A-18-2(a) (1976 & Supp. 1981). Under that statute, North Carolina presumably may only collect up to \$1500. It is easy to imagine a circumstance, however, in which a state where an accident took place would not impose such a limit on the ability of in-state agencies to obtain reimbursement.

51. See *supra* note 21 and accompanying text; see also R. WEINTRAUB, *supra* note 31, § 6.10, at 287-88 (domicile law should apply to wrongful death proceeds distribution).

52. The facts of *Walters* suggest that whatever interest Virginia may be able to generate from the fact that the forum is in Virginia merely is a surplus argument for the application of Virginia law. See *supra* notes 39-40 and accompanying text. Moreover, the wrongful death statute of North Carolina is not a very complex law, and it is questionable that Virginia lawyers and judges would have difficulty working with it.

It happens that on the facts of *Walters*, the court's decision and the results of an interest analysis converge at the same bottom line—Virginia law should apply. As was suggested earlier, however, the fact that both analyses achieve the same conclusion does not demonstrate that the differing approaches are of equal value or that they will usually converge in their conclusions.⁵³ Far from it. In the eyes of the interest analyst, the district court's approach is probably no more than a result-oriented opinion in search of justification. To applaud the opinion because it reached a decision that in the interest analyst's view was correct would be to succumb to the lure of one judge's largely unarticulated view of justice in the individual case.⁵⁴ The interest analysts believe their approach, by contrast, affords the same ability to achieve justice as in *Walters*, but also offers tools that may be used to achieve consistency in future choice of law cases.⁵⁵

Highlighting the differences between an interest analysis of *Walters* and the route followed by the *Walters* court is helpful but does not go far enough. A careful reading of *Walters*, however, suggests that any criticism of the court's analysis is more nearly an attack on what one judge did than an indictment of the traditional learning as a whole. In fact, a review of *Walters* indicates that advocates of a traditional approach may find as much to criticize as do the interest analysts.

The court's decision in *Walters* rested entirely on the characterization of the issue of proceeds distribution as a matter of remedy, to which it applied the forum's law.⁵⁶ In a normal case, advocates of the traditional learning would find it hard to disagree that such an issue should be characterized as remedy,⁵⁷ but *Walters* is not quite a normal choice of law case. *Walters* was based on wrongful death, a cause of action that did not exist at common law. Recovery for wrongful death became possible only with the enactment of legislation creating the right,⁵⁸ a fact that has consequences for choice of law. Because wrongful death is peculiarly a

53. See *supra* notes 31-32 and accompanying text.

54. A major problem with escape devices, such as characterization, is that they relieve a judge from the need to explain in any detail his or her decision. To relieve judges of the burden of defending what they do, of course, is to eliminate one of the checks on arbitrary judicial behavior. See *supra* note 30; *infra* note 96 and accompanying text.

55. See B. CURRIE, *supra* note 3, at 132-33.

56. See *supra* notes 24-27 and accompanying text.

57. See RESTATEMENT OF CONFLICTS, *supra* note 2, § 600 (forum law determines matters pertaining to execution of a judgment).

58. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 127 (4th ed. 1971).

creature of statute, courts have been inclined to treat ancillary features of the cause of action as tied closely to the substantive right. For example, when a court might be inclined to treat the issues of time limitations and restrictions on the amount that may be recovered as classic matters of remedy or procedure for choice of law purposes,⁵⁹ it will hesitate to do so when the limitation or the recovery restriction relates to a wrongful death action. In fact, the rule is now established that when such ancillary matters have been tied by statute, with sufficient specificity, to the wrongful death cause of action—*i.e.*, when there are provisions created to serve the wrongful death action and no other—such matters are treated as part of the substantive law of wrongful death, and they may not be characterized as matters of procedure or remedy, to which forum law would apply.⁶⁰

The facts of *Walters* suggest that the decision to apply the characterization of remedy to the proceeds distribution issue was error. The lawsuit arose under the wrongful death statute of North Carolina,⁶¹ which directs that the intestate succession statute be used for purposes of proceeds distribution. That designated means for distribution seems integral to the North Carolina wrongful death statute and indeed has been held to be so by the North Carolina Court of Appeals.⁶² The factors in *Walters* are similar to those of other cases in which courts have held that issues normally procedural or remedial in nature should be treated as substantive

59. RESTATEMENT OF CONFLICTS, *supra* note 2, §§ 604, 606.

60. R. WEINTRAUB, *supra* note 31, § 3.2C2, at 59-60. The *First Restatement*, for example, treats one ancillary provision in the following fashion: "If by the law of the state which has created a right of action, it is made a condition of the right that it shall expire after a certain period of limitation has elapsed, no action begun after the period has elapsed can be maintained in any state." RESTATEMENT OF CONFLICTS, *supra* note 2, § 605.

