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## Testing the Modern Critics against Moffatt Hancock's Choice of Law Theories

Herma Hill Kay  
hkay@law.berkeley.edu

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# REVIEW ESSAY

## Testing the Modern Critics Against Moffatt Hancock's Choice of Law Theories

STUDIES IN MODERN CHOICE-OF-LAW: TORTS, INSURANCE, LAND  
TITLES; by Moffatt Hancock.† Buffalo: William S. Hein Com-  
pany, 1984. Pp. xviii, 446. \$45.00.

*Reviewed by Herma Hill Kay‡*

### INTRODUCTION: THE PARAMETERS OF THE CURRENT CHOICE OF LAW DEBATE

The interface between principles of choice of law and interpretation of domestic law has been a fertile area of academic debate. How should policymakers<sup>1</sup> in a coherent and just legal system solve the problem of choice of law? That question is both similar to and different from the following question: How should policymakers in a coherent and just legal system solve, for example, the problem of nonmarital cohabitation? The two questions are similar because both require a determination of the content of legal doctrine, both involve a choice by policymakers among competing solutions, and both will ultimately be decided within the legal system as a matter of domestic policy free of substantial constitutional control.<sup>2</sup> Yet the two questions are also different. While the second requires a determination by policymakers only of what they believe to be an appropriate solution to the stated domestic problem, the first requires policymakers to decide how their legal system will interact with other legal systems when the domestic laws of both systems are potentially applicable. The choice of law question responds to interstate

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† Marion Rice Kirkwood Professor of Law Emeritus, Stanford Law School.

‡ Professor of Law, University of California, Berkeley. B.A., 1956, Southern Methodist University; J.D., 1959, University of Chicago.

1. I include in the term "policymakers" both legislators and judges.

2. Although constitutional limits continue to prevent the application of a state's law when the state has "only an insignificant contact with the parties and the occurrence or transaction," *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981), constitutional control of a state's theoretical approach to choice of law has not been attempted. *Id.* at 307 ("It is not for this Court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court."). Similarly, although clear constitutional limits exist on the state's power to regulate marriage, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967), no successful challenge has been made to distinctions based on marriage.

or international matters, as well as to local ones, while the family law question is limited to domestic concerns. The various current approaches to the choice of law question rely upon different factors.<sup>3</sup> Depending on which approach policymakers adopt for their legal system, courts may be required both to take account of doctrines selected, implemented, and enforced by other policymakers in other legal systems, and to choose whether to enforce those foreign determinations rather than domestic ones in deciding particular cases.

A choice of law problem commonly presents a conflict between the domestic laws of two or more jurisdictions. This conflict results from different legal systems' varying solutions to domestic issues. For example, the policymakers of one state may have decided to permit persons to live together in nonmarital cohabitation and to permit both cohabitants to make binding contracts concerning their financial and property rights. Another state may prohibit nonmarital cohabitation and refuse to enforce such contracts. A conflict can arise if one of the cohabitants domiciled in a permissive state owns real property located in a repressive state. If the owner dies intestate, which law will govern the other partner's assertion of contract claims against the decedent's estate? In this example, we may assume that the policymakers of both states have considered whether to encourage or discourage nonmarital cohabitation and have come to different conclusions. Neither set of policymakers, however, has considered how an interstate case involving nonmarital cohabitants should be resolved.<sup>4</sup> When such a case arises, are the differing domestic law conclusions relevant to the choice of law analysis? Should they affect the resolution of the conflict?

Whether local law policies should play a dominant or only a peripheral part in the solution of the choice of law problem is at the heart of the current academic debate over choice of law theory. Few scholars would advise the policymakers of any legal system to choose among competing solutions to domestic law problems without a careful analysis of the content of each potential solution and a determination of how each might fit within its jurisprudence. Nevertheless, some academics have counseled policymakers to resolve the choice of law problem by an approach that

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3. For a description of the current approach to choice of law used by American courts, see Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983).

4. As Professor Lea Brilmayer has shown, legislative attention to the interstate application of local statutes frequently takes the form of geographical designations rather than indications of what groups of persons are intended to be covered by the statute. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 424-29 (1980). Such designations frequently coincide with commonly understood territorial limitations on legislative jurisdiction and may reflect only a superficial analysis of the potential interstate reach of the policy underlying the local statute. If so, the legislative designation, like any other part of the statute, remains open to judicial interpretation. The more frequent absence of any legislative attention to choice of law, of course, leaves the matter entirely in the hands of the courts.

does no more than identify which legal system should decide the underlying dispute, and not engage in any consideration of the content of domestic policy.<sup>5</sup> These advisors believe that the most important issue in the choice of law question is not how it should be decided, but who should decide it. They assert that such a "jurisdiction-selecting"<sup>6</sup> approach will produce, among other things, an impartial, predictable, and uniform solution to the choice of law problem, regardless of where it happens to be litigated.<sup>7</sup> The traditional approach focuses on the location of a single conceptual event, generally the state in which the rights asserted by the claimant vested. Thus, the first group of advisors proposes a choice between the competing legal systems based on a characterization of the underlying controversy and the selection of an appropriate connecting factor,<sup>8</sup> or, in a slightly more flexible formula, on a determination of which jurisdiction has the most significant relationship to the controversy.<sup>9</sup>

Other scholars believe, however, that the most important issue in both domestic and choice of law questions is how they are to be decided. This approach takes as a starting point the realistic view that both decisions will in fact be made by the policymakers of the legal system that has effective control over the outcome of the particular litigation—the forum.<sup>10</sup> This second group counsels policymakers to use the same method as that employed in deciding issues of domestic law: an analysis of the content of the competing laws, followed by a principled decision to implement one or the other in a particular case.<sup>11</sup>

Prominent among those scholars in the latter group is Moffatt Hancock. The publication of his *Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles* provides a welcome opportunity to study Hancock's approach to choice of law theory and to use his insights to respond to some critics of the general approach he favors. Professor Hancock's approach to choice of law is summarized in Part I of this essay. Part II demonstrates his important theoretical contribution to the

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5. 2 J. BEALE, *THE CONFLICT OF LAWS* (1933); *RESTATEMENT OF CONFLICT OF LAWS* (1934).

6. Professor David Cavers first coined this phrase as a concise way of expressing the difference between the "conventional" approach in which a court with a conflicts problem seeks only to determine the jurisdiction whose law is to be applied, rather than an approach that allows a court to take account of the content of the conflicting laws. Cavers, *A Critique of the Choice of Law Problem*, 47 *HARV. L. REV.* 173, 194 (1933).

7. See, e.g., 2 J. BEALE, *THE CONFLICT OF LAWS* 45-48 (1933).

8. See, e.g., *RESTATEMENT OF CONFLICT OF LAWS* (1934).

9. See, e.g., *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* (1971).

10. See, e.g., W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 3-46 (1949).

11. See, e.g., B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

current debate by contrasting Hancock's approach with some of the observations of the "new critics."

