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TRANSNATIONAL PUBLIC POLICY AS A FACTOR IN CHOICE OF LAW ANALYSIS

In the adjudication of a transnational controversy, courts may find that the dispositive choice of law doctrines unequivocally direct the application of foreign law that is repugnant or obnoxious to the forum's sense of justice and morality. In these instances, United States courts will invoke the concept of public policy, a device which permits the forum to avoid application of pernicious foreign law. The classic justification for invoking public policy in choice of law analysis is Justice Cardozo's formulation that application of the foreign law would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonweal."

1. Transnational controversies arise whenever states assert competing claims of competence to resolve issues or regulate transactions which affect a variety of geographical areas. These disputes may involve various combinations of persons and property of diverse national affiliations. See, e.g., M. McDougal & M. Reisman, International Law in Contemporary Perspective 1271 (1981).

2. Public policy as a factor in choice of law analysis is an exception to the practice of resolving choice of law questions with policy neutral choice of law rules. These mechanismic rules, stated in latin phrases which generally begin with the words lex loci, meaning "law of the place," are identified with the original Restatement of Conflict of Laws. For example, the lex loci delicti rule requires that tort claims be governed by the state where the last event necessary to make an actor liable takes place. Restatement (First) of Conflict of Laws § 377 (1934). The lex loci celebrationis rule resolves questions concerning the validity of a marriage by referring to the law of the place where the marriage was celebrated. Id. § 121. Similarly, the lex loci contractus rule signals application of the law of the place of contracting to determine the validity and effect of a promise. Id. § 332. See also 1 Dicey and Morris on the Conflict of Laws 26-27 (J. Morris, 10th ed. 1980).

3. See Cavers, A Critique of the Choice-of-Law Problem, 47 Harv. L. Rev. 173, 183 (1933); 2 E. Rabel, The Conflict of Laws: A Comparative Study 558-60 (1947). See also generally Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 Colum. L. Rev. 969 (1956). Public policy has most often been asserted as a consideration in cases involving either the validity of a marriage or divorce, or the enforcement of a tax or penal statute. These issues are regarded as being peculiarly reflective of domestic policy. Moreover, it is undesirable that the rights, duties, disabilities and immunities conferred or imposed by the family relationship should constantly change as members of a family cross state boundaries during temporary absences from their domicile. Id.

4. Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 111 (1918). Loucks concerned an employee who was killed in Massachusetts as a result of the negligence of
Discussion of "justice" and "good morals," however, tends to lack analytical bite. The actual practice of courts in applying the public policy exception therefore has been the object of much criticism. Choice of law determinations relying on the public policy exception have been particularly susceptible to charges that they are primarily motivated by parochialism on the part of the decisionmakers. In exploring the validity of this allegation, Professors Paulsen and Sovern reviewed United States conflicts cases applying the public policy exception and found that "the overwhelming number of cases which have rejected foreign law on public policy grounds are cases with which the forum had some important connection." The public policy exception is thus seen as a species of interest analysis.

In the cases reviewed by Paulsen and Sovern, courts avoided application of foreign law by first identifying a connection between the controversy and the forum, and then declaring that this connection justified application of forum law. Rather than discussing why the fo-

other employees of the defendant. Id. at 102. The deceased was survived by a wife and two children, residents of New York, who sought damages. Id. The laws of New York and Massachusetts concerning employer liability for employee negligence were in direct conflict. The relevant Massachusetts statute permitted an action to be brought against a corporation for damages arising from the negligence of the corporation's employees. Id. New York law did not permit such actions. Id.

Holding that it was not against forum policy for a New York court to enforce a right of action granted by a Massachusetts statute, Justice Cardozo reasoned:

If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare . . . [T]here is nothing in the Massachusetts statute that outrages the public policy of New York . . . [T]he fundamental policy is that there shall be some atonement for the wrong.

Id. at 110-11.

5. See, e.g., Paulsen & Sovern, supra note 3, at 970-71; Beach, Uniform Interstate Enforcement of Vested Rights, 27 YALE L.J. 656, 662 (1918) (referring to employment of the exception as an "intolerable affection of superior virtue").


7. Paulsen & Sovern, supra note 3, at 981.

8. Interest analysis has largely supplanted the lex loci approach of the First Restatement. See supra note 2. Under interest analysis, courts weigh the respective interests of jurisdictions involved in a controversy to determine which jurisdiction has the strongest connection with the dispute, and therefore should have its law applied. See, e.g., Ehrenzweig, A Counter-Revolution in Conflicts Law? From Beale to Cavers, 80 HARV. L. REV. 377 (1966).

9. See, e.g., Mackey v. Pettijohn, 6 Kan. App. 57, 49 P. 636 (1897) (property located in Kansas; situs law applied); Chambers v. Consolidated Garage Co., 210 S.W. 565 (Tex. Civ. App. 1919), aff'd, 111 Tex. 293, 231 S.W. 1022 (1921) (Texas law applicable because the purchaser was a resident of Texas); Hutchinson v. Ross, 262 N.Y. 381, 187 N.E. 65 (1933) (trust property located in New York, situs law controlled); Forgan v. Bainbridge,
rum's connection with a particular case justified rejection of the choice of law result mandated by ordinary analysis, the courts retreated to a public policy platitude. ¹⁰

Judicial failure to focus on the purpose and role of the public policy exception and to structure a clear and analytical method for employing it, have earned the concept a reputation as a device of judicial inertia. ¹¹ Paulsen and Sovern concluded that "[t]he principal vice of the public policy concepts is that they provide a substitute for analysis. The concepts stand in the way of careful thought, of discriminating distinctions, and of true policy development in the conflict of laws." ¹² As currently applied, the public policy exception both inadequately accounts for all the interests implicated in the transnational controversy and obscures the purpose for invocation of the public policy concept.