An interest analyst should also agree that it would be inappropriate to separate the remedy of proceeds distribution from its attachment to the statutorily created wrongful death action. The North Carolina legislature created both the remedy and the right in tandem. Interest analysis in this case might not be appropriate, for without North Carolina's interest in creating the statute, there arguably would have been no cause of action for the plaintiff. Certainly it is reasonable that a plaintiff who chooses to proceed under a state's wrongful death statute should not be able to tinker with the state's considered balancing of competing claims between the plaintiff, defendant and any creditors a decedent might have; to permit a plaintiff to do so could effectively destroy the equilibrium among those claimants the state had in mind when it created the wrongful death action.

61. 559 F. Supp. at 48.

62. In *Willis v. Duke Power Co.*, 42 N.C. App. 582, 257 S.E.2d 471 (1979), the issue was whether a wrongful death action abated on the death of the primary beneficiary. The North Carolina Court of Appeals held that the action did not abate and also described the state's proceeds distribution scheme as nearly unique and fundamental to the wrongful death statute itself. 257 S.E.2d at 474.

for choice of law purposes when ancillary to a statutory cause of action.⁶³

Those seeking a "good" result in the *Walters* case would be disturbed, however, with a result that required the application of North Carolina law. A result-oriented individual might point out that in *Walters*, unless Mrs. Walters was shown to be a particularly irresponsible person—something not demonstrated in the court's opinion—she would be a better repository for the award than a cumbersome trust established for her minor children. But even if that were true, is it not merely another way of saying that the court should determine the result first and then search for a way to justify the result?

II. THE MISPLACED RELIANCE ON DOMICILE

Scrutiny of *Walters* from the point of view of an interest analyst tells us something important about interest analysis: that in the calculus of interests, domicile or residence⁶⁴ can triumph over the place where an event occurred. In fact, it is now a characteristic of interest analysis that the law of the domicile of at least one of the parties will most likely apply,⁶⁵ and it is this emphasis on domicile that constitutes an important weakness in interest analysis.

In the first instance, the theory that a state has an interest in applying its law in order to protect its domiciliaries or residents, but has no such interest in nondomiciliaries and nonresidents, may be unconstitutional. Although the United States Supreme Court

63. See, e.g., *Bournias v. Atlantic Maritime, Ltd.*, 220 F.2d 152, 156 (2d Cir. 1955) (time limitation in contract action found to be substantive if it is directed with sufficient specificity to the statutorily created right). But see R. WEINTRAUB, *supra* note 31, § 6.10, at 288; Brilmayer, *supra* note 5, at 398-402 (Currie did not intend to let actual legislative intent play an important role in interest analysis).

64. Apparently no one is particularly inclined to draw a distinction between domicile and residence for choice of law purposes. See Ely, *supra* note 12, at 173; discussion *infra* note 83. In a context unrelated to choice of law, the Supreme Court recently reaffirmed its own disinclination to draw a clear distinction. See *Martinez v. Bynum*, 103 S.Ct. 1838, 1843-45 (1983). The *Martinez* Court seemed to use almost interchangeably the elements of the requirements for domicile and residence. See *id.* at 1847-49 (Marshall, J., dissenting) (majority confuses domicile with residence).

65. See *supra* note 12 and accompanying text; see also Brilmayer, *supra* note 5, at 394-95 (commenting on the first general principle of Currie's analysis in the context of the married women's contract cases. "If a state has a protective policy, then its interest in applying its law depends upon the residence of the defendant"). For the interest analyst, domicile is very much a static concept, and the prospect that a domicile may change is given no weight. See *infra* notes 73-83 and accompanying text.

recently concluded that neither the full faith and credit clause⁶⁶ nor the due process clause of the fourteenth amendment⁶⁷ is a significant barrier to a state's determination to apply its law in derogation of competing claims from other jurisdictions,⁶⁸ the Court's holding does not necessarily end the discussion as to the constitutionality of choice of law rules.⁶⁹

One commentator, Dean Ely, has taken the position that the privileges and immunities clause⁷⁰ may be a formidable constitutional barrier to a state's choice of law rules that benefit only state residents.⁷¹ Although it is not clear that Ely is as taken with his own analysis as I am,⁷² his ideas demonstrate that constitutional restrictions on choice of law approaches adopted by interest analysts are not yet out of the question. Even if the possibility of the constitutional issue is conceded by interest analysts, however, it is still not clear that they have justified their preponderant reliance on domicile.

Little attention has been paid thus far in this discussion to the fact that at the time he was killed, Allen Walters was not only employed in North Carolina but was planning to move his family there from Virginia.⁷³ Until now, there has been no need to evaluate that fact because it is not the sort of consideration an interest

66. U.S. CONST. art. IV, § 1, cl. 2.

67. *Id.* amend. XIV, § 1, cl. 3.

68. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

69. Ely, *supra* note 12, at 187-89.

70. U.S. CONST. art. IV, § 2, cl. 2.

71. Ely, *supra* note 12, at 180-91. The essence of Ely's argument is that the Supreme Court, when developing (or not developing) restraints on choice of law rules adopted by the states, has concentrated on other sections of the Constitution at the expense of the privileges and immunities clause. In so doing, it has failed to appreciate the affect on choice of law that some of the Court's own decisions may have. As an example, Ely takes *Austin v. New Hampshire*, 420 U.S. 656 (1975), in which a state law was stricken for treating citizens of other states differently than citizens of New Hampshire. Interest analysts, however, assume that states have a particular interest in affording their domiciliaries the benefit of their law, without having any equivalent interest in affording such benefit to nondomiciliaries. Ely, *supra* note 12, at 186.

72. See Ely, *supra* note 12, at 190-91. Ely suggests that it would be satisfactory, under the privileges and immunities clause, if every person was accorded the benefit of his home state's law. Ely seems to find that approach preferable to the alternative of requiring that a state treat nondomiciliaries as well as it treats its own. *Id.* The idea that the privileges and immunities clause prohibits many distinctions between residents and nonresidents continues to attract adherents on the Supreme Court. See *Zobel v. Williams*, 457 U.S. 55, 71-78 (1982) (O'Connor, J., concurring). But see *White v. Massachusetts Council of Constr. Employers*, 103 S.Ct. 1042, 1046 (1983) (privileges and immunities clause does not prohibit all economic discrimination in favor of residents).

73. 559 F. Supp. at 48.

analyst or an advocate of the traditional learning typically would weigh very heavily. In fact, I am unaware of any interest analyst who treats domicile as anything but a current and immutable fact.⁷⁴ A moment's reflection on *Walters* will help explain why interest analysts are so reluctant to weigh the variable that a potentially changing domicile represents.

If a court applying an interest analysis takes into account an intended change of domicile, the considerations could get very messy. For example, at the moment Mrs. Walters must draw her family together, manage affairs about which she knows little and carry her own grief, it would be difficult for her to be interviewed and to make the decisions concerning the family's future residence. It is accepted wisdom in this country that persons who have suffered the loss of a loved one are among those least likely to make good decisions in the immediate aftermath of the loss (witness our alleged vulnerability to the importunings of undertakers in our first days of grief). It would be difficult, therefore, to ask survivors

74. In *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), the Supreme Court noted that subsequent to the death of her spouse, which gave rise to the litigation, the plaintiff changed domiciles. The Court agreed that the change gave the new state of domicile a stronger interest in the litigation than it otherwise would have had—assuming the change was not made with a motive of forum shopping—but the Court did not suggest that a *planned* move, or the mere theoretical prospect of a move at some distant date, would give rise to a state interest. *Id.* at 318-19.

It is instructive to compare the way one interest analyst constructed a sliding scale of diminishing interest for the place where an event occurred against the interest of a domiciliary jurisdiction:

The place of impact may have an interest in compensating the injured party Of course, it may be that in an individual case the facts are such that these interests of the place of impact are reduced to the vanishing point. For example, the victim may leave the state of impact immediately, go to another state where he is domiciled, and receive medical treatment there. Although, even under such circumstances, the state of impact may retain sufficient interest in providing compensation to prevent our saying that it has no interest and that the application of its law will be unreasonable, the fact that its interest in compensation is thus reduced should certainly be considered in reconciling any true conflict that might exist.

R. WEINTRAUB, *supra* note 31, § 6.10, at 287-88 (footnotes omitted). By contrast, when Professor Weintraub evaluated the interests of the parties' domiciles, he made no mention of the prospect that a party might change domiciles. *See id.* § 6.11, at 289-90, § 6.13, at 293. Note particularly that Weintraub was quite willing to posit that an injured plaintiff may leave the place where the event occurred, but assumes no mobility from the place of domicile: "[C]ompensating the plaintiff will also help guarantee payment for medical creditors who are likely to have attended the injured plaintiff at his domicile." *Id.* § 6.13, at 293. In fairness to Weintraub, it should be noted that he anticipated *Hague* in his willingness to consider, at least on a case-by-case basis, the interest of a state to which a party actually has moved subsequent to the events that gave rise to litigation. *See id.* § 6.28, at 331-35. That flexibility, however, is not at all the same as recognizing that domicile itself is far too slippery a status to serve as a reliable indicator of a state's long term interest in a party.