I  
HANCOCK'S "FUNCTIONAL" APPROACH TO CHOICE OF  
LAW

*Studies in Modern Choice-of-Law* contains twelve essays on choice of law previously published between 1961 and 1979 (chapters one through twelve), and a final essay first published in 1983<sup>12</sup> (chapter thirteen). A Preface and Prologue by the author, and a graceful Introduction by Professor David Cavers, precede the thirteen essays. The book is completed by a Table of Cases, a Bibliography, and an Index, all helpful to researchers. I would have appreciated, however, a complete bibliography of Hancock's own work as well.<sup>13</sup>

The thirteen essays and the Prologue address four major topics. All thirteen essays touch on the first topic, choice of law theory. It is explored most directly, however, in the Prologue (which reviews the modern American debate about choice of law theory), in chapter one (which discusses three approaches to the choice of law problem), and in chapter nine (which shows how choice of law problems in charitable testamentary gift cases may be resolved by statutory analysis). The second topic, torts in the conflict of laws, may be subdivided into two categories. Chapters two through five comprise the first subcategory; they discuss various legal contexts in which tort choice of law problems have frequently arisen in American courts, including the areas of marital immunity, guest statutes (which Hancock calls "anti-guest statutes"), and limitations on damages. Chapters seven and eight, the second subcategory, were originally published in Canada and discuss problems of Canadian and Canadian-American torts in the conflict of laws, with particular attention given to *Phillips v. Eyre*.<sup>14</sup> The third topic, land titles and conflict of laws, is addressed in chapters ten through twelve through examinations of problems concerning equitable conversion, full faith and credit, and the situs rule in land title conflicts cases. The fourth topic, labeled in the book's title as "Insurance," can more accurately be

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12. Hancock, *The Effect of a Post-Occurrence Change of Domicile Upon the Choice-of-Law Determining the Validity of "Other Insurance" Clauses in an Accident Policy*, 7 DALHOUSIE L.J. 653 (1983).

13. Much of Hancock's work was published in Canadian journals, including his 1943 article focusing on the content of local policy as a key factor in the choice of law problem. Hancock, *Choice of Law Policies in Multiple Contact Cases*, 5 U. TORONTO L.J. 133 (1943). Only two of the essays originally appearing in Canadian journals are included in the present volume, those appearing in chapters seven and eight. I do not mean to criticize the selection of essays for the book, but rather to express disappointment at the lack of a complete bibliography.

14. [1870] 6 L.R.-Q.B. 1.

described as a particularized study of the impact of a post-event or post-transaction change of domicile by a party in tort or contract conflicts cases. Hancock discusses several well-known insurance cases in the contract conflicts category.<sup>15</sup>

These essays and the Prologue together present a consistent and coherent approach to the choice of law problem. Hancock vigorously rejects the traditional vested-rights theory, which he calls the "classificatory analysis" (pp. 3, 5), on two grounds. First, the categories it uses (e.g., tort, marital property, procedure) are overly broad and uncertain. Second, this sort of analysis tends to encourage a mechanistic mode of thinking that diverts judicial attention away from what he views as the central importance of "the policies or purposes of the domestic rules" (p. 5). An example of the latter criticism is Hancock's treatment of a leading vested-rights marital immunity case, *Buckeye v. Buckeye*,<sup>16</sup> as an exercise in classification. He concludes that the Wisconsin court was led to the wrong conclusion in *Buckeye* (which was subsequently overruled<sup>17</sup>) by the methodology it employed:

[The court] was led astray by the standard choice-of-law principles upon which it relied to obtain a sound decision. . . . Because these concepts and principles took no account of the policy thrusts of domestic statutes and confronted the court with false issues which effectively concealed them, the judges ended up with a result which has proven to be unsatisfactory (p. 30).<sup>18</sup>

As a substitute for the classificatory analysis, Hancock proposed in 1959<sup>19</sup> a "functional approach" to choice of law. He further proposed a "result-selective approach" to resolve cases in which a true conflict of law and policy appeared (pp. 3-4, 14-15). Hancock views his functional approach, with its method of "statutory construction" (p. 3), as consistent with Professor Brainerd Currie's governmental interest analysis

15. These cases include *Allstate Ins. Co. v. Hague*, 449 U.S. 303 (1981) (discussed in the book at chapter thirteen); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964) (discussed in the book at pp. 162-68); and *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936) (discussed by Hancock at pp. 151-54).

16. 203 Wis. 248, 234 N.W. 342 (1931) (applying the law of Illinois, where the tort occurred, to bar a Wisconsin married woman from suing her husband under Wisconsin law).

17. *Haumschild v. Continental Casualty Co.*, 7 Wis.2d 130, 95 N.W.2d 814 (1959) (recharacterizing marital immunity as a problem of family status rather than tort and applying the law of the marital domicile to permit a Wisconsin married woman injured in California to sue her husband under Wisconsin law).

18. For a similar critique, see also pp. 235-38 (discussing *Toledo Soc'y for Crippled Children v. Hickok*, 252 S.W.2d 739 (Tex. Civ. App. 1952), *rev'd*, 152 Tex. 578, 261 S.W.2d 692 (1953) (upholding a devise of land valid at the situs but invalid at testator's domicile; rejecting "equitable conversion" as a justification for applying the domiciliary law), *cert. denied*, 347 U.S. 936 (1954)).

19. The essay included here as chapter one was first published in 1961, as Hancock, *Three Approaches to the Choice of Law Problem: The Classificatory, the Functional and the Result-Selective*, in *XXTH CENTURY COMPARATIVE & CONFLICTS LAW* 365 (K. Nadelmann, A. von Mehren & J. Hazard eds. 1961). Hancock states in the Prologue, however, that he wrote it in 1959 (p. xii).

(pp. 2-3, 3 n.2).<sup>20</sup> He later also equates the result selective approach, which recognizes that judges in true conflicts cases "consider which of the two competing rules will produce the most rational, convenient and just decision in the litigation before them" (p. 8), to Professor Robert A. Leflar's "better law approach"<sup>21</sup> (pp. *xii-xiii*).

But Hancock's blend of the Currie and Leflar analyses has unique aspects. For one thing, Hancock expects a judge confronting a choice of law problem to analyze the competing laws and policies of both states by conducting detailed research into the domestic cases interpreting the conflicting laws and the legislative history of any relevant domestic statutes. He rejects the notion that judges should rely on a purely abstract estimation of what the underlying domestic policies might reasonably be.<sup>22</sup> Moreover, at the true conflict stage, Hancock rejects any subjective assessment of which one of the two conflicting laws is "better." Instead, he insists that "[t]o justify rejection of a domestic rule in a true conflict case, an objective demonstration must be made that the rule in question is an anachronism, repugnant to accepted present-day policies, by reference to judicial or commentarial criticisms or through historical policy analysis" (p. 141).