The failure of the current conception of public policy to provide a structured, analytical framework for choice of law purposes leaves courts to apply either a platitudinous public policy exception, or hoary and mechanistic choice of law rules such as the lex loci automatons. ¹³ These approaches ignore interests that demand recognition under a structured public policy exception. The purpose of this note is to propose that a reformulated concept of public policy—one adopting a structured, analytical framework and recognizing transnational interests—would yield a system of choice of law analysis that is adequately responsive to the challenges and demands of the world community. Drawing upon and extending American and European conflict of laws theories, this note will suggest that transnational public policy concerns ¹⁴ are a valid factor in choice of law analysis and that such con-

34 Ariz. 408, 274 P. 155 (1928) (Illinois law held applicable to a mortgage granted in Illinois).

10. See, e.g., Mackey v. Pettijohn, 6 Kan. App. at 60, 49 P. at 637. As justification for the application of forum law, the Mackey court merely stated: "[T]o allow the rule of decision in Missouri to prevail here would be to overturn our own policy with respect to mortgages on personal property." See also Forgan v. Bainbridge, 34 Ariz. at 415, 274 P. at 158 ("we are not required under the doctrine of comity to enforce similar contracts according to [a foreign jurisdiction's] rule, when such rule is directly opposed to our own public policy").

11. Paulsen & Sovern, supra note 3, at 1016.

12. Id.

13. See supra note 2.

cerns may have a positive selection role\textsuperscript{15} in choice of law decisionmaking. This probing approach would displace the purely negative,\textsuperscript{16} overriding functions of public policy illustrated in many decisions and result in a more rational choice of law analysis.

**PUBLIC POLICY SOURCES AND EFFECTS**

**A. The United States Approach**

A relatively recent case involving international art theft illustrates the failure of courts to recognize transnational interests in choice of law analysis. In *Kunstsammlungen zu Weimar v. Elicofon*,\textsuperscript{17} the United States District Court for the Eastern District of New York considered cross-motions for summary judgment in an action brought by a German Government art museum seeking the return of two Dürrer\textsuperscript{18} paintings stolen from Germany at the end of World War II.\textsuperscript{19} Elicofon claimed ownership of the paintings based on twenty years of uninterrupted possession, from his good faith purchase in Brooklyn in 1946 until his discovery of their identity in 1966.\textsuperscript{20} Ruling on standing,\textsuperscript{21} limitations of actions and choice of law questions, the court granted the plaintiff's motion for summary judgment and ordered Elicofon to deliver the paintings to the Kunstsammlungen.\textsuperscript{22}

The district court superficially considered whether New York or German law should be applied to determine whether Elicofon had acquired title to the paintings. The court recited the choice of law rule "that questions relating to the validity of a transfer of personal prop-

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\textsuperscript{15} See infra notes 160-69 and accompanying text.
\textsuperscript{16} Id.
\textsuperscript{17} 536 F. Supp. 829 (E.D.N.Y. 1981).
\textsuperscript{18} Albrecht Dürrer (1471-1528) was a German painter and wood engraver. See M. Levy, Dürrer 18 (1964).
\textsuperscript{19} 536 F. Supp. at 830.
\textsuperscript{20} Id. at 833.
\textsuperscript{21} The court described how the Kunstsammlungen derived standing to sue:

On April 14, 1969, retroactive to January 1, 1969, the Minister of Culture of the German Democratic Republic, issued an order conferring juridical personality upon the former Staatliche Kunstsammlungen, which thereafter became known as the Kunstsammlungen zu Weimer [the Weimar Art Collection], a status which under East German Law entitled the Kunstsammlungen to maintain suit for return of the Dürrers.

Id. at 832.
\textsuperscript{22} Id. at 858-59.
Property are governed by the law of the state where the property is located at the time of the alleged transfer.\textsuperscript{23} Even though the paintings were stolen in Germany,\textsuperscript{24} the court determined that New York law should be applied since the paintings were located in New York at the time they were sold.\textsuperscript{25} The court also referred to the "significant relationship" test of the Second Restatement.\textsuperscript{26} Noting that the Dürer paintings were described as "the most important pieces of art of the Land of Thuringia"\textsuperscript{27} and "the most valuable possessions of the Land of Thuringia,"\textsuperscript{28} the court nonetheless held that "Germany's 'connection with the controversy' is not sufficient 'to justify displacing the rule of lex loci delicti.'"\textsuperscript{29} The Second Circuit Court of Appeals affirmed this choice of law determination "substantially for the reasons stated in the district court's opinion."\textsuperscript{30}

The superficiality of the district court's choice of law analysis begs criticism. It is difficult to understand how New York's fortuitous relationship to the paintings could be considered more significant than Germany's relationship to them. The protection and preservation of cultural property is a national public interest in the sense that each


\textsuperscript{24} 536 F. Supp. at 833-39.

\textsuperscript{25} Id. at 846. In diversity cases, federal courts apply the conflict of laws rules that would be applied by the courts of the state in which the federal court is sitting. See Klaxon v. Stentor Electric Mfg., 313 U.S. 487 (1941).

\textsuperscript{26} Section 222 of the Second Restatement enunciates the general rule for determination of choice of law questions:

The interests of the parties in a thing are determined, depending upon the circumstances, either by the "law" or (by) the "local law" of the state which, (with respect) to the particular issue, has the most significant relationship to the thing and the parties (emphasis supplied).

In addition, comment (a) to § 246 provides that "[t]he state where a chattel is situated has the dominant interest in determining the circumstances under which an interest in the chattel will be transferred by adverse possession or by prescription." Restatement (Second) of Conflict of Laws (1969), cited in Elicofon, 536 F. Supp. at 846.

\textsuperscript{27} 536 F. Supp. at 834-35 (citing Letter from Dr. D.W. Scheiding, Director of the Kunstsammlungen zu Weimar, to Thuringian Ministry of Education (June 27, 1945)).

\textsuperscript{28} Id. at 835 (citing Letter from Dr. D.W. Scheiding, Director of the Kunstsammlungen zu Weimar, to Thuringian Ministry of Education (July 21, 1945)).

\textsuperscript{29} 536 F. Supp. at 846 (citing Neumeier v. Kuehner, 31 N.Y.2d 121, 129, 335 N.Y.S.2d 64, 71, 286 N.E.2d 454, 458 (1972)). The lex loci delicti choice of law mandates the application of the law of the place where the tort was committed. See supra note 2. In Elicofon, the court concluded that wrongful possession of the paintings occurred in New York. 546 F. Supp. at 831.