to commit themselves to answer serious questions about future residence. Even if questions about future residence can and should be asked so that a court might inform itself about a factor relevant to choice of law, is it desirable to require courts to establish the quantum of proof necessary to support statements about future domicile? If Mrs. Walters announces that she intends to go ahead with the move to North Carolina, is that enough? What if she asserted that now all plans are changed and the family will move to some third state—perhaps one from which it came—so that the survivors can enjoy the emotional and financial support of relatives and old friends who stayed near home? More to the point, what should a court do if that third state happened to have a proceeds distribution scheme highly favorable to Mrs. Walters and much less so to her children?⁷⁵ Understandably, this is a thicket interest analysts have left undisturbed.⁷⁶

The alternative that interest analysts have adopted—the assumption that the current state of domicile is the state that will have the preponderant longrun interest in the surviving members of the Walters family—also is flawed because it ignores readily available information about the way Americans live and how frequently they relocate. The results of the 1980 census indicate that

75. Attempts to evaluate the nature and quality of a party's purported intention to change domicile might require assessment of both the sincerity of the intent and the motive behind the intent. In other words, a court would have to determine not only whether a move likely will take place, but also whether that move is motivated by a party's desire to obtain choice of law advantages. Assuming that such a motive was found, a court would then have to make a determination as to whether that sort of motive would disable the interest of the intended state of domicile in the matter before the court.

Without belittling the capacity of American courts to take on and resolve knotty problems, it is hard to see how the cause of consistency in choice of law decisions would be furthered by judicial consideration of these issues. For example, consider how difficult it is to establish the element of intent in the tort of deceit. W. PROSSER, *supra* note 58, § 107, at 700-01 ("The state of the speaker's mind, notwithstanding its elusiveness as a matter of psychology and its difficulty of proof, must be looked to in determining whether the action of deceit can be maintained"). As a practical matter, if intent to deceive is so difficult to prove, how much more difficult would it be for a court contemplating an intended move to ascertain not only the genuineness of the intent involved, but also the motive behind that intent and the impact a selfish motive might have on domiciliary interests?

76. Not entering that thicket, of course, has a desirable by-product for interest analysis. Staying out of the undergrowth means that domicile will continue to be treated as the constant factor interest analysts seem to want it to be. Interestingly, however, when movement across state lines will enhance the interest of a domiciliary state to the detriment of the interest of the place where an event occurred, at least one interest analyst is quite willing to factor it in. See R. WEINTRAUB, *supra* note 31, § 6.10, at 287-88 (possibility that injured plaintiff will leave state where injury occurred to seek help in domiciliary state reduces interest of state of injury "to the vanishing point"). However, Weintraub does not give weight to the possibility that a party might change domiciles.

44.5% of the persons living in the United States in 1975 changed their residence by 1980.⁷⁷ Moreover, 9.7% of people living in the United States in 1975 moved their residences across state lines by 1980, a total of more than twenty million people moving from one state to another in a five-year period.⁷⁸ The Bureau of the Census also reports that if its survey contains a significant error, it is a slight *undercount* of people who moved across state lines in that five-year period.⁷⁹

Twenty million persons moving across state lines in a five-year period is a rather imposing phenomenon to contemplate, but the interest analyst could reasonably respond that one should not lose sight of the fact that during the same period, much larger numbers of persons (about 190 million)⁸⁰ did not transfer their residence across state boundaries. At first glance, the larger figure indicates that the use of domicile as a basis for a state interest retains a great deal of validity. However, a careful assessment of the numbers suggests that the fact that 190 million people have not moved out of state within a five-year period grossly overstates the importance of domicile as a tool of choice of law.

Most Bureau of the Census information is not organized in a way that affords an easy opportunity to reach a firm conclusion, but it is reasonable to assume that, other things being equal, individuals whose 1975 residences were close to state boundaries were more likely to have moved across a state boundary by 1980 than persons whose 1975 residences were more removed from state

77. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION: STATE OF RESIDENCE IN 1975 BY STATE OF RESIDENCE IN 1980, Table 1, at 3 (supplementary report PC80-S1-9 (1983)) [hereinafter cited as BUREAU OF THE CENSUS 1980].

78. *Id.* That percentage has not varied greatly for decades. Between 1965 and 1970, 8.6% of the population moved from one state to another. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION: MOBILITY FOR STATES AND THE NATION II, Table 1, at 2 (1970) (Call No. PC(2)-2B). Between 1955 and 1960, 8.9% of the population changed residences across state lines. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1960 CENSUS OF POPULATION: MOBILITY FOR STATES AND STATE ECONOMIC AREAS II, Table 1, at 1 (1960) (Call No. PC(2)-2B).