A convenient summary of the approach to choice of law that Hancock favors appeared in his 1968 article explaining the American learning to a Canadian audience:

During the last decade a number of American courts have expressed strong dissatisfaction with the place-of-wrong formula and the use of ancillary formulas to avoid its application. They have, in effect, cast aside this bewildering array of overlapping inconsistent choice formulas and directly confronted the basic elements of the choice-of-law problem. Those elements are, of course, the facts (including the parties' domiciles) which are connected with two different political communities, and the relevant domestic laws of these political communities each of which implements a different social policy. Since the litigation normally (though not invariably) occurs in a court of one of these political communities, the problem becomes for that court a problem of construction or interpretation. The court must decide whether, given the policy underlying its local statute or non-statutory rule, that rule or statute should be applied to the facts of the case before it. Since some of these facts are not connected with the forum, the problem is seen to be one of a familiar type: that of applying a statute or other legal rule to a marginal and unforeseen set of facts. Since the facts may or may not also fall within

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20. See B. CURRIE, *supra* note 11, *passim*.

21. 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).

22. Hancock is critical of courts that fail to undertake an analysis of the policies of the divergent rules in a choice of law case. See, e.g., pp. 85-87, 110-13.

the policy-determined coverage of the other community's local law, that question must also be resolved. In the light of such an analysis the court should be able to make a rational, purposeful choice between the relevant laws and policies of the two communities (p. 185)(footnotes omitted).

Why did Hancock, like Currie, believe that the search for a solution to the choice of law problem should begin with an analysis of the content of the conflicting laws? Both men were heirs to the critical attack on the traditional approach led by Professor Cook<sup>23</sup> and others: an attack that had exposed the arbitrary and irrational nature of the traditional theory. Both Hancock and Currie refused to join in the effort to build a new system for deciding conflicts cases to replace the discredited theory. Instead, both insisted that a choice of law case presented a dispute to be decided like any other case, and that such choice of law cases did not require unique methods of analysis. Both examined the choice of law problem from the vantage point of a state court judge deciding a case in which a question is raised about what law should provide the rule of decision. Significantly, both men offered an analogy to a state court judge choosing between two competing interpretations of a state statute, or deciding which of two lines of rival common law precedent, adopted in two other states, to follow. That analogy calls for the judge to examine the content of each local law: its legislative background, if a statute; its prior judicial interpretation; and its consistency with existing law. Seen in light of that analogy, the advice of both men that judges should look first at the policies or purposes of the conflicting laws in a choice of law case is understandable. The state court judge normally applies local law. If someone asserts that a different law should govern, a plausible point to begin the analysis is to ask, "What does that other law provide? Does it apply to the facts of this case? How would the case be decided if it were applied?"<sup>24</sup>

Hancock argues that an analysis of the content of the conflicting laws, in light of the facts of the particular case, will itself resolve many choice of law problems. Thus, to return to the hypothetical decedent who lived in nonmarital cohabitation in one state and died leaving real property in another, I understand Hancock's analysis to work as follows. First, in order to discover the underlying policy or purpose of the differing laws, he would have a court examine the domestic cases and statutes in both states that deal with the problem of nonmarital cohabitation. The court would then ask whether the facts of the present case brought it

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23. See W. COOK, *supra* note 10, *passim*.

24. Unlike Currie, Hancock did not phrase his methodology in terms of a search for a "governmental interest" in applying the policy of the domestic law to the choice of law case. In an earlier article predating Currie's published work, he spoke of the "interest of states in transactions occurring in their territories", but he used that observation as a basis for urging comity between states, rather than as a part of the analysis of local policy. Hancock, *supra* note 13, at 136-37.

within those conflicting policies. In several essays (chapters nine through twelve), Hancock rejects the idea that the location of real estate in a particular state gives that state a basis for regulating the rights of a nonresident owner, except where the owner seeks to affect "the actual use of the land or . . . the free circulation of the land in the market" (p. 329). In the hypothetical case, no such matters are involved. Instead, the validity of a contract between two nonresidents who had lived in nonmarital cohabitation is at issue. Hancock would doubtless conclude that the situs state has no legitimate interest in applying its own law prohibiting nonmarital cohabitation to this case, and that the case presents a false conflict in which only the law of the decedent's domicile applies.<sup>25</sup> If, however, the judge discovered that the situs state still followed the traditional rule, Hancock would suggest that the court not use any of the conventional escape devices, such as the fiction of equitable conversion, to find a way consistent with the traditional approach to apply the law of the decedent's domicile. Instead, he urges that "the ideal opinion" in a case similar to the hypothetical would be one in which the court

would have candidly identified the conversion doctrine as an escape device transposed from domestic common law to avoid absurd applications of the situs formula and would then have proceeded to announce that in the future that formula would be restricted to cases where the policy of a domestic statute of the forum-situs appeared to require its enforcement (p. 320).<sup>26</sup>

Suppose, however, that the contract between the cohabiting partners called for the construction of a condominium on the real property with apartments to be sold to nonmarital couples. In this case, Hancock might find that the situs state, whose policy favors marriage, would wish to apply its law invalidating contracts between nonmarital cohabitants to prevent this use of property located within the state. To the judge thus confronted with a potential true conflict, Hancock offers several "techniques of reconciliation" (p. 119). One such technique is to assess the policies of the conflicting laws at the time of the suit. Thus, in discussing *Miller v. Miller*,<sup>27</sup> a wrongful death case in which the state of injury limited damages to \$20,000, while the forum, where defendant was domiciled, allowed unlimited damages, Hancock points out that the court "missed a golden opportunity" (p. 120) to use the repeal of the damage limitation prior to the decision as an indication that the state of injury had abandoned its former policy. Similarly, in the hypothetical, if the

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25. Cf. Hancock's analysis of *Toledo Soc'y for Crippled Children v. Hickok*, 252 S.W.2d 739 (Tex. Civ. App. 1952), *rev'd*, 152 Tex. 578, 261 S.W.2d 692 (1933), *cert. denied*, 347 U.S. 936 (1954), in chapter nine and *In re McDougal's Will*, 29 N.J. 586, 151 A.2d 540 (1959), in chapter ten.