\textsuperscript{30} 678 F.2d 1150, 1160 (2d Cir. 1982).
nation is vitally concerned with the preservation of its own cultural heritage.31 Thus, Germany's interest in the Dürer paintings, its cultural property, should have given Germany a greater interest in the adjudication of their ownership.32 In addition, there is a transnational interest in cultural property because all nations share a common interest in preserving the aggregate cultural heritage of the world community.33 Under a structured public policy analysis,34 these transnational interests would be recognized and considered in determining which law to apply. In Elicofon, these interests should have been weighed against those of the New York forum in order to determine which law should govern. This balancing of interests would ensure that an interest based on fortuitous contacts would not blithely obscure an interest of transnational dimensions.

B. The European Perspective

Courts in the United States have failed to delineate the purposes and roles of the public policy exception35 and have tended to employ the exception to further domestic concerns at the expense of foreign and transnational interests.36 These faults could be remedied by adoption of certain theories advanced by European choice of law scholars. These scholars have developed a structured concept of public policy

31. This interest is reflected in screening regulations which empower the government of the country of origin to decide whether or not a particular work of art should be allowed to leave its borders. Under English law, before an export license is issued, an expert decides how closely the work of art is connected with English history. The export license will be withheld if the artwork is of outstanding significance to the study of art, learning or history. IV LAW ON HISTORICAL MONUMENTS 153 (1913). Other examples of this approach are found in French law, see id., and Polish legislation. See B. Burnham, HANDBOOK OF NATIONAL LEGISLATION (1974). Japan has one of the most effective systems for protecting cultural property through its specific prohibition of the export of selected cultural items. For an analysis of the Japanese statutory scheme, see Administration For Protection of Cultural Properties in Japan (1962).

32. See supra notes 27-29 and accompanying text. For a comparative study of domestic regulations and international agreements recognizing and protecting interests in cultural property, see S. Williams, supra note 14.


34. See infra note 37 and accompanying text.


36. See generally 1 DICEY AND MORRIS ON THE CONFLICT OF LAWS, supra note 2, at 83 (since domestic law will apply when the right, power, capacity, disability or legal relationship arising under the law of a foreign country is inconsistent with the forum's fundamental public policy, the effect of the doctrine of public policy always is to exclude the application of otherwise applicable foreign law).
which distinguishes among types of public policy according to their respective sources and effects. Adoption of a more probing public policy analysis modelled on the European approach would contribute greatly toward more comprehensible and internationally sensitive choice of law determinations.

Savigny noted that public policy may sometimes operate to bar an application of foreign law which under ordinary choice of law analysis would be applicable. Savigny reduced such exceptions to two classes:

A. Laws of a strictly positive, imperative nature which are consequently inconsistent with that freedom of application which pays no regard to the limits of particular states.
B. Legal institutions of a foreign state, of which the existence is not at all recognized in ours, and which, therefore, have no claim to the protection of our courts.

The first class of exceptions rests on either moral or public interest grounds. For example, Savigny cites "every marriage law which excludes polygamy" and the "laws which restrict the acquisition of immovable property by Jews." These laws, by barring certain classes of persons from acquiring immovable property and refusing to recognize certain marital arrangements, implement imperative moral and public interests of the forum. The second class of exceptions is illustrated by

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39. F. SAVIGNY, PRIVATE INTERNATIONAL LAW AND THE RETROSPECTIVE OPERATION OF STATUTES (W. Guthrie trans. 2d ed. 1880 & photo. reprint 1972) (English translation of F. Savigny, 8 SYSTEM DES HEUTIGEN ROEMISCHEN RECHTS (Berlin 1849)). Savigny made his observations in the context of the German Empire, focusing on the relations between the individual German states, as well as on the relations between the particular states and the German Empire. He also refers to the Roman Empire as support for his theory. Id. at 65.
40. Id.
41. Id. at 65, 77-78.
42. Regarding the first category of exceptions, Savigny contends that if the law of the forum forbids polygamy, then the judges of the state must refuse the protection of the law to the polygamous marriages of foreigners who, under the laws of their domicile, would be entitled to practice polygamy. Similarly, if one state's law forbids Jews to acquire land, the judges of the state may not recognize acquisitions by native Jews or foreign Jews in whose state there is no such prohibition. A similar example is given regarding heretics. Id. at 166-69.
“[s]lavery, [which] as a legal institution, is foreign to our state, [and is] not recognized in it.” Any rights and liabilities arising within the context of such institutions would be unenforceable because the forum entirely rejects the institution's legitimacy.

Savigny's sketchy outline for a structured theory of the public policy exception was expanded and clarified by subsequent developments in the European theory of *ordre public*. Three categories of *ordre public* will be discussed in this note: *ordre public interne*, *ordre public international*, and *ordre public universel*. This tripartite *ordre public* concept provides a structured framework for public policy analysis which is based upon the respective sources and effects of different public policy demands.

1. *Ordre Public Interne*

Although rules of *ordre public interne* do not enter into choice of law analysis, an understanding of this concept is useful in distinguishing the other types of *ordre public* and in gaining an appreciation of the full *ordre public* structure. *Ordre public interne* refers to “purely internal [or domestic] rules of an imperative character.” These rules are a matter of domestic, but not of international, public policy. The *ordre public interne* rule is “imperative” only in the domestic sense that it “must be applied irrespective of a contrary intention of the parties.” A rule of *ordre public interne* is not applicable when foreign

43. The second class of exceptions also operates to supersede the rule of the domicile. In a state which does not recognize slavery, a Negro slave will not be treated as property of his master, nor will the general legal incapacity of slaves be acknowledged. Savigny suggests there are additional examples relating to nobility, bankruptcy and minors. *Id.* at 65, 79-80, 166-69.

44. See infra notes 47-53 and accompanying text.

45. See infra notes 54-87 and accompanying text.

46. See infra notes 88-141 and accompanying text.


48. Kahn-Freund, supra note 47, at 42. See also, e.g., C. Forsyth, *Private International Law* 85 (1981) (modern Roman-Dutch Law of South Africa) ("Moreover, public policy in the international sense—i.e., the public policy which on occasion excludes foreign law—must be distinguished from internal public policy, the public policy which obtains in cases governed by the *lex fori* (i.e., law of the forum)").

