VERMONT LAW REVIEW

VOLUME 1 | 1976 | NUMBER 1

RULE OR REASON IN CHOICE OF LAW: A COMMENT ON *NEUMEIER*†

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Significant apprehension has been expressed recently about current developments in the area of choice of law. There is rapid and revolutionary movement in that field today toward solutions in individual cases based on analysis of the substantive-law and multistate policies involved and the relevance of those policies in the particular multistate fact patterns presented. Like a revolutionary movement, it is disjointed and apparently discontinuous. To many observers, the developments appear to be lawless or at least unsystematic. Even those of us most sympathetic to the change 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.

Willis Reese, the Reporter for *Restatement (Second) of the Conflict of Laws*, Stanley Fuld, until recently Chief Judge of the New York Court of Appeals, and my colleague David Cavers, who long ago reminded us, even in the context of choice of law, that lawyers "are a rule-making sect,"[1] have all lately indicated that they are concerned whether rules like those we find in other areas of the law will eventually emerge.[2] Perhaps chidingly—or perhaps

† This comment is in major part a revision and update of the author's discussion of the *Neumeier* case in a survey of recent developments in American choice of law, in French, in Trautman, *Chronique de jurisprudence des Etats-Unis d'Amérique*, 102 J. DU DROIT INTERNATIONAL 371, 373 (1975).

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1. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 193 (1933).

2. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972); Fuld, C.J.,

longingly—Professor Reese has succinctly observed: "Rules are employed in most areas of the law."[3]

Like my colleague Arthur von Mehren, however, who has recently surveyed the developments and explored some new dimensions of the problem,[4] and like Charles Breitel, now Chief Judge of the New York Court of Appeals,[5] I am not sure we are ready to assay such rules. As Professor von Mehren makes clear, the problems are immeasurably more complex than the problems in many areas of domestic law. If pursuit of a policy-based (teleological, instrumental) approach to choice of law appears at the moment to lead to unprincipled *ad hoc* law-making, let us not lose sight of the values of patience and gradual progress, those great virtues of judicial law-making in its endless choice between continuity and change. We need to be clear that we understand the problem in all its dimensions before we become too firm in our conclusions. It is worth remembering that the New Hampshire Supreme Court, which in the celebrated case of *Gray v. Gray*[6] accepted "fixed rules" and pronounced that an approach to individual cases in terms of "reason, justice and expediency" was appropriate only "in the first stages of the development of the law,"[7] came to regret its complacency.[8]

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concurring in Tooker v. Lopez, 24 N.Y.2d 569, 583, 301 N.Y.S.2d 519, 531, 249 N.E.2d 394, 403 (1969), and speaking for the Court in Neumeier v. Kuehner, 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972); Cavers, most recently in *The Value of Principled Preferences*, 49 TEXAS L. REV. 211 (1971).

3. Reese, *supra* note 2, at 316.

4. *See* von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927 (1975); *cf.* von Mehren, *Comment: Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974).

5. *See* Breitel, J., concurring in Neumeier v. Kuehner, 31 N.Y.2d 121, 130, 335 N.Y.S.2d 64, 71, 286 N.E.2d 454, 459 (1972): ("It is undesirable to lay down prematurely major premises based on shifting ideologies in the choice of law.")

6. 87 N.H. 82, 174 A. 508 (1934).

7. The statement in its entirety is instructive: " . . . The novel complaint is made that the foregoing conclusions upon the application of the lex loci set up fixed rules. The proposal is that instead thereof the whole matter be left to the discretion of the court to apply either the foreign or the domestic law to the individual case as 'reason, justice and expediency' require. That might well be taken as the guide for determining what should be done in the first stages of the development of the law. But as the law progresses definite rules are evolved in the course of the frequent application of those tests. That is the situation here. It has become settled that reason, justice, and expediency require that causes of action for foreign torts be dealt with as hereinbefore indicated." Id. at 89-90, 174 A. at 512.

8. *Gray v. Gray* was expressly overruled in Thompson v. Thompson, 105 N.H. 86, 193

"Hard-and-fast" rules, to use one of Professor Reese's favorite epithets, were the vice of the first *Restatement of Conflict of Laws*, which sought to foreclose consideration of questions that judges were unwilling to overlook. So too with premature efforts today. As Justice Frankfurter said in describing the devastating criticism that Thomas Reed Powell brought to dogmatism in Constitutional Law, ". . . to strip legal decisions of their pretensions was an important function. You had to make clearings before you could build. . . . Besides, clearing—necessary clearing—is constructive. Without it, there can be no building, certainly none that lasts."[9]

A recent case in New York starkly exposes the competition in choice-of-law thinking between the quest for rule or principle and the demands for rationality and reason. In the opinion in *Neumeier v. Kuehner*,[10] written by Chief Judge Fuld, the New York Court of Appeals recently endorsed "a few rules of general applicability, promising a fair level of predictability" for choice of law in a particular area of tort. These "rules" or "principles" were ones first articulated by Judge Fuld in an earlier concurring opinion in a related case.[11] In my view, the suggested rules are unworkable because reason and rationality have not yet succeeded in opening up all the dimensions of the problem. This comment is an attempt to probe a bit further into the problem of the *Neumeier* case but not at all to suggest rules or principles, for which I think we are not ready, to deal with its solution.

I.