26. This passage is included in the discussion of *In re McDougal's Will*, 29 N.J. 586, 151 A.2d 540 (1959).

27. 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

situs state had amended its laws after the decedent's death but prior to the suit to allow nonmarital cohabitants to make binding contracts, Hancock would take that as evidence that the laws were no longer in conflict. Another technique of reconciliation that Hancock discusses with approval is Professor Baxter's "comparative impairment" technique (pp. 131-32), although he does not mention Baxter's own restriction on the use of that approach to the federal courts.<sup>28</sup>

If these efforts to achieve reconciliation fail, Hancock rejects Currie's proposal that the forum should advance its own interests in a true conflict case by applying forum law as "rigid and dogmatic" (p. 114).<sup>29</sup> Rather, Hancock favors the "result selective" or "better law approach." He prefers this analysis because he believes it permits judges to "approach choice cases in very much the same familiar way they approach domestic cases" (p. 141): the judge must choose, as between two inconsistent lines of precedent in domestic cases, or divergent doctrines developed in other states, "the doctrine that achieves what he considers the more fair and rational result" (p. 141).

How Hancock would use the better law approach to resolve a true conflict between laws encouraging and discouraging nonmarital cohabitation as a social policy is unclear. Even California, the leader in recognizing contract rights between cohabiting couples, does not view its stance as inconsistent with the continued protection of the legal rights of married couples.<sup>30</sup> While some states have rejected the California approach as detrimental to the legal family,<sup>31</sup> others have accepted it as part of a growing tolerance for alternative lifestyles.<sup>32</sup> The choice is perhaps not as clear as that between a guest statute and unlimited recovery for an injured guest, where Hancock makes plain his view that the common law rule is the better law (p. 78).<sup>33</sup> The value of Hancock's methodological point, however, is not in the outcome that he would select.

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28. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 41-42 (1963); see also Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577, 580-82 (1980), emphasizing this restriction and pointing out that it has not been observed by the California courts.

29. Hancock suggests that Currie took this position in his early articles but that he subsequently gave a "somewhat different statement of his views" (p. 114, 114 n.61). I do not agree that Currie ever changed his view that the forum should apply its own law to resolve a true conflict case. See Kay, *supra* note 28, at 584. Nor do I find that view to be rigid or dogmatic, in the context of Currie's theory. See Kay, *supra* note 3, at 552.

30. See *Marvin v. Marvin*, 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976).

31. See, e.g., *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

32. See, e.g., *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977).

33. Hancock's use of the result selective or better law approach permits him to determine that certain types of laws frequently involved in choice of law problems ought not be used to provide the rule of decision. These laws include guest statutes (p. 78), spousal immunity doctrines (pp. 89-90), and statutory limitations on recovery for wrongful death (pp. 121-22).

Rather, Hancock demonstrates that a judge deciding whether to accept or reject the new learning in the conflicts case is in no different position and needs no other resources than a judge deciding a domestic case raising the novel issue of the validity of a contract between two cohabiting partners arising from their relationship.

## II

### HANCOCK AND THE "NEW" CRITICS

In the late 1950s, a new approach to choice of law problems emerged that disavowed systematic choice of law rules in favor of an intense analysis of domestic policy. This approach was accompanied by critics who objected that the new method was unduly forum oriented and parochial.<sup>34</sup> The critics saw it as appropriate, however, to focus on domestic policy, at least as one necessary factor in the choice of law analysis.<sup>35</sup> Today, some of the "new" critics seem to object to even a limited emphasis on the content of local law in the choice of law inquiry,<sup>36</sup> while another rejects the analogy between the judicial tasks of ascertaining local policy in domestic cases and in conflicts cases.<sup>37</sup> At the other end of the spectrum, one recent writer has so far exalted the analysis of domestic policy in choice of law cases as to predict the disappearance of a separate body of conflict of laws doctrine.<sup>38</sup>

The new critics of the modern approaches to choice of law have made Currie their primary target.<sup>39</sup> This is understandable, for Currie's work was at the cutting edge of the choice of law revolution that swept classroom and courtroom alike in the wake of the destruction of the traditional approach. Yet both Moffatt Hancock and Chief Justice Traynor<sup>40</sup> were working toward their own theories of choice of law prior to the publication of Currie's earliest articles in 1958.<sup>41</sup> While both drew

34. See, e.g., von Mehren, Book Review, 17 J. LEGAL EDUC. 91, 96-97 (1964) (reviewing B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963)).

35. See, e.g., Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 474 (1960):

At the outset it should be noted that Professor Currie does not purport to have originated the theory that choice-of-law rules should rationally advance the policies or interests of the several states (or of the nations in the world community). Leaving aside for the moment the question of when this theory was first advanced, the fact is that scholarly criticism of the law of conflict of laws during the last four decades has elaborated the theory with such great success that today it is largely taken as axiomatic by scholars, if not always by judges.

36. See, e.g., Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 33-35 (1984).

37. Brillmayer, *supra* note 4, at 417-23.

38. Morrison, *Death of Conflicts*, 29 VILL. L. REV. 313 (1984).

39. See, e.g., Brillmayer, *supra* note 4; Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Juenger, *supra* note 36; Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983).

40. See Kay, *Chief Justice Traynor and Choice of Law Theory*, 35 HASTINGS L.J. 747 (1984).

41. In his first article announcing governmental interest analysis, Currie cited Freund and

heavily on Currie's work, both rejected his approach in important part,<sup>42</sup> and both ultimately created their own unique solutions to the choice of law problem. The new critics have frequently discussed Traynor's work, but they have paid relatively little attention to Hancock.<sup>43</sup>

Modern writers ignore Hancock at their peril, for his work provides a fresh approach to choice of law theory. Moreover, his critiques of specific issues help to correct the misperceptions of some critics of modern choice of law theories, such as Professor Lea Brilmayer, refute the arguments of others, including Professors Friedrich Juenger and Harold Korn, and anticipate some of the discoveries of another, Professor Mary Jane Morrison.

Professor Lea Brilmayer, whose 1980 article<sup>44</sup> touched off the current wave of "new" criticism of Currie's governmental interest analysis, does not in that essay consistently observe Currie's distinction between the "policy" underlying a domestic statute or common law rule and the "interest" a state may have in applying that policy to a particular case. In asserting that Currie's notion of legislative intent was fallacious, she appears to assume that the method of statutory construction and interpretation of common law rules, which both Currie and Hancock use, was meant to identify legislative intent as to "interests."<sup>45</sup> But this method is instead used to determine the content of domestic policy in both statutes and common law rules—a point that Brilmayer accepts in a later essay.<sup>46</sup> Only after domestic policy is identified should a judge following Currie's approach determine whether the state has an "interest" in having that domestic policy applied to the conflicts question. To ask, as Brilmayer does in her subsequent 1984 "challenge,"<sup>47</sup> whether it matters for constitutional purposes if a state legislature were to declare its interest in applying its guest statute to all accidents occurring within its borders is

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Hancock as suggesting a similar approach. Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 235 n.18 (1958).