49. Kahn-Freund, supra note 47, at 41.
law governs under the operation of ordinary choice of law analysis.\textsuperscript{50} Rules of ordre public interne are thus subordinate to ordinary choice of law analysis and apply only when a "relevant connecting factor" between the cause of action and the jurisdiction directs application of that jurisdiction’s internal law.\textsuperscript{51}

An example of an ordre public interne rule is the doctrine of consideration in the law of contracts. Under English domestic law no one can, except by deed, make a valid contract without consideration.\textsuperscript{52} Under Italian law a contract without consideration is perfectly valid.\textsuperscript{53} The enforceability of a particular agreement lacking consideration would depend on whether ordinary choice of law rules directed application of English or Italian law. As an ordre public interne rule, the English doctrine of consideration would only bear upon transactions governed by English law.

2. Ordre Public International

Ordre public international is a public policy doctrine that, despite its name, is essentially national in character.\textsuperscript{54} The term “international” refers only to the effect of the forum’s rules on the policy and law of other jurisdictions interested in the case. Ordre public international rules form “separate norms” which override general conflict of laws principles and are applied irrespective of the policy and interests of a foreign jurisdiction connected with the controversy.\textsuperscript{55} Rules of ordre public international may be said to erect a policy barrier around the forum.\textsuperscript{56}

Critics of ordre public international have described the concept as

\textsuperscript{50} C. Forsyth, supra note 48, at 42.
\textsuperscript{51} Kahn-Freund, supra note 47, at 42.
\textsuperscript{52} Id. at 41.
\textsuperscript{53} Id.
\textsuperscript{54} See, e.g., 1 H. Batiffol & P. Lagarde, Droit International Privé 424 (7th ed. 1981) (“L’expression n’est guère heureuse parce que cet ordre public est essentiellement national et s’oppose précisément à l’ordre international régulier qui est l’application des lois compétentes. Elle est néanmoins assez répandue et peut s’admettre, toutes réserves étant faites sur son sens littéral. Il a été aussi proposé de parler d’ordre public [absolu], sans grande succès, vu la relativité de la notion. La terminologie la plus sûre, quand la spécification paraît utile, consiste à viser l’ordre public au sens du droit international privé, ou l’ordre public, au sens du droit civil interne”) (emphasis in original); Husserl, supra note 37, at 39; Kahn-Freund, supra note 47, at 41.
\textsuperscript{55} Kahn-Freund, supra note 47, at 48.
\textsuperscript{56} See 3 J.P. Niboyet, Traité de Droit International Privé Français 493 (1944) (“La notion de l’ordre public . . . est une sorte de barrière fermant le passage au droit étranger.”)
“the negation of private international law”57 and “the triumph of nationalism over internationalism, of policy over uniformity or harmony.”58 It has also been observed that “inject[ing] national policies directly into conflicts law, will destroy it. In such event ‘international public order’ would embrace all internal laws.”59 These criticisms underscore the need to distinguish between ordre public interne and ordre public international, to ensure that forum law will be applied with restraint.60 Without this distinction, the concept of public policy would comprehend all domestic law and would justify the rejection of all foreign law in conflict with any provision of domestic law.

European conflict of laws scholars offer numerous definitions of ordre public international.61 Nevertheless, these scholars agree that the function and effect of ordre public international is to reject only foreign law that is in conflict with the forum’s fundamental legal principles or moral beliefs.62

In an effort to define ordre public international with greater specificity, some scholars have divided the choice of law exceptions into two subcategories. Weber63 reasoned that the operation of ordre

57. Kahn-Freund, supra note 47, at 57. “Private international law” is another term for the field of conflict of laws. In order to apply forum law, rules of ordre public international override or negate the choice of law branch of conflict of laws. See Paulsen & Sovern, supra note 3, at 969.
58. Kahn-Freund, supra note 47, at 57.
60. See, e.g., 1 J. Castel, Canadian Conflict of Laws 4-5 (1975). Castel explains the origin and effect of ordre public international as follows:

In the conflict of laws, public policy must connote more than local policy as regards local internal affairs. It is true that internal and external public policy stem from the national policy of the forum but they differ in many material respects. Rules affecting public policy and public morals in the internal legal sphere need not always have the same character in the external sphere . . . . Public policy is relative and in conflicts cases represents a national policy operating on the international level.

Id.
61. For a full discussion, see Habicht, supra note 35, at 243-49, reviewing the “Divergences of the Theory About the Exception of Public Order.” Habicht cites numerous definitions including “those legal precepts which evidently and principally serve to guarantee in the state the political, economical, and moral order established by the legislator”; “those laws which safeguard directly and immediately the principles upon which is based the political organization of a civil society, and, therefore, safeguard the state as a collective entity”; those laws which “are closely connected with the ethical, religious, economic, and political principles of a state”; “those laws ‘qui interessent les droits de la société, sa conservation, son perfectionnement’”; “the penal law, laws concerning the condition of ownership of immovables, laws of procedure, laws ‘de credit public’ and laws protecting good morals.” Id.
63. H. Weber, Die Lehre vom Ordre Public International (1922), cited in Habicht,
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Public international is founded upon forum principles of good morals and forum principles of absolute recognition derived from an interpretation of the purpose of forum laws. Szaszey provides a more complete definition of these two categories in his discussion of the concepts of propter normam externam and propter normam domesticam.

The principle of public policy, under propter normam externam, "bar[s] the application of foreign legal rules where such application would conflict with the fundamental moral, ideological, social, economic or cultural standards of the forum, its ideas of equity and justice, or its fundamental institutions of the legal order." This function of ordre public international is identical to the standard formulated by Justice Cardozo in Loucks v. Standard Oil Co. of New York. Employing this branch of ordre public international, a court would first be directed to apply foreign law under ordinary choice of law analysis. After an examination of the foreign law, however, the court would find the foreign law or its effect at odds with fundamental principles of the forum, and thus reject application of the offensive foreign law.

The principle of public policy, under propter normam domesticam, "prevails in the insistence of unconditional, absolute application of the content of domestic legal rules. . . . [H]ere the stress is on the absolutely applicable domestic legal rule." Propter normam domesticam thus functions to impose application of domestic law without re-

Supra note 35, at 247.
64. Habicht, supra note 35, at 247.
65. I. Szaszey, Conflicts of Laws in the Western, Socialist and Developing Countries (J. Decsenyi trans. 1974).
66. Id. at 96.
67. Id.
68. Id.
70. For Justice Cardozo's formulation of propter normam externam, see supra text accompanying note 4.
71. The practice of invoking public policy to escape application of offensive foreign legal rules has a long history.