79. The technical reasons for that apparent undercount are explained by the Bureau of the Census as follows:

The number of persons who were living in a different house in 1975 is somewhat less than the total number of moves during the 5-year period. Some persons in the same house at the two dates had moved during the 5-year period but by the time of enumeration had returned to their 1975 residences. Other persons who were living in a different house had made one or more intermediate moves.

BUREAU OF THE CENSUS 1980, *supra* note 77, Table 1, at 1.

80. *Id.* Table 1, at 3.

lines.⁸¹ If that assumption is true, domicile may not be a useful indicator of a state's long term, or even intermediate (five-year) term, interest in the welfare of persons living near state borders. Another assumption that seems reasonable, but which lacks proof, is that litigation affected by choice of law issues is more likely to arise in portions of a state adjoining other states than in portions of a state more distant from other states.⁸² It is possible, therefore, to tentatively conclude that domicile loses its utility as an indicator of a state's interest in persons living near the boundary of the state, which are precisely those areas of the state where choice of law rules are most important.

One other consideration also raises doubt about the utility of domicile as a foundation for choice of law. That consideration may

81. Bureau of the Census data is organized in such a way that proving the assumption would be prohibitively expensive. It is the opinion of a mobility specialist within the Bureau of the Census, however, that if other factors bearing on individual mobility decisions were held constant, the validity of the assumption probably could be established. Telephone interview with Kristin Hansen, Bureau of the Census (June 16, 1983).

Data from a few jurisdictions in which the bulk of the population lives close to state borders offer some very qualified support for the assumption. In the District of Columbia, for example, where all residents live close to the boundaries of other jurisdictions, 16.3% of the population transferred residences across jurisdictional lines between 1975 and 1980. BUREAU OF THE CENSUS 1980, *supra* note 77, Table 1, at 3. In Delaware, the percentage was 13.3%. *Id.* In Rhode Island, however, the percentage was only 8.7%. *Id.* Nevada is a Western state in which the bulk of the population lives near the California border, and Bureau of the Census data show that 31.5% of the population of Nevada changed residences across state lines between 1975 and 1980. *Id.* It is not clear, however, that those rather startling high percentages for jurisdictions in which the bulk of the population lives near a border may be taken at face value, for autonomous factors may help explain mobility rates. In Nevada, for example, the population grew rapidly from 1975 to 1980, due in important degree to a substantial inward migration from other states. *Id.* Table 2, at 10. That phenomenon alone may explain why people living in Nevada in 1980 reported such a high rate of interstate residence changes. The District of Columbia, on the other hand, experienced a significant net outward migration to other states, *id.*, suggesting that its higher-than-national-average percentage of interstate residence change (16.3%) was attributable to the proximity of other states. The District of Columbia, however, also is the center of the federal government, and that fact alone may produce a uniquely mobile workforce. Because both Rhode Island and Delaware experienced net outward migration between 1975 and 1980, *id.*, when the net outward migration is factored in, Delaware and probably even Rhode Island examples may support the assumption.

82. I know of no data whatever that support or refute this assumption. The National Center for State Courts in Williamsburg, Virginia, which seemingly is the research group most likely to have data on this subject, reported no knowledge of work in the area. Additionally, a search of reported Ohio appellate court decisions to determine if choice of law issues were appealed more frequently from the Cincinnati area (a metropolitan area in Ohio contiguous with borders of two other states) or from the Cleveland area (a metropolitan area of more or less similar size but well removed from the borders of other states) failed to produce useful results, chiefly because almost no choice of law issues could be identified in appellate court opinions in a three-year period.

be described most readily as the phenomenon of the bogus domiciliary. Most of us are domiciled for all purposes in the state in which, as a layperson might say, we "live." That does not apply to all Americans, however. In fact, there are categories of individuals who are legally domiciled in places far removed from where they actually reside. One such group is career military personnel who frequently obtain domiciliary status in a particular state—often with favorable tax consequences in mind—but who serve most of their active military careers in other states or abroad. It is difficult to say with any confidence that those individuals are likely to return to their nominal state of domicile even on retirement from military service, and for that reason it is hard to divine a relationship between their nominal domicile and an interest of that domiciliary state for choice of law purposes.⁸³

Those considerations identified seem to demonstrate that interest analysts have been remarkably uncritical about the way they have used domicile to identify a state's interest in a matter. An obvious corrective response might be to qualify the use of domicile by more careful consideration of the nature of the state's putative interest and of the likelihood that domicile will remain stable long enough to be an accurate measure of the duration of that interest. Implementation of that recommendation, of course, might create substantial practical difficulties that interest analysts have heretofore avoided⁸⁴ and might only serve to provide defenders of the traditional learning with additional ammunition for their charge

83. It is true, of course, that the test of domicile can change according to the purpose for which domicile is being determined. For example, the test of domicile for tax purposes can be different from the test of domicile for choice of law purposes. See, e.g., *Bangs v. Inhabitants of Brewster*, 111 Mass. 382 (1873).