42. Hancock rejected Currie's suggestion that the forum apply its own law in a true conflict case. See *supra* text accompanying note 29. Traynor did not adopt as part of his own methodology the requirement of a "moderate and restrained reinterpretation" of policy and interest at the apparent true conflict stage, which Currie had drawn from Traynor's opinion in *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961). See Kay, *supra* note 40, at 790, 790 n.285.

43. None of the critics cited *supra* in note 39, refers to Hancock's work. The omission is perhaps most surprising in Morrison, *supra* note 38, since Hancock's work provides support for the approach she favors. See *infra* text accompanying notes 84-86.

44. Brilmayer, *supra* note 4.

45. *Id.* at 393, 399-402.

46. Brilmayer, *Legitimate Interests In Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1342 (1981) ("State policies ideally should be the product of statutory construction or interpretation of common-law rules . . .").

47. Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555, 558 (1984).

to confuse the determination of domestic policy with the affiliating circumstances that trigger the application of that policy to the controversy.

Brilmayer's criticism concerning the existence of legislative intent does highlight Currie's dual usage of the word "interest."<sup>48</sup> One sense, drawn from two workers' compensation decisions written by Chief Justice Stone for the United States Supreme Court,<sup>49</sup> signifies the factual connection between a state and an occurrence posing a legal problem. The affiliating circumstances that permit the state to apply its own law to resolve that legal problem are not created by the state's declaration of the content of its domestic law; rather they are independent objective factors that serve to assure a court that the state has a reasonable basis for the application of its law.<sup>50</sup> Such circumstances include traditional geographical connecting factors like the place of wrong or the situs of real property as well as more personal ones like a decedent's domicile. These factors, made relevant by the underlying conflict of domestic policies, give the state an "interest" in providing the governing law for a particular case, or, as in the workers' compensation context, a particular class of cases. They do not, however, determine whether the state has an "interest" in Currie's second, narrower, sense of the word: that the state's domestic policy will be furthered by its application to the facts of the particular case.

Thus, in Professor Brilmayer's hypothetical case, where a guest and host are domiciled in a state having the common law rule of unlimited

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48. Brilmayer recognizes that Currie uses the term in more than one sense, but her recognition is obscured when she equates both of Currie's uses of the term "interest" with legislative intent. Brilmayer, *supra* note 4, at 401-02 & n.47. Thus, she states:

[b]orrowing from Supreme Court decisions that chanced to use the word "interest" before it became a term of art, Currie argued that the Constitution would be offended if and only if a court applied the law of a state without an interest. The significance of using the same term both to signify actual intent and to serve as a constitutional test is that the tests for actual intent and constitutionality are thereby equated.

*Id.* at 401 (footnotes omitted). In fact, as pointed out in the text, neither sense of the term "interest" connotes legislative intent. *See supra* text accompanying note 46; *infra* text accompanying notes 49-52.

49. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 540-43 (1935). Currie attributed to Justice Stone the "modern rediscovery of the importance of governmental interests." B. CURRIE, *supra* note 11, at 613.

50. Thus, Brilmayer's claim, that Currie's analysis permits a state to foreclose the constitutional question of whether it can apply its own law by an expansive interpretation of domestic policy, assumes that a state interest in applying the policy of its domestic law is created by the interpretation of that policy rather than existing as an independent factual circumstance. *See Brilmayer, supra* note 46, at 1316-17; Brilmayer, *supra* note 4, at 401. For example, the fact that a decedent died in his or her state of domicile may give that state an interest, i.e., a basis, for applying its law of intestate succession to personal property located in another state. But the state court's interpretation of its intestacy statute does not create the fact of domicile. Moreover, the state's declaration that it is interested in controlling the affairs of deceased domiciliaries does not determine whether the factual basis of domicile, giving rise to the interest, exists in a particular case.

recovery and the injury occurs in a state having a guest statute,<sup>51</sup> both states have an "interest" in the first sense: either state could constitutionally apply its own law. But only the state where both parties are domiciled has an "interest" in the second sense, because the state of injury, under Currie's analysis, will not advance the policy of its domestic law by applying that law to prevent the foreign guest's recovery. The enactment of a statute declaring that a state has an "interest" in applying its guest statute to all injuries occurring within the state would be an express declaration of the first, affiliating, interest; it would say nothing about the second, narrower, policy interest.<sup>52</sup>

As Brilmayer notes,<sup>53</sup> the first use of "interest" is similar to the concept of minimum contacts required for personal jurisdiction. A state's assertion of jurisdiction over a nonresident defendant who injures a resident plaintiff in a third state will indicate the state's desire to provide a forum for such cases. It will not, however, control the constitutional validity of such a jurisdictional claim. Similarly, if a state were to declare a legislative "interest" in applying its guest statute to all cases brought within its courts (even in the absence of clearly constitutional affiliating factual circumstances such as the place of injury or the domicile of the parties), that declaration would have no bearing on the state's constitutional basis for applying its law.<sup>54</sup> In both cases, the constitutional question focuses on whether the state "can" exercise its power, under federal standards of fairness, not on whether the state "should" exercise its power.<sup>55</sup>

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51. Brilmayer, *supra* note 47, at 556. Her hypothetical case is as follows:

Jones and Smith are Connecticut domiciliaries and both reside in New Haven. Jones proposes to Smith that they travel together in Jones' car to New York City for an evening of cultural activities. They plan to return late that same evening, but on the way home, they skid on icy pavement near Rye, New York, and collide with a tree. Jones was negligent, but not wantonly so. New York has a guest statute that would bar recovery; Connecticut does not.

52. Compare Korn, *supra* note 39, at 786 (discussing the Supreme Court's use of the concept of state interests to define a state's legislative jurisdiction in choice of law cases) with *id.* at 811 (defining Currie's use of state interest to denote a situation in which a "state is so connected with the case that the purposes or policies of its law will be advanced by such application").

53. Brilmayer, *supra* note 46, at 1322-23.

54. I take Brilmayer's larger point to be that state interests should not weigh in the constitutional analysis unless those interests form the factual basis for applying the state's domestic policy to a situation that it was intended to regulate. See *id.* at 1328-41. This is a promising approach to constitutional control of choice of law. It narrows the "interests" that the Supreme Court will recognize as enabling a state to apply its own law to Currie's second sense of that term. Moreover it makes the constitutional inquiry a more precise undertaking.