Where nondiscriminatory invocation of foreign "personal" or "real" statutes and customs seemed unworkable in the growing commerce among the Italian city states . . . , foreign "statuta odiosa" were rejected in a partly regained discretion of the forum. When in nineteenth century Europe the nationality principle and vested rights . . . began to arrogate a universal regime based on non-existing superlaws, the forum's ordre public was called in as a corrective. And all through the history of conflicts law public policy has been used to limit a potentially all-embracing autonomy of the parties.

72. I. Szaszey, supra note 65, at 96.
sort to choice of law analysis or to an appraisal of the foreign law that might otherwise be applied. Domestic law is summarily applied because the particular subject matter involved in the case is deemed to be exclusively governed by the forum law.\(^\text{73}\)

Both functions of ordre public international are illustrated in *Mertz v. Mertz*.\(^\text{74}\) In *Mertz*, the plaintiff, a New York resident, had been injured in Connecticut as the result of her husband’s alleged negligent operation of a motor vehicle.\(^\text{75}\) The defendant husband was also a New York resident.\(^\text{76}\) Under Connecticut law, a spouse was permitted to recover damages for injuries caused by the other spouse’s negligent operation of an automobile,\(^\text{77}\) while New York law did not recognize such suits.\(^\text{78}\) The *lex loci delicti*\(^\text{79}\) choice of law rule applied in New York at the time directed application of the law of Connecticut, the place of the accident.\(^\text{80}\)

In rejecting the application of Connecticut law, the New York Court of Appeals relied upon two alternative rationales. First, the court found that the Connecticut law stood in direct contradiction to the public policy embodied in the New York law prohibiting negligence actions between spouses.\(^\text{81}\) This holding represents ordre public international in its first function, *propter normam externam*. Finding foreign law applicable under choice of law analysis, the court examined the foreign law and determined that it violated the fundamental public policy of New York.\(^\text{82}\) Based on the “common law doctrine of the merger of the beings of husband and wife in the unity of marriage,”\(^\text{83}\) New York’s policy disabled spouses from maintaining an action against

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73. The effect of the unconditional application of domestic rules is to bar the use of foreign law. Szaszey cites as examples of *propter normam domestica* “rules which protect individuals against undue influence, exploitation bordering on blackmail, or the extreme restriction of economic freedom.” *Id.* at 98.

74. 271 N.Y. 466, 3 N.E.2d 597 (1936).
75. 271 N.Y. at 469, 3 N.E.2d at 597-98.
76. *Id.*
77. 271 N.Y. at 470, 3 N.E.2d at 598.
78. *Id.*
79. See supra note 2. The *lex loci delicti* choice of law rule states that the place of wrong is in the state where the last event occurs that is necessary to make an actor liable for the tort, and that the law of the place of wrong determines whether a person has sustained a legal injury. See *Restatement (First) of Conflict of Laws* §§ 377-378 (1934).
80. 271 N.Y. at 469, 3 N.E.2d at 597-98.
81. 271 N.Y. at 470-73, 3 N.E.2d at 598-600.
82. *Id.*
83. 271 N.Y. at 469, 3 N.E.2d at 598.
each other for personal injuries.\textsuperscript{84} This policy would not defer to otherwise applicable foreign law.

As an alternative rationale, the court stated that the law of no other state could have an extraterritorial effect altering the status disability imposed by New York in precluding one spouse from suing the other.\textsuperscript{86} This alternative rationale is an example of the second function of \textit{ordre public international}, \textit{propter normam domesticam}. New York characterized the disability attaching to the spousal status as a rule of absolute application.\textsuperscript{86} Regardless of the result under ordinary choice of law analysis and regardless of the substantive content and effect of any otherwise applicable foreign law, the policy of the domestically imposed spousal disability would suffer no manipulation by the extraterritorial application of foreign law.\textsuperscript{87}

In both of its functions, the \textit{ordre public international} concept is concerned with elevating or transforming certain national policies to international stature in order to override the result of ordinary choice of law analysis. \textit{Ordre public international}, as an instrument of judicial decisionmaking, is thus insufficient to embrace truly transnational interests which do not have their origin in the internal policy of any given country. This inadequacy of \textit{ordre public international} is remedied by the third category of public policy, \textit{ordre public universel}.

3. \textit{Ordre Public Universel}

This category of public policy, termed \textit{propter normam inter gentes praeceptum}\textsuperscript{88} or \textit{ordre public universel},\textsuperscript{89} provides that "the principle of public policy will prevail [over ordinary choice of law analysis] if the application of a foreign legal rule conflicts with the peremptory rules of the law of nations, the international commitments of the home state, or the requirement of justice as generally recognized by the in-

\begin{itemize}
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} The court of appeals noted that "[t]he law of this state attaches to the marriage status a reciprocal disability which precludes a suit by one spouse against the other for personal injuries. It recognizes the wrong but denies remedy for such wrong by attaching to the spouse a disability to sue." 271 N.Y. at 473.
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} \textit{Id.} at 473-74.
\item \textsuperscript{88} The New York disability to sue may perhaps be an anachronistic survival of the common law rule. Even then, the courts should not transform an anachrony into an anomaly, and a disability to sue attached by our laws to the person of a wife becomes an anomaly if another State can confer upon a wife, even though residing here, a capacity to sue in our courts upon a cause of action arising there.
\item \textsuperscript{89} \textit{Id. at} 474.
\item \textsuperscript{88} Id. \textit{Supra} note \textsuperscript{65}, at 96.
\item \textsuperscript{89} \textit{Id.}
Several British and United States cases dealing with the effect of wartime decrees issued by the governments of occupied countries provide examples of the recognition and nonrecognition of \textit{ordre public universel} interests.\textsuperscript{91}

In Lorentzen \textit{v.} Lydden \& Co.,\textsuperscript{92} the Norwegian Government issued a decree purporting to requisition all ships registered in Norway, situated outside the area of Norway occupied by an enemy force, and owned by a company carrying on business in that occupied area.\textsuperscript{93} Enacted to prevent these ships from coming within the control of the enemy occupier,\textsuperscript{94} this decree gave the Norwegian Minister of Shipping the power to take over ships under construction outside the occupied area. The Minister was also authorized to collect claims of the owners of these ships and to enforce such claims by action.\textsuperscript{95} Pursuant to these powers, the Minister of Shipping brought an action in England to recover damages arising from the defendant's breach of a contract to charter a steamship.\textsuperscript{96} The defendants contended that the Minister of Shipping had no right to collect claims belonging to the owners of the steamship and that the Norwegian Government could not, by any legislative or executive act, transfer title to claims or other property situated in England.\textsuperscript{97}

The court, through Justice Atkinson, responded:

It seems to me that the English courts are entitled to take into consideration the following matters: that this is not a confiscatory decree \ldots, that England and Norway are engaged together in a desperate war for their existence, and that public policy demands that effect should be given to this decree \ldots

\textsuperscript{90} \textit{Id.} at 96. \textit{See also infra} text accompanying notes 99-102.