The last few years have seen many decisions in the area of multistate tort, where the courts show a continuing concern to do justice in cases typically—but not always—involving automobile accidents in a jurisdiction having no relationship to the parties or the occurrence other than that it is the locus of the tort.[12] No richer

A.2d 439 (1963).

9. FELIX FRANKFURTER REMINISCES 293 (H.B. Phillips ed. 1960).

10. 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972).

11. Tooker v. Lopez, 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394 (1969).

12. A perhaps equally puzzling profusion of cases results from death by airplane accident, for which the Supreme Court has made some functional beginnings but with somewhat more Delphic than Olympian insight. *See, e.g.*, Richards v. United States, 369 U.S. 1 (1962); Executive Jet Aviation Inc. v. City of Cleveland, 409 U.S. 249 (1972).

nor more bemusing experience is to be found than that of the New York Court of Appeals, beginning with the now familiar case of *Babcock v. Jackson*.[13] There, New York law permitting full compensatory recovery in an action by a negligently injured guest passenger against his host was applied in a case involving a New York host, a New York guest, a car registered and insured in New York, a trip that began and was to end in New York, but an accident in Ontario, where at the time a guest passenger was completely barred from suing his host driver even for gross or wanton negligence. In 1972, in *Neumeier v. Kuehner*, the New York Court of Appeals considered the first New York guest-statute case to involve a driver and a guest who did not share a common residence or domicile.

In *Neumeier*, a New York resident, Kuehner, drove his New York registered car to Ontario and met a relative, Neumeier, at Neumeier's Ontario home; Kuehner and Neumeier then set out on a trip that was to be entirely within Ontario and to end at Neumeier's home in Ontario. The trip ended abruptly and tragically in a collision of the car with a railroad train; Keuhner and Neumeier were killed instantly.

Chief Judge Fuld, who wrote for the Court in *Babcock v. Jackson* and who has figured significantly in the several New York guest-statute cases since *Babcock*, wrote the opinion for the Court applying Ontario's statute, which by this time had been amended so as to bar recovery by guests or their representatives unless the driver was guilty of gross negligence. The intriguing problems of dealing with the earlier cases will here only be considered as they bear on the question whether it is time for the elaboration of principles to deal with cases in this area.

Neumeier, taken together with its immediate predecessor guest-statute case, *Tooker v. Lopez*,[14] appears to establish that, in

13. 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963). The New York decisions, beginning with the *Babcock* case, are analyzed in considerable detail in von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 946-52 (1975). *See also Symposium, Neumeier v. Kuehner: A Conflicts Conflict*, 1 HOFSTRA L. REV. 93 (1973).

14. 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394 (1969) (New York law applied to accident in Michigan, a guest-statute state, where guest and host, classmates at a Michigan university, were from New York and the car was registered and insured in New York, although the trip began and was to end in Michigan).

an accident outside New York involving a New York driver and car, New York law will normally govern if the injured guest is from New York but will not if the guest resides outside New York, at least if the accident occurred in the guest's home state. The Court does not clearly explain the result as a rational elaboration of the policies underlying the New York and Ontario law, preferring instead to adopt Judge Fuld's guidelines set out in his concurring opinion in *Tooker v. Lopez*. Under the basic guideline for cases in which the passenger and driver are domiciled in different states, normally "the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive-law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants."[15]

II.

Briefly stated, the relevant substantive-law purposes in guest-statute cases would include those ordinarily found in negligence cases—a compensatory interest in shifting the loss from the victim to the actor, or through insurance to the automobile-driving public, and a deterrent interest either specifically addressed to the actor or generally addressed to automobile drivers, depending on the degree to which insurance practice specifically affects drivers with accident experience.[16] These policies are the ones presumably predominant in New York law, which has no guest statute, while in Ontario, although they are clearly determinative in many negligence cases, they have been subordinated to specific policies addressed to the guest-passenger or host-driver. These specific policies need to be separated into three groups for choice-of-law purposes, as each group must be considered separately in the multistate context.

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15. As will be seen, this is Judge Fuld's third rule and is the one applicable on the facts of *Neumeier*. His second rule, discussed later, appears to be a special application of the third rule to cases in which the driver comes from a state that does not impose liability or the guest comes from a state that imposes liability.

16. Although a sophisticated analysis of tort policy will doubtless require the re-examination of many premises currently used to establish the concern of a jurisdiction with particular policy goals, in this context the communities concerned will normally be the place of accident and the communities from which the victim and the actor come, so that it will be sufficient here to examine the question from the standpoint of those communities. *See generally*, G. CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970).

First are policies reflecting the unfairness or inappropriateness of shifting the loss to a generous driver who has accommodated an ungrateful guest. This range of policy is most understandable in hitch-hiking settings; it loses much of its appeal in settings in which the relationship is closer socially or by kinship, as in *Neumeier*, and all of its appeal, at least so far as the Canadian cases are concerned, in settings in which the relationship is in part an employer-employee relationship or where the transportation occurs primarily "for hire."[17] Its relevance to the multistate setting depends somewhat on whether it is seen as reflecting a dislike of ungrateful passengers or a protection in the interest of fairness to the driver. If it were the only policy supporting a guest statute,[18] it clearly would be relevant to a multistate situation in which both the passenger and the driver came from that jurisdiction. (Since it would seem directed at least to the persons involved, the policy is one rationally applied by the home community of both persons; it is not clear that it should be asserted by the place of accident when both persons come from a community having no such policy.)