55. Chief Justice Traynor's opinion in *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961), makes the two distinct meanings of state interest clear. Early in the opinion he noted that "[w]e have no doubt that California's interest in protecting estates being probated here from false claims based on alleged oral contracts to make wills is constitutionally sufficient to justify the Legislature's making our statute of frauds applicable to all such contracts sought to be enforced against such estates." *Id.* at 594, 360 P.2d at 909, 12 Cal. Rptr. at 269. After an analysis of the

Unlike Currie, Hancock does not accord a central role in the choice of law analysis to the determination of a state's "governmental interest" in applying its domestic policy.<sup>56</sup> Instead, he advocates a method of statutory construction that determines whether the facts of the case bring it within the policy of the domestic law (pp. 3-4). This is not a search for specific legislative intent about the geographical scope of domestic law;<sup>57</sup> it is instead a more comprehensive interpretation of local policy to see whether it rationally encompasses the extrastate facts. Hancock occasionally expresses the results of his inquiries in terms of whether a particular state has an "interest" in applying its policy to the choice of law question (e.g., p. 10). But he uses the term in Currie's narrow sense and does not make that concept as central to his analysis as Currie did. By focusing clearly on domestic policy, rather than domestic interest, Hancock can avoid some of Brilmayer's criticisms of Currie's approach. By inference his methodology serves to correct Brilmayer's initial misperception of the different roles accorded to policy and interest in the writings of both men.

Hancock cannot so easily avoid another of Brilmayer's criticisms. She rejects the assumption, central to Hancock's methodology, "that conflict-of-laws reasoning is no different from ordinary substantive interpretation of statutes."<sup>58</sup> Her argument seems to turn on the point at which a statute properly can be said to "apply" to a case. She offers a distinction between two meanings of the word "applies"—a law is "perti-

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competing policies of the California and Nevada laws, however, Traynor concluded that "California . . . would have no interest in applying its own statute of frauds unless [the decedent] remained here until his death." *Id.* at 596, 360 P.2d at 910, 12 Cal. Rptr. at 270. Brilmayer questions whether the United States Supreme Court would have subject-matter jurisdiction to review the judgment of a state court in such a choice of law case. *See* Brilmayer, *supra* note 47, at 557. In this example, the Court has jurisdiction to review California's first determination of its interest, but not the second one. If Brilmayer's reformulation of the standard to be used by the Supreme Court in approaching its constitutional assessment is adopted, *see supra* note 54, Traynor's second determination that California lacked an interest in regulating the case through its domestic policy might undercut his first statement that California's law could constitutionally be applied. Professor Brilmayer has not addressed the question of when a state may constitutionally choose not to apply its law. *See* Brilmayer, *supra* note 46, at 1316 n.9.

56. *See supra* note 24.

57. I am not entirely comfortable with Brilmayer's definition of a "multistate policy choice" as "[a] principle that this rule [i.e., a domestic rule] applies to contracts made within the state, or to contracts made by women residing in the state." *See* Brilmayer, *supra* note 46, at 1326. I think this limited sense of the term "multistate policy," denoting a state's determination that its policy applies to extraterritorial facts, may be confused with the broader sense in which other writers speak of multistate policies as "policies peculiar to (or of special importance in) multistate transactions as distinguished from wholly domestic transactions." A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 77 (1965). As I understand Brilmayer's point, her meaning is close enough to Baxter's earlier distinction between a state's "internal objectives" and its "external objectives," *see* Baxter, *supra* note 28, at 17-18, so that his terminology could have been used.

58. Brilmayer, *supra* note 4, at 417.

ment," or it is "satisfied."<sup>59</sup> To use her example, a statute requiring a guest to prove gross negligence in order to recover from a host will be "pertinent" whenever a nonpaying passenger sues a driver for an injury resulting from ordinary negligence. Whether the guest statute is "satisfied" will depend on whether the court, interpreting the statute in light of its underlying policy and the facts of the case, decides that the passenger was truly nonpaying. The statute may not be satisfied if, for example, the court finds that the passenger offered compensation that the driver rejected.<sup>60</sup> In the conflicts case, however, the two meanings are combined: a forum following Hancock's method of statutory construction will hold its statute "pertinent" only if its policy can be satisfied, and not otherwise. Brilmayer objects that without distinguishing the notions of "pertinence" and "satisfaction" one cannot determine whether a statute should apply because "[a]t least three different situations require different treatment: the purely domestic case with all substantive preconditions satisfied, the purely domestic case with some deficiency in the substantive preconditions, and the purely foreign case."<sup>61</sup>

I understand Brilmayer to mean that in the first case the guest would not recover; in the second case, the guest would recover since a passenger who offered to pay is not viewed as a guest and not barred by the underlying statutory policy; and in the third case, the guest would be treated under the foreign law like any other injured party and allowed to recover. But Brilmayer overlooks the fact that, like the domestic case, the foreign case can be subdivided into cases in which the foreign domestic law's substantive provisions are met and cases in which they are not. The absence of a guest statute in the foreign legal system merely removes one potential defense to the action. If the plaintiff fails to prove causation, for example, recovery will also be denied. Presumably, however, there is no conflict of laws issue at that point, and no need for a choice of law.

Brilmayer's line of reasoning does not seem to me to demonstrate that "domestic interpretation and conflicts interpretation are different enterprises altogether."<sup>62</sup> Nor does her discussion about the impact on conflicts cases of a repeal of the domestic guest statute<sup>63</sup> appear to support the view that policy interpretation is fundamentally different in conflicts and domestic contexts. If a state changes the content of its domestic tort law respecting the recovery of guests against hosts, no remnant of an earlier protectionist policy for hosts survives to be resurrected

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59. *Id.* at 422-23.

60. *Id.* at 421.

61. *Id.* at 423.

62. *Id.* at 417.

63. *Id.* at 417-20.

in a conflicts suit by a nonresident passenger against a local driver. If both states follow the common law rule of unlimited recovery, there is no difference in laws and no choice of law problem. The fallacy in this objection is the notion that a state is interested in applying its policy in a conflicts case to benefit only local residents.<sup>64</sup> That criticism is not relevant to whether judicial interpretation of the content of local policy is the same or different in domestic and conflicts cases.

Brilmayer correctly points out, however, that "in a purely domestic case, domestic law 'applies' under any conflict of laws theory; the word ['applies'] means that domestic law supplies the pertinent rule of decision."<sup>65</sup> Thus, a judge in a domestic case must apply domestic law regardless of whether the domestic outcome is the one that the judge might have preferred to reach in a conflicts case involving the domestic policy. This point is a telling criticism, however, of neither Currie's governmental interest analysis nor Hancock's functional method, but rather of Leflar's "better law" approach with which Hancock merged his own "result selective" technique for resolving true conflict cases. A court following the latter approach can escape the confines of a distasteful domestic law by turning a domestic case into a conflicts problem. In my view, Hancock comes close to doing this in his analysis of *Allstate Insurance Co. v. Hague*<sup>66</sup> (chapter thirteen).

In *Hague*, a man domiciled in Wisconsin was killed when his son's motorcycle, on which he was riding as a passenger, collided with an automobile owned and operated by another Wisconsin domiciliary. The widow, who moved to Minnesota after her husband's death, filed suit in a Minnesota court. The choice of law question in *Hague* concerned the permissibility of adding together ("stacking") the decedent's three automobile insurance policies, purchased in Wisconsin from Allstate Insurance Company, which covered him for injuries he might suffer resulting from the negligence of a noninsured driver.