Szaszey remarks that this may be the only category of public policy to which an international tribunal may have recourse since \textit{ordre public interne} and \textit{ordre public international} are based on internal, domestic policies of the forum. I. \textit{SZASZEY, supra} note 65, at 96. An international tribunal, by its nature, is not bound by the domestic policy of any particular state. \textit{Id.; see} I.C.J. \textit{Stat.} art. 38, para. (1). It is empowered to adjudicate claims for the benefit of the international community and may apply that community's policy to the disputes before it. I. \textit{SZASZEY, supra} note 65, at 96.

Similarly, a national court should resort to \textit{ordre public universel} when it employs the public policy exception in cases having transnational dimensions. \textit{Id.} In these instances, the national court is playing a role similar to that of an international tribunal.

\textsuperscript{91} \textit{See infra} notes 92-142 and accompanying text.

\textsuperscript{92} [1942] 2 K.B. 202.

\textsuperscript{93} \textit{Id.} at 203.

\textsuperscript{94} \textit{Id.}

\textsuperscript{95} \textit{Id.} at 203-04.

\textsuperscript{96} \textit{Id.} at 202.

\textsuperscript{97} \textit{Id.} at 203.
where the dictates of policy are so plain,... I am entitled to give effect to this decree. It is not confiscatory, it is in the interests of public policy, and it is in accordance with the comity of nations.\textsuperscript{98}

Although the court failed to offer an analytical definition of the public policy applied, Lorentzen clearly involves application of the \textit{ordre public universel} doctrine.\textsuperscript{99} Since England and Norway were allies during the war, recognition and enforcement of the Norwegian decree by the English courts would reflect an "international commitment" of England.\textsuperscript{100} The Lorentzen holding may also reflect the belief that recognition and enforcement of a decree that would impede the efforts of an aggressor occupying another nation's territory was required by "justice as generally recognized by the international legal community."\textsuperscript{101} Under either justification, the \textit{ordre public universel} concept was invoked to override the otherwise applicable \textit{lex situs} rule,\textsuperscript{102} which would have directed application of English law and barred enforcement of the Norwegian decree.

In reaching its decision, the Lorentzen court relied on the reasoning in \textit{Anderson v. N.V. Transandine Handelmaatschappij},\textsuperscript{103} decided by the New York State Supreme Court only six months before Lorentzen. Anderson involved the A.1 decree that had been issued by the Royal Netherlands Government.\textsuperscript{104} After the Netherlands was invaded by the enemy in May, 1940, the Royal Netherlands Government, with the approval of the British Government, exercised its sovereign powers from London.\textsuperscript{105} In order to prevent property belonging to persons residing in the occupied Netherlands from being used in a manner contrary to the interests of the Netherlands, the government in exile issued the A.1 decree which purported to transfer such property to the state.\textsuperscript{106}

In \textit{Anderson}, the defendant was a Dutch corporation that had retained its domicile in the Netherlands during the enemy occupation and had deposited certain securities and assets in the United States
before the war. The plaintiff had attached these assets believing that they belonged to the defendant. The defendant moved to vacate the attachment on the ground that the assets belonged to the Netherlands Government as a result of the A.1 decree.  

The New York State Supreme Court held that the A.1 decree had effected a transfer of title to the securities and assets from the defendant to the Netherlands Government. Observing that the decree did not violate the forum’s public policy, the court cited Hilton v. Guyot and found that “the comity of nations” required the foreign decree to be recognized and enforced. Accordingly, the defendant’s motion to vacate the attachment was granted.  

In Anderson, the concept of comity served the function of ordre public universel. Although application of the forum’s lex situs choice of law rule would have permitted the court to disregard the decree, the court instead chose to enforce the decree as a matter of “comity of nations.” Like the court in Lorentzen, the Anderson court likely preferred not to frustrate the efforts of an ally aimed against a common enemy.  

The appellate division unanimously affirmed Anderson without issuing an opinion. On appeal to the New York Court of Appeals, the United States Attorney for the Southern District of New York was granted leave to file “a Suggestion of the Interest of the United States in the Matter in Litigation.” This suggestion provided a certification by the State Department that the United States Government recognized the Royal Netherlands Government in England as the govern-

107. Id.  
108. 28 N.Y.S.2d at 553 (Sup. Ct., N.Y. Co. 1941).  
109. 159 U.S. 113 (1895).  
110. 28 N.Y.S.2d at 552.  
111. Id. at 560.  
112. See supra notes 88-90 and accompanying text.  
113. For a general discussion of the lex loci rules, see supra note 2. See also supra note 102.  
114. 28 N.Y.S.2d at 552.  
115. See supra notes 92-102 and accompanying text.  
116. 28 N.Y.S.2d at 553, 560.  
118. 289 N.Y. at 15, 43 N.E.2d at 504, 505.
ment of the Netherlands.\textsuperscript{119} The court of appeals stated that this certification presented a political question, but maintained that the "scope and the effect within this State of a decree promulgated by the recognized government" was a judicial question.\textsuperscript{120} Since the "public policy" formulated by the State Department "accords with the public policy of [New York] State,"\textsuperscript{121} the court of appeals found it unnecessary to "consider or decide" whether courts must give effect to the political public policy embodied in the certification.\textsuperscript{122} In the absence of a conflict between United States and New York policy, the court could safely reach its policy decision without analyzing the federal/state and political/judicial question controversies. The lower courts' decisions recognizing and enforcing the extraterritorial effect of the decree were unanimously affirmed by the court of appeals.\textsuperscript{123}

The Netherlands A.1 decree upheld by the New York courts in Anderson was successfully challenged in England. In Bank voor Handel en Scheepvaart N.V. v. Slatford,\textsuperscript{124} the English court considered whether the A.1 decree operated to transfer title to a quantity of gold from a Dutch bank to the Netherlands Government.\textsuperscript{125} The bank, which had retained its commercial domicile in the Netherlands during enemy occupation, had deposited the gold in London before the war.\textsuperscript{126} The Dutch bank brought suit to recover damages for the defendant's alleged conversion of the gold during the time title to the gold had been purportedly held by the Netherlands Government pursuant to the A.1 decree.\textsuperscript{127} The English Board of Trade had mistakenly transferred the gold to the defendant Custodian of Enemy Property for England and Wales,\textsuperscript{128} and then had authorized the custodian to sell the gold.\textsuperscript{129} If title to the gold during this time had been held by the Netherlands Government, the sale of the gold by the custodian might constitute actionable conversion.