If the persons come from different jurisdictions, only one of which has a guest statute, the bearing of this policy is more difficult to assess. If the purpose of the guest statute could somehow be seen solely to reflect a lack of sympathy for the ungrateful guest, there is an argument that such a statute in the place of accident, by which that jurisdiction has subordinated its concern with compensation, is relevant for all victims, regardless of their home state; there is, however, a contrary concern at home if the guest comes from a

17. See my discussion of cases in Ontario, in Trautman, *Kell v. Henderson: A Comment*, 67 COLUM. L. REV. 465, 468-69 (1967).

18. I was once persuaded by the Ontario cases to suppose that it might be the primary policy supporting the Ontario guest statute. *Id.* That nothing of the sort could properly be identified as part of the legislative history of the statute is convincingly demonstrated in Baade, *The Case of the Disinterested Two States: Neumeier v. Kuehner*, in *Symposium Neumeier v. Kuehner: A Conflicts Conflict*, 1 HOFSTRA L. REV. 93, 150 (1973). There, as here, I was speaking hypothetically. I accept Judge Breitel's wise admonition, *see* Breitel, J., dissenting in Tooker v. Lopez, 24 N.Y.2d 569, 597, 301 N.Y.S.2d 519, 543, 249 N.E.2d 395, 411 (1969): "Intra-mural speculation on the policies of other States has obvious limitations because of restricted information and wisdom. It is difficult enough to interpret the statutes and decisional rules of one's own State." But I believe there are many situations in which one can nonetheless proceed because no conceivable policy—whether it actually exists or existed—could rationally support application of a jurisdiction's rule in a multistate context.

liability state. On the other hand, if the purpose were seen as one solely to protect the driver and not to subordinate a compensatory concern in the place of accident, such a statute in the place of accident should rationally have little bearing on a case in which the driver comes from a liability state, as in the *Neumeier* case. If no reliable indication exists of which of these two possible purposes underlay the statute, perhaps it will suffice at this stage of the analysis to recognize that the statute may not have as much bearing on the case as it would if both parties came from the guest-statute jurisdiction.[19]

A second range of policies conceivably supporting guest statutes has to do with possible collusion between guest and host in an action whose ultimate goal is to exploit insurance coverage. Unlike the policies associated with ingratitude, these policies are less intense in the case of hitchhiking and more intense as the relationship between the parties becomes more settled, as in *Neumeier*; such policies indeed would support independently a bar of suits between spouses in tort. In a multistate setting, then, the policies would rationally be asserted on the basis of any of a number of ties between the transaction and the jurisdiction having such policies: (1) if the jurisdiction is the forum, it may be concerned on the basis of its interest in regulating potentially collusive litigation; (2) if the jurisdiction is the focal point of the relationship (*e.g.*, domicile of spouses; center of a relationship, such as an employment or social relationship), it may also be concerned, although more particularly if it is also the forum; and (3) if the jurisdiction has a concern with protection of the integrity of insurance coverage (because it is concerned with insurance rates of its drivers or with protection of insurance companies insuring its drivers), its policy to protect against collusion would rationally be asserted.

The third range of policies possibly supporting guest statutes works itself out about like the third aspect of policies against collusion just discussed—a policy to keep insurance rates down. Although such a policy adopted independently of policies against in-

19. An illustration of the disappearance in the multistate situation of some of the policies supportive of application of a rule in the fully domestic situation is provided in von Mehren, *supra* note 13, at 936-37.

gratitude or collusion may seem somewhat arbitrary—is it wise and just to subordinate compensation policies by singling out what may be a frequent source of insurance liability (host-guest cases) and reduce insurance rates by excluding this class of case on that ground alone? A jurisdiction with such a policy again would rationally assert it wherever it is concerned with rates of insurance, either those of its drivers or, if the insurance business were so conducted, those of all drivers whose rates vary depending on accident experience in the jurisdiction.

Fortunately, we do not always need to know which policies a jurisdiction has and how strongly they are held, for it is implicit in much of the above discussion that some policies, even if held, would not rationally be asserted in particular multistate situations. In the *Neumeier* case, on this analysis, Ontario would not rationally apply its guest statute if the purpose of the statute were (1) to keep insurance rates down (unless the Ontario accident experience of insurers of non-Ontario cars somehow came to be counted so as to increase rates charged by insurers of Ontario cars); (2) to prevent collusive suits against insurers of Ontario cars, since Ontario is neither the forum nor the jurisdiction concerned with the insurance company involved; or (3) to protect Ontario drivers against claims by ungrateful guests. If, however, Ontario has a policy with respect to ingratitude that can be said to include a policy to penalize Ontario guests injured by out-of-state drivers, the result in *Neumeier* would be supportable although not inevitable. It would be more supportable if any such policy was clearly strongly held today. Even so, as will be argued below, such a policy would have to be weighed against New York's evident policies to require its negligent drivers to compensate victims of the increasing number of automobile accidents, in a context of growing awareness of the destruction wrought by automobiles, and to treat like cases alike—a fundamental policy against discrimination between local and outside plaintiffs.

In refusing to pursue this kind of analysis and instead relying on Judge Fuld's rules, the *Neumeier* court only adds to the agony in the movement away from the *lex loci delecti*. It has been suggested that the case reflects some disenchantment with the so-called "interest analysis" and a return to territorialism, at least where the territorial connections are substantial rather than "fortuitous" or

"adventitious."[20] It clearly does not pursue analysis of the underlying domestic-law policies as far as it might. However, its movement to general guidelines or rules might be helpful, if those rules were workable. Even if they are workable, they do raise the question whether it is not unequal justice to distinguish New York and Ontario plaintiffs. Before we come to that, it will be helpful to consider the workability of Judge Fuld's guidelines.