Ely has noted that Currie "never did get around to sorting out whether he meant to be talking about residence, domicile, citizenship, or 'the state to which one belongs.'" Ely, *supra* note 12, at 173. If interest analysts identify interests in a state of residence, as opposed to a domiciliary state, the phenomenon of the bogus domiciliary may lose some of its relevance as a problem for interest analysis. However, the highly transitory nature of residences of career military personnel, along with the fact that such individuals may look more to the federal government than to the state of residence in times of need, suggests that states where military personnel reside may have as little interest in those residents as do their nominal states of domicile.

In some important measure, of course, many persons in highly mobile categories as career soldiers or sailors may already have been accounted for in the census surveys. See *supra* notes 77-81 and accompanying text. It is unlikely, however, that all of them have been identified, and to the extent that such individuals have not been identified, they may add to the number of people for whom domiciliary status may create no reasonable interest on the part of the nominal domiciliary state.

84. See *supra* note 76 and accompanying text.

that interest analysis affords little predictability of results.⁸⁵

Perhaps a better reaction is to recognize that for a large number of people living in this country domicile is simply not a good reflector of a state's interest in a particular matter.⁸⁶ That recognition may be even more unpleasant for interest analysts than qualifying the use of domicile, for it compels a restructuring, rather than a more limited correction, of the theoretical foundation of interest analysis. Acknowledging the deficiency of relying on a choice of law technique that is simply irrelevant, however, and therefore often wrong for many Americans, should not be all that difficult for the interest analyst. After all, interest analysis was born in reaction to the apprehended irrelevance, not to say the error and injustice, of the traditional approach.⁸⁷

The search for a choice of law foundation that improves on

85. See, e.g., *McMillan v. McMillan*, 219 Va. 1127, 1131, 253 S.E.2d 662, 664 (1979) (modern approaches "susceptible to inconstancy").

86. Ely has noted:

[T]he 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 dismissible 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, *supra* note 12, at 175-76. For a further explanation of the "false conflicts" concept, see R. CRAMTON, D. CURRIE & H. KAY, *supra* note 8, at 222-51.

However, if it is clear that domicile is the foundation of interest analysis as it has developed, and that domicile is unsuitable as a measure of state interest in too many cases to permit its use as a reliable predictor, the distinction many interest analysts make between "false" conflicts—which lend themselves to the process of resolution Ely described—and "true" conflicts—cases that even some interest analysts concede are difficult to resolve through interest analysis—simply does not hold up. To the extent that the so-called "false" conflicts are resolved or dismissed by a reliance on state interest created through reliance on domiciliary status, those resolutions are no more reliable than the more dubious solutions for "true" conflicts. Ely, *supra* note 12, at 175-76.

87. See, e.g., B. CURRIE, *supra* note 3, at 613. After noting that his own work is part of a more general attack on the traditional learning, Currie remarked:

I . . . emphasize cases in which the courts have followed *Restatement* doctrine, or hypothetical cases for which the *Restatement* provides a rule of thumb, in order to demonstrate what damage that method of dealing with problems would do if it were taken too seriously. And there is no doubt that to a considerable extent it has been and is taken seriously. Just such doctrine has driven perceptive judges to resort to disingenuous devices to reach just results "consistent" with the system. Just such doctrine has trapped some of our finest judicial minds into decisions that are unworthy, to say the least: Holmes, Cardozo, Learned Hand, and Mr. Justice Harlan are among them. Just such doctrine, when a perceptive court has managed to extricate itself from the coils of the system and reach a just and sensible result, has called forth angry denunciations from academic acolytes.

Id. at 614 (footnote omitted).

domicile probably should begin with a recollection of that which caused the ferment in choice of law thought that ultimately produced interest analysis. When Currie and others began their revolution, they sought to bring down a system grounded in the vested rights theory. The rules that grew out of that theory had come to be seen as possessing an arbitrariness exceeded only by the caprice that sometimes characterized escape devices appended to the rules.⁸⁸ Currie sought to replace those rules with a system grounded in a rational assessment of the interests of potentially affected jurisdictions. I am aware of nothing in Currie's writing, however, that indicates that the factor to which the traditional learning tried to anchor itself—the place where an event occurred—was to be eliminated from choice of law thinking. Indeed the record is clear that Currie originally treated that factor as one that might sometimes predominate.⁸⁹ At some early point, however, he and his colleagues began to lose sight of that factor as their infatuation with domicile grew. At that point, interest analysis went astray.

III. REDISCOVERING LEX LOCI

The fault in interest analysis, therefore, is not so much in attempting to replace the vested rights concept underlying the traditional learning with a consideration of competing interests, but in downplaying the importance of the interests of the jurisdiction in which the event occurred. The interest analysts have thrown out the good with the bad, and it is time to retrieve the former.