The English court stated that under the generally applicable \textit{lex situs} rule, a decree of a foreign government was not effective to transfer property situated in Britain.\textsuperscript{130} Citing Anderson\textsuperscript{131} and Lorent-

\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} 289 N.Y. at 20, 43 N.E.2d at 507.
\textsuperscript{122} Id.
\textsuperscript{123} 289 N.Y. at 20, 43 N.E. 2d at 507.
\textsuperscript{124} [1953] 1 Q.B. 248.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 251.
\textsuperscript{127} Id. at 253.
\textsuperscript{128} Id. at 251.
\textsuperscript{129} Id. at 257.
\textsuperscript{130} Three considerations were advanced in support of this rule. First, in the con-
\textsuperscript{131} Footnote 131 appears on page 384.
zen, the plaintiff bank argued that the decree should be enforced notwithstanding the result mandated by the lex situs rule. Plaintiff maintained that an exception to the lex situs rule was justified by policy concerns implicated in "decrees of an allied Power in respect of the property of its nationals made in this country with the approval or at least the acquiescence of His Majesty's Government with a view to keeping property out of the hands of a common enemy." Characterizing Anderson as "a dangerous precedent," the court declared that "[p]ublic policy appears to be in the hands of the New York courts a more flexible instrument than it is in this country." The court dismissed Lorentzen as an anomalous decision requiring courts to make political judgments. Citing a distinction between public policy and political policy, the court stated:

No doubt one could formulate a broad rule of public policy that allied governments should be assisted in time of war. But the extent to which a particular decree serves that end seems to me to be entirely a matter for political decision by the Government of the day, which would have to consider whether all its provisions or some or none fitted in with their war policy. A power at war is not bound to regard everything that its allies do as politically desirable.

Thus rejecting public policy as a ground of decision, the court applied the lex situs rule to hold the A.1 decree ineffective in England and find
the custodian's action not subject to challenge.\textsuperscript{142}

The argument that policy assessments are political judgments unsuited for decision by the judiciary is not unknown in United States jurisprudence. In the original version of his choice of law theory, Professor Currie claimed that "assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy."\textsuperscript{143} Currie suggested that courts should avoid undertaking this legislative task by resolving conflict of laws questions in favor of the forum whenever the forum had a reasonable basis for applying its own law.\textsuperscript{144} Currie later developed the theory of the more moderate, restrained and enlightened forum which, upon finding an apparent conflict of laws, would take a second look and might altruistically subordinate forum self-interest in the face of foreign interests in order to minimize conflicts problems and advance the establishment of a stable legal order.\textsuperscript{145} In this later formulation, Currie "permits and expects courts to apply foreign laws even in the presence of a legitimate forum interest."\textsuperscript{146}

With most courts and modern conflict of laws scholars embracing some form of interest balancing analysis,\textsuperscript{147} it is inevitable that courts will continue to assign policy values to rate those interests. The fundamental question is not whether courts will make public policy deci-
sions, but whether those policy decisions will be obscured by an opaque application of choice of law rules or openly analyzed and discussed within the framework of a structured public policy exception.

Although courts appear to have failed in developing a disciplined public policy approach, a structured public policy concept that incorporates a transnational interest element is not entirely foreign to the United States. The executive branch of the United States Government has implicitly recognized the *ordre public universel* concept in relation to a transnational interest. In its remarks relating to a preliminary draft of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the United States took the following position:

> It is one thing to seek international cooperation for the recovery and return of stolen art treasures of national importance, or to stem a flood of exports that threatens seriously to damage the cultural heritage of a people. It is quite another thing to expect States to enforce foreign laws that could lead to the elimination of all significant international movement of art objects of cultural importance and thus diminish the cultural experience of all people. . . . The United States does not rule out appropriate international cooperation in the enforcement of reasonable regulations controlling the export of cultural property in cases of demonstrated gravity. However, the United States would be reluctant to agree in advance to undertake this responsibility for any and all export systems of unknown character and scope.

The United States, while acknowledging that a transnational interest in cultural property is worthy of recognition (*ordre public universel*), added a caveat that not all foreign laws (*ordre public interne* and *ordre public international*) will necessarily be deemed to be of transnational dimension.

As noted earlier, the choice of law analysis in *Elicofon* would have been clarified by such careful delineation of the issues. Instead, the court relied on the mechanistic *lex situs* rule which can be read-

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150. See supra notes 88-142 and accompanying text.
151. See supra notes 47-53 and accompanying text.
152. See supra notes 54-87 and accompanying text.
153. See supra notes 17-34 and accompanying text.
154. See supra notes 23-25 and accompanying text.
ily applied without analysis. The remarks of the United States representa-
tive to the UNESCO Convention also illuminate a prime reason for courts, rather than legislatures, to make the discriminating decisions inherent in public policy oriented choice of law analysis. The United States would never agree in advance to enforce any and all foreign export control systems regardless of their provisions and purposes. Similarly, a legislative decision regarding what public policy interests may be recognized for choice of law purposes could not possibly anticipate the unknown public policy interests and fact configurations that would arise in future cases.

The rare cases in which a transnational interest is recognized for public policy reasons, such as Anderson, indicate that courts will employ public policy as a factor in choice of law analysis at least when the particular facts of a case would lead to an egregious result if public policy concerns were ignored. This fact may indicate that courts do not have any principled objections to public policy analysis, but are indisposed to perform such analysis except in egregious cases. The adoption of a public policy concept structured to reflect the sources and effects of public policy as a factor in choice of law analysis would delineate and clarify the respective roles of the public policy exception. Such clarification could lead to a more probing choice of law analysis that would facilitate judicial identification and recognition of transnational interests.