III.

Judge Fuld, like many experienced weeders of the conflict-of-law gardens—among whom no one rises to such preeminence as Professor David F. Cavers[21]—clearly believes it is time to move judicially, as Cavers does academically, to "principles of preference" or "rules of guidance" to simplify and regularize the process of decision in choice-of-laws cases. As noted earlier, Judge Fuld's "rules" or "guidelines" first appeared in his concurring opinion in the *Tooker* case. Now he has apparently persuaded his brethren that the Court should adopt them, as three other members of the seven-judge Court concurred with Judge Fuld. Judge Breitel, who has since succeeded Fuld as Chief Judge, was of the view, in his concurring opinion, that *Neumeier* itself "is disproof that the time has come" to adopt such principles or rules.

Judge Fuld's third rule has already been referred to and, in any event, is "less categorical" than the first two, to which this discussion will be directed. They are:

> "1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
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> "2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law

20. *See* Twerski, "*Neumeier v. Kuehner: Where Are the Emperor's Clothes?*" in *Symposium, supra* note 18, at 104.

21. *See, e.g.*, Cavers, Book Review, 56 HARV. L. REV. 1170, 1172 (1943).

> permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense."

No one can dispute the need for as much simplification and predictability as is reasonably possible. It is doubtful, however, that these two rules will achieve their intended purposes.

The first rule may appear to state the results of the series of cases beginning with *Babcock* and ending with *Tooker*. It is stated, however, without regard to the content of the rules of the state of domicile. More accurately, it should be qualified by an ending clause which—if taken from the second rule—might read: "if that state's law casts the driver in liability [permits recovery] for the driver's conduct." The Court of Appeals—unlike lower New York courts—has not yet dealt with a case in which the parties' domicile and the place of registration of the car was a state with a guest statute. In *Kell v. Henderson*,[22] an Ontario driver in an Ontario car was held liable to an Ontario passenger for an accident in New York, and comparable results have been reached in Wisconsin and Minnesota.[23] The *Kell* case has since been repudiated by the court that decided it,[24] but the New York Court of Appeals has not spoken and one wonders whether Judge Fuld's first rule will be followed when it does. It is quite conceivable that a proper examination of the competing policies would lead to imposing liability under the law of the place of accident. A strong policy of compensating all victims of automobile accidents, including guests, in recognition of the increasing destructiveness of the automobile and the serious injuries often inflicted, might well be found to warrant application in the face of weak or non-existent policy bases for the guest statute involved. As the New Hampshire Supreme Court recently stated:

> The automobile guest statutes were enacted in about half the states, in the 1920's and early 1930's, as a result of vigorous pressures by skillful proponents. Legislative persuasion was largely in terms of guest relationships (hitchhikers) and uninsured personal liabilities that are no longer characteristic of

22. 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (3d Dep't 1966).

23. Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968); Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973).

24. Arbuthnot v. Allbright, 35 App. Div. 2d 315, 316 N.Y.S.2d 391 (3d Dep't 1970).

> our automotive society. Cavers, *The Choice of Law Process* 297 (1965). The problems of automobile accident law then were not what they are today. New Hampshire never succumbed to this persuasion. No American state has newly adopted a guest statute for many years. Courts of states which did adopt them are today construing them much more narrowly, evidencing their dissatisfaction with them. Pedrick, *Taken for a Ride: The Automobile Guest and Assumption of Risk; Comment, The Ohio Guest Statute*. Though still on the books, they contradict the spirit of the times. [Citations omitted.][25]

Particularly if the accident resulted in the guest's death, a court holding the New Hampshire court's view would, it seems, quite rationally conclude that policies, if any, against collusion or ingratitude or both were inapplicable if the guest was dead, and perhaps even more so if, as in *Neumeier*, the driver was also dead.[26]

Judge Fuld's second rule in its first sentence is as categorical as the first rule but does refer to the content of the law of the concerned jurisdictions. Although the rule is soundly based on notions of fairness in its usual application, it is not clear that it should be followed in all situations. Indeed, Judge Fuld himself in the *Neumeier* opinion spoke of New York's "deep interest in protecting its own residents, injured in a foreign state, against unfair or anachronistic statutes of that state"; doubtless this approach could provide an occasional basis for applying the liability-imposing law of the victim's domicile.[27]

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25. Clark v. Clark, 107 N.H. 351, 356-57, 222 A.2d 205, 210 (1966).

26. Professor Sedler agrees that courts may find a sufficient interest in the place of injury to apply its law although both parties come from a guest-statute state. *See* Sedler, *Interstate Accidents and the Unprovided for Case: Reflections on Neumeier v. Kuehner*, in *Symposium*, *supra* note 18, at 125, 133-34. Although he himself believes the place of injury's concern should not prevail if the home state "denies recovery in order to protect the defendant and his insurer, . . ." *id.* at 134, his stated view does not literally encompass a situation in which the home state's policy is weak or regressive.