As I have stated the facts of *Hague*, it seems to have been a purely domestic Wisconsin case, one in which all conflicts scholars could agree with Brilmayer that only Wisconsin law was "pertinent."<sup>67</sup> Hancock,

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64. *Id.* at 420. For criticism of this notion, see Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, 34 MERCER L. REV. 593, 620-35 (1983).

65. Brilmayer, *supra* note 4, at 423.

66. 449 U.S. 302 (1981).

67. Six of the nine contributors to a Symposium on *Hague* concluded that, regardless of the constitutionality of such a course, the Minnesota Supreme Court should not have applied its own law to resolve the choice of law question. See Davies, *A Legislator's Look at Hague and Choice of Law*, 10 HOFSTRA L. REV. 171, 193 (1981); Reese, *The Hague Case: An Opportunity Lost*, 10 HOFSTRA L. REV. 195, 198-200 (1981); Silberman, *Can the State of Minnesota Bind the Nation? Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 105-10 (1981); Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149, 153-57 (1981); von Mehren & Trautman, *Constitutional Control*

however, believes the case had interstate elements even at the time of the injury, because the decedent commuted daily from his home in Hager City, Wisconsin, to his workplace in Red Wing, Minnesota, and had done so for fifteen years prior to his death. In Hancock's view, these circumstances affiliated the case with Minnesota. He argues that the relevance for choice of law purposes of this relationship between the decedent and the state of Minnesota should not be limited to events arising out of the employment context, or even to automobile injuries suffered during the daily commute. Rather, he equates Minnesota's concern with the well-being of persons in its work force with Wisconsin's concern for the well-being of its domiciliaries (pp. 407-10). Hancock sees *Hague* as a case in which the permissibility of stacking insurance coverage fell within the conflicting domestic policies of both Wisconsin and Minnesota. Had the suit been filed in Wisconsin, Hancock would find the Wisconsin policy against stacking "pertinent." His own analysis of the historical background of "non-insured negligent driver" insurance and the prior Wisconsin cases adopting the minority position, however, leads him to conclude that the question of recovery was an open one on the *Hague* facts (pp. 392-97). The case was, however, filed in Minnesota after the widow had moved there and remarried. Under those circumstances, Hancock's method of resolving true conflict cases allows him to counsel the Minnesota court to apply its own law permitting stacking (pp. 414-16). Nevertheless, he makes clear that but for the decedent's prior employment relation with Minnesota, the widow's post-occurrence change of domicile should not bring her within the scope of Minnesota's domestic policy. Hancock believes that this subversion of Minnesota's policy of protecting all its citizens, including recent arrivals in the state, is required in order to avoid unfairness to Allstate, which should be able to rely on its defense under Wisconsin law (pp. 411-14).

In my view, the difference Hancock sees between *Hague* and a hypothetical case he posits in which the deceased was not a member of the Minnesota work force is compelling only if one agrees that the employment relationship brings the nonresident worker within the scope of the employment state's general domestic policies, not just those that regulate the employment relationship. In *Hague*, the underlying domestic policy

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*of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35, 39-43 (1981); Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17, 24-25 (1981). Professor Sedler indicated that he approved of the result but was troubled by the apparent lack of constitutional limitations imposed by the *Hague* court's analysis. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 74-75 (1981). Another contributor, Professor Martin, did not express an opinion. Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133 (1981). The final author, Professor Leflar, defended the Minnesota court's use of his "better law" theory. Leflar, *Choice of Law: State's Rights*, 10 HOFSTRA L. REV. 203, 208-11 (1981).

relates to the ability of insurance carriers to restrict coverage by preventing stacking. In a comprehensive computerized search of Minnesota domestic cases concerning insurance stacking, Professor Brilmayer found "no suggestion that employment and insurance stacking are related" in their underlying policies.<sup>68</sup> Nor was she able to find any evidence in Minnesota law of a generalized social welfare concern directed toward nonresident employees outside the employment context.<sup>69</sup> Thus, using Hancock's own method of a careful analysis of domestic law, Brilmayer has proven unfounded Hancock's assertion that Minnesota was concerned with Ralph Hague in a relevant way at the time of the injury. Under Hancock's methodology, *Hague* is properly analyzed as a case in which only Wisconsin's domestic policy applies.

Hancock observes that "[t]he notion that a man who, having established his home in one state, works all day in another, makes a greater economic contribution to the state of service rather than to the former state, has come to modern choice of law doctrine as a startling novelty" (p. 411). Yet this statement goes too far in its implication that the commuter is to be viewed as equally affiliated with both the state of domicile and the state of employment for purposes of choice of law. For example, what if the choice of law question dealt with intestate succession to the deceased commuter's estate, or the legitimacy of his children? Would the domestic policies of the state of employment be "pertinent" to those aspects of an employee's affairs? If not, why is the state's policy on insurance coverage pertinent? I cannot rule out the possibility that the attraction of Minnesota law as the "better" law contributes to Hancock's characterization of *Hague* as a conflicts, rather than a domestic, case at the point of injury. If that is so, recognizing that the state of employment's policies are potentially applicable to choice of law cases involving nonresident workers may lead to the identification of other potentially concerned jurisdictions. What would Hancock do if a husband and wife, domiciled in State *W*, were both commuters? The husband works in State *X*, while the wife works in State *Y*. Are all three states concerned with the general welfare of the spouses? What if the couple owns a vacation home in State *Z*, where they plan to move when they retire? Surely that state has as much of "a strong and legitimate concern to help [the husband] provide for his wife after his death" (p. 408) as do States *X* and *W*. We can end such speculation by redefining a state's domestic policies and interests in a moderate and restrained fashion, as Currie suggested,<sup>70</sup> in order to avoid conflict with the policies and interests of other poten-

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68. Brilmayer, *supra* note 46, at 1344.

69. *Id.* at 1345-47.

70. See Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROBS.* 754, 757-58, 763-64 (1963).

tially concerned states. Escalating the matter to the true conflict stage in order to escape an "archaic" domestic law does not provide the solution.

Despite her criticism of Currie's methodology, Brilmayer accepts the assumption Currie shares with Hancock that a state court is capable of determining the content of domestic policy and using that information in deciding choice of law problems.<sup>71</sup> Another of the "new" critics, Professor Friedrich Juenger, rejects even this possibility. First on his list of the "defects" of interest analysis is "The Futility of Ascertaining Policies."<sup>72</sup> This heading subsumes such diverse complaints as the difficulty of determining what particular legislative policy is to be attributed to a particular law; whether all policies are to be given equal respect, even those in conflict with federal law or those that are archaic and outmoded; and whether it is possible to determine the policy of foreign law.