C. Positive Selection Role of Public Policy

The analysis of competing interests, with regard for public policy concerns, will never be reduced to an exact science. Differentiation of ordre public interne policies, ordre public international policies and ordre public universel policies would, however, provide an analytical framework within which courts and prospective litigants could

155. See supra note 149 and accompanying text.
156. Id.
Only a court can tailor its decision to the needs of a particular case, and only by proceeding on a case-to-case basis can there be hope of ultimately developing satisfactory rules of choice of law. . . . If the job is to be done at all, it must be done by the courts.
Id.
158. See supra notes 103-23 and accompanying text.
159. 289 N.Y. at 9, 43 N.E.2d at 502.
160. See supra notes 47-53 and accompanying text.
161. See supra notes 54-57 and accompanying text.
162. See supra notes 88-142 and accompanying text.
assess and better comprehend the role and effect of public policy in choice of law analysis. Judicial choice of law decisions would be clarified and could escape characterization as being parochial if choice of law questions were resolved by discussing and carefully considering the sources of the interests involved, and the respective effects that may be appropriately assigned to those interests. An integral aspect of this approach is that the weighing of interests would not be impeded or limited by a preconceived refusal to grant full recognition to foreign policy interests. In short, courts would avoid the incomplete and parochial analysis that endows forum policy with power to override foreign interests, but is disinclined to grant reciprocal power to foreign or transnational interests.

Scholarly discussion of the effects of the operation of the ordre public concepts has failed to overcome a certain forum bias. Szaszey suggests that the principle of public policy in choice of law analysis may have a threefold effect: negative, positive and transforming. The negative effect consists simply in “precluding the application of a foreign legal rule which conflicts with the public policy of the forum.” The positive effect may itself have three functions: the precluded foreign legal provision will be replaced (1) “by another rule of the same foreign law” (e.g., if the precluded foreign provision appears as an exception under a more general provision), (2) “by a rule of the domestic law,” or (3) “by a provision of a third legal system.” The transforming effect “operates to modify the foreign law so as to exclude the elements found objectionable to the forum.” These three categories of effects all result in the preclusion of otherwise applicable foreign law that is deemed unsatisfactory by the internal, domestic standards of the forum. Szaszey does, however, acknowledge that “in exceptional cases” the forum may take foreign policy into consideration.

163. See supra note 36.
164. I. Szaszey, supra note 65.
165. Id. at 98.
166. Id.
167. Id.
168. Id.
169. Id. at 99. Szaszey provides, without explanation, several instances when foreign policy should be respected:

(a) in the event of a conflict between conflict rules of the second degree (for example, in the event of renvoi) the foreign conflict rule has to be applied, the principle of public policy being part and parcel of the foreign conflict law; (b) the safeguard of the foreign substantive legal situation actually and definitively developed on the ground of a third legal order, and not on that of either the lex fori or lex causae, calls for recourse to foreign public policy. In this case the domestic public policy will insist on the consideration of the foreign public pol-
A public policy exception that comprehends the ordre public universel concept would require courts to recognize transnational interests as factors in choice of law analysis which may properly direct the use of otherwise inapplicable foreign law. This public policy exception would consist of two elements: (1) public policy would be used to select otherwise inapplicable foreign law rather than to preclude otherwise applicable foreign law; and (2) the foreign law would be selected for application not merely to advance domestic self-interest but rather to defer to the transnational interest implicated.

The facts in Kunstsammlungen zu Weimar v. Elicofon provide an example of how this structured analysis would operate. In Elicofon, the district court failed to recognize Germany's interest in the artworks representing "the most important pieces of art" and "the most valuable possessions of the Land of Thuringia." The court's choice of law calculus should have balanced this interest against New York's interest in adjudicating the validity of a New York resident's claim of title to property situated in New York. Even if the New York interest prevailed after ordinary interest analysis, the court should have further considered whether the interest in preserving and protecting cultural property was sufficiently implicated so as to give rise to a public policy exception to ordinary choice of law analysis. As an interest of transnational dimensions, the interest in preserving and protecting cultural property gives rise to an ordre public universel exception that overrides ordinary choice of law analysis. New York's interest was primarily based on the fact that the paintings were situated in New York. This is a purely domestic interest of the ordre public interne category. The ordre public universel exception overrides the narrow choice of law rule which recognizes New York's fortuitous contacts

icy; (c) the judge of the forum has to take into consideration the rules of a third legal system associated with the legal relations which, in the opinion of the judge, call for absolute application, because the fact defined by the legal rules, wholly or in its essential parts, materializes in the social sphere of the legislator who has enacted the rules in question; (d) the vital political interests of the home state insist on the consideration of the foreign public policy, provided these have to be respected.

Id. 170. See supra notes 88-142 and accompanying text.
172. See supra notes 27-28 and accompanying text.
173. See supra notes 32-34 and accompanying text.
174. See supra notes 88-142 and accompanying text.
175. See supra notes 47-53 and accompanying text.
176. See supra note 25 and accompanying text.
177. See supra notes 47-53 and accompanying text.
with the paintings as a more substantial interest than Germany's interest in having its law govern the determination of ownership of vital artworks stolen from Germany.

With the adoption of a structured concept of public policy, courts would be able to analyze and delineate the sources and effects of the policy considerations that serve as criteria in the choice of law process. The public policy exception would cease to be a platitude and would become a viable alternative to applying hoary, mechanistic choice of law rules formulated when nations were far more independent and isolated from each other than they are today.\textsuperscript{178}

\textbf{Conclusion}

The current conception of public policy as a factor in choice of law analysis has been rightfully maligned for its opacity. Differentiation of the purposes, sources and effects of the public policy exception would provide the analytical framework for a policy oriented choice of law analysis that would recognize transnational interests. The European \textit{ordre public} concepts provide a blueprint for this policy analysis. Until a structured public policy exception is adopted, transnational interests will continue to suffer subordination to nationalistic public policy and antiquated choice of law rules.

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\textit{David Clifford Burger}
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\textsuperscript{178} See generally J. Story, \textit{Commentaries on the Conflict of Laws} (1st ed. 1834 & photo. reprint 1972) (tracing the \textit{lex loci} principles to antiquity).