27. But in Pryor v. Swarner, 445 F.2d 1272 (2d Cir. 1971), a New York resident guest sued her sister and her sister's husband, Florida residents and owner and driver, respectively, of a car registered and insured in Florida, for an accident in Ohio. Both Ohio and Florida had guest statutes. After struggling with Judge Fuld's second and third rules and applying "afresh" the *Tooker* approach, the court concluded that New York courts would not apply New York law in the face of the common policy of the place of accident and the driver's home state. *Cf.* Reich v. Purcell, 67 Cal. 2d 551, 63 Cal. Rptr. 31, 432 P.2d 727 (1967) (Traynor, C.J.), where a limitation on the amount of recovery for wrongful death in Missouri was not

A recent case in Kentucky illustrates a kind of difficulty with broad formulations such as those in all Judge Fuld's rules. In a case involving the first part of rule 2, the Kentucky court ignored the guest statute of the place of accident and the driver's technical domicile when the driver was employed in and spent much of his time in the liability-imposing state of the victim's domicile.[28] Perhaps, at least for the purpose of these rules, the term "domicile" must be given a meaning differing in some instances from the usual rules for defining domicile. Or perhaps the result is to be explained in terms of an alteration of normal expectations, if expectations form a basis for Judge Fuld's rules, when the relationship between parties from different jurisdictions was rather clearly located in one jurisdiction, here Kentucky. Although consideration of the "seat of the relationship," which was dominant in the decision in *Dym v. Gordon*,[29] appears to have been rejected by New York in *Tooker v. Lopez*, it is one of considerable appeal. It should be noted that the comparable "principle of preference" of Professor Cavers, which normally would use the lower standard of conduct or financial protection of the place of injury in preference to the laws of the home state of the victim, is qualified as follows: "at least when the person injured was not so related to the person causing the injury that the question should be relegated to the law governing the relationship."[30]

Judge Fuld's second rule does state the result in *Cipolla v. Shaposka*,[31] a 1970 Pennsylvania case which evoked considerable law review comment.[32] Like *Neumeier*, it involved a guest domiciled in one state and a host driver domiciled in another. Unlike *Neumeier*, the trip contemplated was from the driver's state to the guest's state; however, the accident occurred in the driver's home

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applied to a suit against a California defendant by Ohio plaintiffs whose cars crashed in Missouri, where neither Ohio nor California limited recovery for wrongful death.

28. Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972).

29. 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965) (New York guest and driver were summer students in guest-statute state where accident occurred).

30. D. Cavers, The Choice-of-Law Process 146 (1965) (Second Principle of Preference). *See also* the Fourth Principle of Preference, *id.* at 166, which supports use of the higher standard of the seat of the relationship rather than the lower standard of the place of injury.

31. 439 Pa. 563, 267 A.2d 854 (1970).

32. *See Symposium on Cipolla v. Shaposka— An Application of "Interest Analysis"*, 9 Duq. L. Rev. 347 (1971).

state, which had a guest statute and which probably, as the guest and driver were both students at a school in the state, could be viewed as the seat of the relationship. Thus, to Professor Cavers[33] and undoubtedly to Judge Fuld, that state's law denying liability would apply, and so the Supreme Court of Pennsylvania decided.

The Court stated that the issue was whether Pennsylvania, the guest's home state, or Delaware, the driver's home state, place of accident and place where the car was registered and insured, had "the greater interest in the application of its law" to the question presented. It noted that it was a rare case in which the driver and guest are domiciled in different states and that a deeper analysis of the underlying policies was necessary in such a case. But, after simply reciting that Pennsylvania's sole relevant contact was as the domicile of the guest while Delaware was both the domicile of the host with a policy of protecting its drivers and the place determinative for insurance rates, the Court asserted: "Thus, it appears that Delaware's contacts are qualitatively greater than Pennsylvania's and that it has a greater interest in having its law applied. . ." In a footnote to this assertion, the Court stated that the fact that Delaware was the place of the accident was not relevant "because the Delaware statute does not set out a rule of the road."

Finally, quoting Professor Cavers extensively and referring to his Second Principle, the Court found this result justified in terms of fairness to the defendant and stated that "as a general approach a territorial view seems preferable to a personal view." There was no analysis of the policies underlying the Delaware statute or of their present strength.

Justice Roberts, in dissent, agreed that the case was difficult but, after concluding that Delaware had no policy to keep insurance rates down, found the interests of the two states "evenly balanced," there being only a Delaware policy to protect a "generous host" and a Pennsylvania policy to compensate an injured guest. "In my view, each State has but one relevant contact with respect to host-guest liability—the domicile of the party who will benefit from their respective State's policy."

33. Cavers, *"Cipolla and Conflicts Justice"*, *id.* at 360.

In light of this even balance of interests, Justice Roberts would have decided the case on the basis of "what has been termed 'the better rule of law,'" a term of Professor Leflar's[34] which has been cautiously adopted as an approach in some jurisdictions, notably New Hampshire, Wisconsin, and Minnesota.[35] Although in this author's view the "better-law" approach is not only treacherous but will ultimately prove illegitimate in principle for choice-of-law theory, this is not the appropriate place for more than a word or two; in any event Justice Roberts relied also on what seems the far safer and more neutral approach of showing that the present policy underlying Delaware's guest statute was weak and regressing as seen by Delaware's own treatment of its guest statute. Doubtless many judges using the language of "better law" really are saying nothing more than that the other law has a weak, obsolescent policy basis rather than making a judgment that one rule is good and the other bad, a judgment that is, I believe, impermissible in a multistate order functioning on neutral principles.[36] On the other hand, an approach in terms of emerging and regressing rules, as elaborated elsewhere,[37] is legitimate and has utility, when undertaken with care, when the position that one state's law has a regressing policy basis can be established and documented, and when, as here, preliminary analysis shows that there is a true conflict not readily handled under simpler approaches. Justice Roberts proceeded with appropriate care, as had Chief Justice Kenison in the New Hampshire case, by establishing that there was a true conflict, that guest statutes are widely regarded as involving not an "emerging" but a "regressing" policy, and that, in support of this conclusion, guest

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34. *See* Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Calif. L. Rev. 1584 (1966).

35. Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967); Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973).

36. *Cf.* von Mehren, *supra* note 13, at 952-53; it is far more difficult to suppose that the "better-law" approach will be applied in a way that is not parochial or self-regarding than analysis of the relative strength of policy. Either approach is more persuasive when a forum rejects its own law in favor of some other law, as in Milliken v. Pratt, 125 Mass. 374 (1878). For a forum to apply its own law on the ground that that law is better is too dangerous; even the proposition that another state's law is regressing or anachronistic should be considered only when it can clearly be established on the basis of a comparative study of the law of other jurisdictions or good evidence from the state whose law is being rejected.

37. *See* A. von Mehren & D. Trautman, Law of Multistate Problems 377, 394 (1965).

statutes have been subjected to strict construction in many states, including Delaware,[38] with many "artificial" exceptions being created judicially to remove cases from the reach of guest statutes. Thus, Justice Roberts in my view persuasively established and documented that the Pennsylvania rule should be applied not because it was the law of the forum but because the Delaware guest statute is anachronistic and, as seen in analysis of Delaware cases, does not have currently significant policy underpinnings.

Doubtless the conclusion that a rule or statute currently in force lacks a present policy basis is one to be reached with care and trepidation. The difficulty with it seems to me to be entirely the practical one of the reliability of the conclusion that such a situation exists; in principle, if the situation clearly exists, there is no theoretical difficulty in saying that the shared policies of both jurisdictions to provide compensation and deterrence in tort remain and should be given effect.[39] There is then "no ground of policy for an exception,"[40] and I submit that the solution is more rational and more understandable than the result in the *Cipolla* case, if Delaware law can indeed be described as lacking a current policy basis. A general rule or principle that precludes this result will not, I believe, stand the test of time.[41]

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38. In Mumford v. Robinson, 231 A.2d 477 (Del. 1967), a guest's offer to give the host a sewing lesson on return from their visit to a fabric shop took the host out of the intended scope of the Delaware statute, whose purpose "is to protect one who generously, without accruing benefit, has transported another in his motor vehicle."

39. *See* Sedler, *supra* note 26, at 137-39.

40. Holmes, J., speaking for the court in Polson v. Stewart, 167 Mass. 211, 215, 45 N.E. 737, 738 (1897). Although Justice Holmes was here expressing the view that the local policy was no different from that of the other jurisdiction involved, the language seems to me to fit better than that used in an equally venerable case that may be more precisely in point, Milliken v. Pratt, 125 Mass. 374 (1878) (Gray, C.J.), finding that there was no local policy to interfere with shared interests of the two jurisdictions in the security of transactions. For a quite related analysis by a great judge in modern times, *see* Traynor, C.J., in Bernkrant v. Fowler, 55 Cal. 2d 588, 596, 12 Cal. Rptr. 266, 270, 360 P.2d 906, 910 (1961) (" . . . [W]e can give effect to the common policy of both states to enforce lawful contracts and sustain Nevada's interest . . . without subordinating any legitimate interest of this state").

41. *See, e.g.*, Rosenthal v. Warren, 374 F. Supp. 522 (S.D.N.Y. 1974) (later Massachusetts statute abolishing charitable immunity "an effective indication of the contemporary attitude of Massachusetts toward charitable immunity"). *Id.* at 527.

IV.

Even if Judge Fuld's rules were not subject to the objections already expressed, they produce a result which appears, as noted above, to discriminate between New York and Ontario plaintiffs. Judge Fuld concedes that the court, "in a sense, extend[s] a right less generous than New York extends to a New York passenger in a New York vehicle with New York insurance." That result, however, he states is not a consequence of improper or "invidious discrimination." New York law should not be applied "simply because some may think it is a better rule, where doing so does not advance any New York State interest, nor the interest of any New York State domiciliary." "It is clear that, although New York has a deep interest in protecting its own residents, injured in a foreign state, against unfair or anachronistic statutes of that state, it has no legitimate interest in ignoring the public policy of a foreign jurisdiction—such as Ontario—and in protecting the plaintiff guest domiciled and injured there from legislation obviously addressed, at the very least, to a resident riding in a vehicle traveling within its borders."

Briefly put, I submit that here, as in other areas where even-handed treatment of people comes in question, the question whether the discrimination is invidious depends on whether the classification of people according to the communities from which they come is a rational classification in the context of this case.[42] Whether a question of constitutional dimension is presented is beside the point; an irrational classification produced by choice-of-law rules is clearly an objection to such rules.[43] I agree with Judge Bergan in dissent that the distinction between New York and Ontario plaintiffs is inadmissible if, in this context, the residence of the plaintiff is not the basis of a rational distinction. The difficulty is that one cannot decide that question without knowing the policy basis of the

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42. For collections of relevant materials, *see* A. von Mehren & D. Trautman, Law of Multistate Problems 1258-66 (1965); R. Cramton, D. Currie & H. Kay, Conflict of Laws 470-87 (2d ed. 1975). In Toomer v. Witsell, 334 U.S. 385 (1948), the Court used an approach for the Privileges and Immunities Clause that seems equally valid for equal protection, asking for "substantial reason" and "valid independent reasons" for differential treatment. *See generally*, Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. Chi. L. Rev. 1 (1960), reprinted in B. Currie, Selected Essays on the Conflict of Laws 526 (1963).