Some of Juenger's methodological criticisms apply to both Currie and Hancock, while others apply only to Currie.<sup>73</sup> All are either exaggerated or irrelevant. Thus, a domestic tort rule that has a dual purpose of compensating injured parties and regulating an actor's conduct does not create an analytical problem. A dramshop law that holds a tavern liable for the conduct of its bartender in serving intoxicating beverages to an already intoxicated patron is a common illustration.<sup>74</sup> The domestic policy of the law will be attained in the conflicts context whenever the beverage was served within the state, regardless of the place of the resulting injury or the residence of the injured party. Whether the state chooses to assert that domestic policy when it conflicts with the contrary domestic policy of another state is a separate question.<sup>75</sup> Both policies must be identified by statutory construction; neither Currie nor Hancock suggested that "all plausible policies be imputed"<sup>76</sup> to the domestic statute. In particular, Hancock refutes Juenger's assertion when he insists that the court in a choice of law case analyze all the previous domestic interpretations of a state law said to be in conflict with another state law.<sup>77</sup>

Juenger's implicit opinion that federal policies are entitled to greater weight than state domestic law policies<sup>78</sup> does no more than restate the supremacy clause, and neither Currie or Hancock would controvert it. Hancock, but not Currie, however, would agree with Juenger's further

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71. Brilmayer, *supra* note 46, at 1342.

72. Juenger, *supra* note 36, at 33-35.

73. I discuss here only the first of Juenger's asserted "defects" in governmental interest analysis.

74. See, e.g., *Schmidt v. Driscoll Hotel*, 249 Minn. 376, 82 N.W.2d 365 (1957).

75. See B. CURRIE, *supra* note 11, at 495.

76. Juenger, *supra* note 36, at 33.

77. See *supra* text accompanying note 22.

78. Juenger, *supra* note 36, at 33.

point that choice of law analysis can disregard or downgrade state domestic policies characterized as “drags on the coattails of civilization.”<sup>79</sup> Both Hancock and Currie would reject Juenger’s implicit claim that a state court cannot ascertain the policies of a foreign jurisdiction, whether those of a sister state or a foreign country. Hancock’s work refutes this claim by providing several examples of the interpretation of domestic policy of several American states,<sup>80</sup> as well as that of foreign countries.<sup>81</sup>

Juenger cites the experience of the New York Court of Appeals in the well-known series of guest statute cases that began with *Babcock v. Jackson*<sup>82</sup> to illustrate the difficulty courts experience when they try to determine the content of domestic law.<sup>83</sup> Another of Currie’s critics, Professor Harold L. Korn, has treated these same New York cases as a microcosm of the “rise and fall of interest analysis.”<sup>84</sup> Through an exhaustive dissection of the opinions, he seeks to reduce the core insight of the modern choice of law revolution to a rule applying the law of the common domicile of the parties, rather than the law of the place of injury, to a tort conflicts action.<sup>85</sup> Hancock examined a similar attempt to substitute for an analysis of the competing domestic law policies a choice of law rule pointing to the common domicile of the parties in the context of spousal immunity. He rejected it as an effort to establish a choice of law principle “conceptually so crude and indiscriminating that, while indicating a satisfactory solution for one case, it compels the court to approve an unwelcome result in another” (p. 33). He believes that the state of injury should be free to decide whether its domestic policy permitting an injured spouse to recover applies to spouses domiciled in a state that prohibits spousal suits. Acceptance of a choice of law principle such as that advocated by Korn, in Hancock’s view, would “offer the courts a ridiculous ‘package deal’; though the cases be diametrically different, the adjudication of one automatically settles the result in the other” (p. 34).

In contrast to Juenger and Korn, Professor Mary Jane Morrison calls for courts deciding conflicts cases to “grab [the] lifeline” of keeping “choice of law consonant with the policies of the underlying substantive

79. *Id.* at 33-34.

80. Chapter two analyzes the spousal immunity laws of Illinois and Wisconsin; chapter nine construes New York charitable trust law.

81. Chapter eight construes various tort laws of Quebec, Ontario, and England.

82. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). The series of cases ended with *Towley v. King Arthur Rings, Inc.*, 40 N.Y.2d 129, 351 N.E.2d 728, 386 N.Y.S.2d 80 (1976).

83. Juenger, *supra* note 36, at 34.

84. Korn, *supra* note 39, at 776. As I have explained elsewhere, I do not view the approach used by the New York Court of Appeals in these cases as Currie’s governmental interest analysis. See Kay, *supra* note 3, at 525-35.

85. Korn, *supra* note 39, at 799-801.

law.”<sup>86</sup> She deplors the rarity with which scholars have focused on “connecting a court’s choice of law decisions with its non-conflicts decisions in the related substantive law.”<sup>87</sup> She finds “most promising” those contemporary analytic methods for choice of law that “include not only analyses of the policies or interests of the competing jurisdictions in their conflicting substantive laws, but also an analysis of which of these laws is better or more just.”<sup>88</sup> Despite the obvious similarities between Morrison’s critique of choice of law and Hancock’s methodology as I have outlined it in this Essay, she does not refer to Hancock’s work. Yet the parallels that exist between her thought and his help to establish her case, while the differences, including Hancock’s limitation of the better law approach to resolve true conflicts cases, might help to refine her analysis. The publication of Hancock’s *Studies in Modern Choice-of-Law* should go far to bring his work to the attention of current conflicts writers. All of us can profit from his insights.

#### CONCLUSION

Hancock, like other scholars,<sup>89</sup> applauds the *Babcock* court’s approach to the choice of law problem. In his view, it showed that judges were finally looking at real questions of domestic policy in conflicts cases, rather than distracting themselves with artificial issues of classification (pp. 55-56). He cites *Babcock* to Canadian readers as the best illustration of the new American methods (pp. 186-88). He harshly criticizes the New York Court of Appeals for its subsequent retreat in *Neumeier v. Kuehner*<sup>90</sup> from the analysis of the content of domestic law (chapter four). Yet Hancock does not draw from the experience of the New York Court of Appeals the lesson that Korn suggests: that we should put aside the choice of law revolution in favor of a return to choice of law rules. Instead, Hancock continues to believe that the point at which a judge should begin the analysis of a conflicts case is the interpretation of conflicting domestic policies, and he has not changed his view that the decision in a choice of law case requires no different judicial skills than in any other case. One of Hancock’s goals in publishing this volume is “to illustrate the working of the new methodology in practice for the benefit of students, scholars of other countries or anyone who would like to expand his understanding of it” (p. ix). That goal has been amply attained.

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86. Morrison, *supra* note 38, at 313 (footnote omitted).

87. *Id.* at 314.

88. *Id.* at 321 (footnote omitted).

89. See, e.g., Symposium, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

90. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).