We can do that if we resurrect the proposition that a state's law presumptively should be applied to an issue if events giving rise to the issue took place in that state. That proposition requires no great adjustment in the way courts operate. Indeed, that presumption is the basis for the way courts currently operate in the overwhelming majority of cases before them. For example, no one contends seriously that anything but *lex loci* should apply when

88. *Id.* at 614.

89. *Id.* at 3-76; *see also id.* at 701 ("It is true that the state of wrongful conduct or injury normally has an interest in applying certain of its policies: *e.g.*, an interest in deterring dangerous conduct, and an interest in requiring reparation, if not primarily for the victim, at least for the protection of those who go to his aid"). As Professor Brilmayer pointed out, interest analysis developed in reaction to the "metaphysical" theory underlying the traditional learning, and not necessarily out of hostility toward the belief that the place in which an event occurred has an interest in legal issues arising out of the event. Brilmayer, *supra* note 5, at 392.

the plaintiff, the defendant, the forum and all operative events are to be found within the same state.⁹⁰ In fact, it is extremely unlikely that anyone would even be able to identify a choice of law issue in such litigation. Before we deviate from that general approach in choice of law cases, we should first determine that justice to the parties or the interests of other jurisdictions mandates such deviation. That may sound like interest analysis revisited, but if it is, it is interest analysis shorn of the reliance on domicile that has characterized modern approaches.

More likely, that suggested approach, devoid of dependence on domicile, is not interest analysis at all. Instead, it may only be a recognition that the rules developed in the heyday of the traditional learning, when shorn of the ideology that aggravated interest analysts,⁹¹ may not be so bad after all. One need not, for example, swear fealty to the ideology of vested interests in order to recognize that the state in which events take place normally will have the preponderant interest in litigation relating to those events.⁹² That recognition requires no belief in vested interests. It admits of the possibility that sometimes the interest of the situs state will be outweighed by the interest of another jurisdiction—possibly including the parties' domiciliary states—so that nonsitus law may apply. Such an approach, however, would create a burden on those who would oppose the use of situs law to justify application of an exception. In the meantime, the predictability of results that advocates of the traditional learning rightly cherish⁹³ will have been somewhat restored.⁹⁴

90. These facts, of course, constitute the standard intrastate litigation with which state courts commonly are concerned and which have nothing to do with choice of law.

91. See B. CURRIE, *supra* note 3, at 701 (traditional approaches simply refuse to conform to the reality of differences in the laws of different states).

92. Weintraub, who generally is not an advocate of applying the law of a state whose interest depends solely on its status as the place where an event occurred, nevertheless recognizes two interests in such a state: its interest in compensation for an injured party so that local creditors can be reimbursed and so that the injured party does not become a burden on the state, and its interest in discouraging conduct within its borders that is inconsistent with its laws. R. WEINTRAUB, *supra* note 31, § 6.10, at 287-89. Weintraub and other interest analysts tend to quickly minimize the weight of those interests. *Id.* It is not entirely clear, however, that the second interest should be so quickly discarded. See *infra* note 94. Moreover, even assuming those interests should be so minimized, it may be that when the interest of a domiciliary state is properly discounted to allow for personal mobility, the interest of the domicile will deserve less weight than that to be accorded the reduced interest of a state where an event occurred.

93. See, e.g., *McMillan v. McMillan*, 219 Va. 1127, 1131, 253 S.E.2d 662, 664 (1979).

94. The assumption is sometimes made that in negligence cases predictability is overrated because the nature of negligence is that no one intends the tort. Cf. R. LEFLAR, *supra*

A return to the old rules, with or without their ideological baggage, easily can be construed as regression, or at least as evidence that very little progress has been made in choice of law theory. Perhaps the most ominous feature of such a return is the prospect that attempts to develop exceptions to a presumption in favor of situs law might only reintroduce the old escape devices, such as the characterization technique used in *Walters*.⁹⁵ Escape devices are not much loved by the interest analyst, and with reason. Speaking of characterization, Professor Leflar explained succinctly what can be wrong with the escape device:

Characterization can be a result-selective device.