43. *See* von Mehren, *supra* note 13, at 945-46, 948-52; Sedler, *supra* note 26, at 148.

law of the plaintiff's residence that denies him recovery. And so the question, again, resolves itself into the policy basis of the Ontario law. There is no escape. If the policy is directed to Ontario plaintiffs, the classification has a valid independent basis (on the assumption, of course, that the policy remains of importance). If it is directed to the defendant, or to his insurer, or to suits in Ontario, it cannot provide a basis for a rational classification. What is interesting is that Chief Judge Fuld did not proceed in this way.

As noted above, Judge Fuld did face up to the problem quite forthrightly, which in itself is something of a rarity in choice-of-law decisions. However, Judge Fuld's resolution of the issue is disappointing. He contented himself with a statement that different rules of law obtain in different jurisdictions; there may exist in the other jurisdiction "diverse and important connections with the litigants and the litigated issues." However, I believe that it is not enough to state that the connections with the other jurisdiction are "diverse and important"; one must give content to these words, and in this context the word "important" must mean significant in light of the policies that bear on the issue presented. Judge Fuld may well have worked all these questions out in his own mind, but he has not succeeded in showing how they lead him to the decision in *Neumeier*.

Some of the difficulty stems from the rather treacherous notion that a court should ask whether a given solution "advances" the interest of a state. That notion proceeds from analysis suggested by Professor Brainerd Currie, who popularized and elaborated on methods of analysis suggested by many early critics of the 1934 *Restatement*, such as Professors Cook, Lorenzen, and Cavers. Currie's special talent was exhaustive, and at times exhausting, analysis of policy. His emphasis, unfortunately, was on local policies rather than also the policies that a single jurisdiction—state or nation—might look to in recognition of its membership in a community of states or nations. Nevertheless, in proceeding from the policies of individual jurisdictions, he was able to expose the defects of a great number of decisions based on place-of-wrong or place-of-contracting approaches, and his analysis has, in that way, been extremely helpful to American conflict of laws. Limitation of the inquiry to the domestic-law policies of each jurisdiction inevitably

led to thinking in terms of "advancing" the policies of a single jurisdiction as compared with possibly conflicting policies of other jurisdictions. The "advancement" idea is sound but not at all complete; it should be seen as one facet of a more general inquiry into the relevance of a given domestic-law policy to the total multistate situation.

If one is prepared to go beyond analysis of domestic-law policies, recognizing that multistate policies often override domestic-law policies,[44] a contrary result in *Neumeier* is more clearly supported. A basic policy in all domestic law and in conflicts law is the evenhanded treatment of similar cases; indeed, law itself can be defined as the like treatment of like problems. In the multistate case, of course, great difficulty arises in deciding which cases are similar or like cases, but a solution, as in domestic law, can be found in terms of an answer to the question whether there is a reasonable basis for distinction between different classes of persons. Residence (or other elements, such as domicile and nationality, used to relate persons to communities) is of course a rational basis for distinguishing among different persons for many purposes such as questions of capacity and status. The question is whether there is a policy basis for a distinction along these lines for questions of liability in automobile guest cases. Clearly there is not, if the purpose of the guest statute is to protect insurers against collusion; the proper distinction would be among insurers, not plaintiffs. However, if the policy is to penalize ingratitude, more of a case for distinctions among plaintiffs can be made, but only if the policy is directed at guests. As suggested earlier, the policy could also or even primarily be directed to drivers; that seems a more likely conclusion in view of the common concern of all jurisdictions to compensate accident victims. Even if the policy is clearly directed at least in part at guests, the policy should be quite strong to prevail over policies of avoiding irrational discrimination. Even the appearance of irrational discrimination ought if possible to be avoided; consequently, in cases of doubt concerning the existence or strength of such a policy, it would be rational to resolve the controversy in favor of evenhanded treatment.

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44. *See* A. VON MEHREN & D. TRAUTMAN, LAW OF MULTISTATE PROBLEMS 215-327 (1965).

Thus, it seems to this writer that the court was misled by its concern to see whether local interests would be "advanced." If that concern means only that some pecuniary interest of New York, or of a New York resident, must be favored, it is an unworthy concern in a multistate case and should be dismissed as being parochial and divisive in a multistate society. If, on the other hand, New York's more fundamental interest in like treatment of like cases, in the idea of law, is one encompassed within the term "advancement," then the notion of advancement is more acceptable but at the same time should lead to a much more complicated inquiry than that undertaken by the court in *Neumeier* and, it is submitted, to a contrary result.

I could understand a reconciliation of the result in *Cipolla* with a decision either way in *Neumeier*. If, accepting the *Cipolla* result, New York denied its citizen recovery in an action against an Ontario defendant arising out of an accident in Ontario, the actual result in *Neumeier* in denying an Ontario citizen recovery would present no problem of discrimination, although the defendant is from New York. That result, in *Neumeier*, however, is irrational if the only purposes of the Ontario guest statute are related to Ontario defendants and their insurers. If these assumptions about the purposes of the Ontario statute are sound, it would then make sense to let recovery or non-recovery turn on the defendant's citizenship and the place of insurance of the car, so that *Cipolla* would stand together with the contrary result in *Neumeier*. And the contrary result in *Neumeier* would remove the apparent discrimination between plaintiffs in the *Tooker* and *Neumeier* situations.

A more fundamental difficulty arises, however, when the place of accident is New York and there is an Ontario driver. Whether the plaintiff is from Ontario or New York, the assumed Ontario purposes then clearly conflict with relevant compensatory and deterrent policies of New York. These purposes, perhaps involved in the *Cipolla* situation, become far more clear and compelling when the accident occurs in the state granting recovery. Indeed, I find it difficult to believe, because of these now clearly relevant policies of the place of accident, that New York would deny recovery to a New

York plaintiff injured in New York by an Ontario car.[45] The Ontario policies of protecting the defendant and his insurer remain as strong, but competing New York policies have come into play.

However, once New York grants recovery to its plaintiff injured in New York by an Ontario car, it ought also to grant recovery to the Ontario plaintiff injured in New York by an Ontario car. This follows not only from New York's substantive-law policies but also from its multistate policies against discrimination between plaintiffs on the basis of citizenship where citizenship is an irrational distinction.[46]

Finally, it is not inconceivable to me that a state's interest in protecting its defendants should not prevail even in the *Cipolla* situation. That conclusion would be far easier to reach if one were satisfied that there is no current policy footing for the Ontario guest statute, and Judge Fuld has indeed broadly hinted that an "unfair and anachronistic" statute ought not to be applied to its citizens. If, however, it takes that view, subordinating Ontario's defendant-protecting policies to New York's concern with compensation of its citizens—a concern we assume is shared by Ontario but subordinated in the interest of protecting Ontario drivers—then New York must, it seems to me, extend the same compensatory interest to Ontario citizens in the *Neumeier* situation, where Ontario's concern with its drivers disappears, and in the case of an Ontario guest injured in an Ontario car in New York, where New York's compensatory interest is at least as clear as it would be in a *Cipolla* situation.

V.

I do not intend here to prescribe the results outlined above any more than I intended to approve *Kell v. Henderson*. All I intend to do is to indicate that we need to do much more thinking about the problem, and in particular to strive further for approaches that reach principled results. It does seem to me that Judge Fuld's rules are unruly in this sense, that his principles will lead to results that

45. Indeed, Judge Fuld would so hold, according to the second part of his second rule. *See* pp. 9-10 *supra*.

46. *See* note 24, *supra*.

will not stand up when tested against demands for neutrality and evenhandedness. We have not reached a satisfactory position and, no more than the New Hampshire court in *Gray v. Gray*, do we have reason for complacency.

Although for these reasons I find the approach taken in Judge Fuld's rules unrewarding, it occurs to me that it may be helpful to summarize what I have been saying in terms that attempt to help a judge by formulating the issue in these cases for him. Let me be clear at the outset that this formulation really adds nothing new to what might be a statement of a general functional or policy-based approach. Indeed, it is perhaps only a paraphrase of Professor Cavers's 1933 suggestion. But it may be helpful to give it a guest-statute setting. The issue, I believe, would then be, for any forum including but not limited to a forum in the place of accident or in the domicile of the guest or the host, as follows: Do the interests of the state with the guest statute, given the current significance of policies known to underlie or presumably underlying the statute, and the relevance of those policies to the actual multistate occurrence, warrant application of the guest statute as an exception to the shared domestic-law policies of both jurisdictions in compensation and deterrence and their multistate interests in rules that work with a fair degree of predictability and evenhandedness and that will be perceived as being evenhanded by those subject to the rules?

I believe this formulation, although it may lead to different results in the hands of different judges putting differing weights on the several implicated policies, at least puts the correct question. Argument by able counsel addressed to this question and judgment by judges aware of local interests in multistate order and stability[47] —including interests in neutral evenhanded principles—should ultimately provide more information that is understandable and transmissible for use in new situations[48] than is provided by the principles adopted in *Neumeier*. Indeed, it is entirely possible for a court under this formulation to reach the results in *Cipolla* and *Neumeier*. A court doing so would have concluded that it could not confidently sort out the various policies underlying the other state's

47. *Cf.* RESTATEMENT (SECOND) CONFLICT OF LAWS §6.

48. *See* A. VON MEHREN & D. TRAUTMAN, LAW OF MULTISTATE PROBLEMS 78 (1965).

guest statute and determine that the strength of the policies was weak or that multistate order arranged according to territorial notions and demands for simplicity ought to prevail over other multistate interests, that are in any event perhaps too uncertain, in predictability and evenhandedness. However, the court would have understood far better what it was deciding and could have explained how its decision ought to affect other cases with other fact and law patterns. Thus, even if I were able to find the *Neumeier* and *Cipolla* results correct, I would feel as Justice Jackson so well expressed it: "I part company with the Court as to the road we will travel to reach a destination where all agree we will stop, at least for the night. But sometimes the path that we are beating out by travel is more important to the future wayfarer than the place in which we choose to lodge."[49]

49. Mr. Justice Jackson, concurring in First National Bank of Chicago v. United Air Lines, Inc., 342 U.S. 396, 398 (1952).