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It is an essential early step in almost any legal analysis, but the step is one that can serve the purposes of the legal artist as well as those of the legal logician. If more than one characterization is logically available for a set of facts . . . the choice between the characterizations may turn on a judicial desire to achieve justice in the particular case, on a public policy preference for one rule of law over another, on a preference for the forum state's own rule of law, on the plaintiff's pleadings, or on something else other than pure logic

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That other real reasons may exist cannot be doubted. The valid questions are as to what the real reasons are, and why a cover-up device should be manipulated to conceal them.⁹⁶

Certainly the interest analysts would not be alone in their reluctance to permit judges to give highly personalized justice, devoid of any articulated explanation that will guide other judges in subsequent cases. The question is whether a return to the old rules, with allowances for exceptions, will necessarily lead to the apprehended

note 10, § 103, at 205 (predictability is treated as significant only in "consensual" transactions). However, it is likely that most Americans expect that if they are involved in a tort action, the applicable law will be that of the jurisdiction in which events occurred. When choice of law theories begin to interfere with such expectations without explanations comprehensible to laypersons—and the level of understanding of interest analysis even among trained lawyers suggests that the theory is not readily comprehensible to laypersons—the net effect is to erode respect for the law and to reinforce the prejudice that law is all too often a collection of lawyers' tricks.

Moreover, as was pointed out long ago, predictability is an important factor working to encourage settlement of litigation, and that presumably remains a goal of the judicial system. See Comment, *Selection of Law Governing Measure of Damages for Wrongful Death*, 61 COLUM. L. REV. 1497, 1509 (1961).

95. See *supra* notes 23-34 and accompanying text.

96. R. LEFLAR, *supra* note 10, § 88, at 176-78; accord B. CURRIE, *supra* note 3, at 132-33. What Leflar had to say about characterization can be said as easily about any of the other escape devices. See *supra* note 8.

fear.

If judges are free to create exceptions to this new *lex loci* as they see fit, but which they also must defend, it is hard to see how the old escape devices will be resurrected. As Leflar pointed out, the problem with the devices is not in their search for just solutions but in the shield they provide for hidden decisionmaking.⁹⁷ Judges who write opinions explaining why *situs* law should not be applied on certain facts are doing anything but hiding their decisions. In fact, far from hiding behind an escape device, such judicial opinions would be true to the common law heritage we normally esteem so much.⁹⁸

IV. CONCLUSION

There is a last lesson in the story of interest analysis that does not bear directly on choice of law but that still may be worth considering for its own value. When domicile became nearly the *sine qua non* of interest analysis, it looked like a very reasonable foundation for the modern approaches. Domicile possesses a rather precise definition, and caters to the general perception that everyone has a home. But evidence shows that domicile has been a much less stable foundation than the proponents of interest analysis were inclined to suppose.⁹⁹ It is ironic that Currie, who seems to have viewed his methodology as much more pragmatic than the theoretical meanderings of the traditional learning,¹⁰⁰ should have overlooked such a point. What is more troubling is the discovery that Currie and other interest analysts may have made other assumptions that were not tested.¹⁰¹

97. See R. LEFLAR, *supra* note 10, § 88, at 176-78; *supra* text accompanying note 96.

98. In the last 20 years, the Supreme Court gradually has moved toward approaches that vest considerable discretion, in the name of equity, in the lower courts. See, e.g., *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 334 (1971) (mutuality requirement for collateral estoppel abandoned in favor of collateral estoppel test that "will necessarily rest on the trial courts' sense of justice and equity"); *Linkletter v. Walker*, 381 U.S. 618, 637-38 (1965) (automatic retroactivity doctrine abandoned in favor of three-part test in which one part directs consideration of the equities in particular cases).

Because of its newer and more flexible approach, the new retroactivity doctrine that emerged in the wake of *Linkletter* initially produced a substantial degree of confusion in the lower courts. The confusion eased significantly, however, when the lower courts reached that portion of the three-part test directing them to consider their own sense of fair play and to apply it along with a reasoned explanation. See Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. Rev. 745, 779-81 (1983).

99. See *supra* notes 77-80 and accompanying text.

100. See *supra* note 5.

101. For more than two decades, interest analysts were content to assume, without

The lesson of the interest analyst's experience is a simple one, obvious until we contemplate how often we overlook it: However necessary assumptions may sometimes be, they are always risky.¹⁰² Moreover, they take on an element of foolishness if they are capable of testing and that opportunity is not taken. Intellectual leaps may help change legal doctrine, but unless the product of glittering intellect is tested by, and corresponds with, mundane reality, it is questionable that any change will be a leap forward.

further examination, that legislatures intended to afford the benefits of state law only to residents of their respective states. *See* Ely, *supra* note 12, at 180-91; *supra* note 72. That assumption went unquestioned until 1980 when an investigation of the assumption caused it to crumple like wet paper. *See* Brilmayer, *supra* note 5, at 399-402, 424-29 (exhaustive review of choice of law legislation discloses almost total absence of legislative intent to benefit solely state residents).

102. In making this comment, I am uncomfortably aware that I have made two assumptions in this article that are incompletely supported. *See supra* notes 81-83 and accompanying text. I hope the explanation I offer in those notes constitutes sufficient excuse for my failure to establish those points conclusively.