FEATURED ARTICLE

"The Entrails of a Goat": Reflections on Reading Lea Brilmayer's Hague Lectures

by Herma Hill Kay*

I. INTRODUCTION

No one will be surprised to hear that my former student, Professor Lea Brilmayer, and I have a long-standing disagreement about the merits of the approach to choice of law theory proposed by my former teacher, Professor Brainerd Currie. I take Currie's interest analysis to be a major intellectual achievement, a paradigm-shattering advance over the traditional vested rights theory advocated by the father of the First Restatement, Professor Joseph Beale, and a sound basis for further theorizing in choice of law. Brilmayer regards interest analysis as a

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“house without foundations”\(^1\) that was built on the “myth” of legislative intent;\(^2\) rejects its teachings as “methodologically bankrupt”\(^3\) and “metaphysical as Beale”;\(^4\) and denounces its claim to identify governmental interests after having examined the policy underlying a state statute as providing “no more guarantee of authenticity than the fact that an announcement that the gods want human sacrifices takes place after examining the entrails of a goat.”\(^5\)

I do not propose to revisit here my disagreement with Brilmayer over Currie’s theory. I have defended his approach against several critics, including Brilmayer, elsewhere.\(^6\) Rather, I wish to elaborate on two of my own clarifications of Currie’s approach in light of Brilmayer’s discussion of my work in her recent Hague Lectures.\(^7\) This volume in honor of Currie, which revisits his approach, seems a convenient occasion for me to offer a reply to Brilmayer on two points: (1) whether governmental interests, as Currie used that term, can be created by legislative enactment, or whether instead, interests arise from the objective confluence of the law-fact pattern of a given case; and (2) the relevance to a court using interest analysis of the existence of jurisdiction-selecting choice of law rules in another state whose domestic law is potentially applicable. Brilmayer uses my analysis of both points as fresh support for her claim that interest analysis eschews actual legislative intent in favor of choice of law logic that chooses connecting factors to establish the spacial applicability of conflicting laws just as the traditionalists did. As she puts it, “the interests that the modern theorists purport to identify bear only the most casual and coincidental resemblance to what the legislature happens to want.”\(^8\) I believe her claim can be shown to be overstated. Adopting the method used by the panel in the conversations reported in this volume, I will focus on a

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4. Id. at 563.
7. Brilmayer, supra note 5, at 84-89.
8. Id. at 107-08.
familiar case, *Pfau v. Trent Aluminum Co.*, for purposes of this discussion.

II. THE *PFAU CASE*

*Pfau* involved an automobile collision in Iowa between two vehicles, one driven by a New Jersey student attending Parsons College in Iowa who was en route to Missouri for the weekend with a college classmate from Connecticut, the other operated by an Iowa resident driving with his family. The collision resulted from the negligence of the New Jersey driver and caused injuries to the Iowa family as well as the Connecticut passenger. The vehicle driven by the New Jersey student was owned by his father's New Jersey corporation, registered in New Jersey, and insured by a New Jersey insurance company. The insurer settled the claims of the Iowa family, but denied that of the Connecticut passenger, who thereafter brought suit in New Jersey against the host and the owner of the vehicle, relying on the New Jersey law that required a host to use at least ordinary care for the safety of a guest. The defendants invoked the Iowa guest statute as a defense. That statute provided that a host-driver is not liable to his guest-passenger for ordinary negligence. The trial court struck this defense, holding New Jersey law applicable. The appellate division reversed and reinstated the defense. On appeal from the interlocutory order dismissing plaintiff's claim, the Supreme Court of New Jersey reversed the order of the appellate division and reinstated the order of the trial court striking the defense based on the Iowa guest statute.

Justice Proctor began his analysis for the New Jersey Supreme Court by noting that the court had previously rejected the *lex loci delicti* rule for determining choice of law in torts cases and had adopted the governmental interest analysis approach. True to the methodology of interest analysis, Justice Proctor began by examining the policies underlying the law asserted by one of the parties to displace forum law as the rule of decision: he examined the purposes of the Iowa guest statute "as articulated by the Iowa courts." That examination

10. *Id.* at 130.
11. *Id.*
14. *Id.* at 130-31 (citing Melk v. Sarahson, 229 A.2d 625 (N.J. 1967)).
15. *Id.* at 131.
produced a list of purposes, none of which appeared to the New Jersey court "to be relevant to the present matter" because "[t]he desire of Iowa to prevent collusive suits and suits by ungrateful guests and to cut down litigation would ordinarily apply to Iowa domiciliaries, defendants insuring motor vehicles [there], and persons suing in its courts."

Having examined the legislative purposes (or using Currie’s term, the policies) that Iowa courts had identified underlying the guest statute, and having determined that, given the facts of the case before him, none of those purposes would be achieved by applying the statute, Justice Proctor drew the following conclusion:

It is clear to us that Iowa has no interest in this suit. Recovery for negligence in this action will not transgress any of the purposes behind Iowa's guest statute as enunciated by that state's courts or legislature, and will not in the slightest impair traffic safety in Iowa .... We are convinced that if the plaintiff were a New Jersey domiciliary Iowa's guest statute would be inapplicable.

The final sentence of the quoted paragraph reflects two conclusions about New Jersey law, both spelled out later in the opinion: First, as to its domestic law, "that the strong policy of this state is to allow a guest-passenger to be compensated by his host-driver in cases of ordinary negligence," and second, that in a case where both guest and host were domiciliaries of New Jersey, the state would have an interest in implementing its policy of compensation.

16. Id. These purposes are: "to cut down litigation arising from the commendable unselfish practice of sharing with others transportation in one's vehicle and protect the Good Samaritan from claims based on negligence by those invited to ride as a courtesy," Rainsbarger v. Shepherd, 118 N.W.2d 41, 44 (Iowa 1962); to prevent ingratitude by guests, Knutson v. Lurie, 251 N.W.2d 147, 149 (Iowa 1933); to prevent suits by hitchhikers, Id.; "to prevent collusion suits by friends and relatives resulting in excessively high insurance rates," Hardwick v. Bublitz, 111 N.W.2d 309, 312 (Iowa 1961).

17. Pfau, 263 A.2d at 131-32. This action will not increase litigation in the Iowa courts; no hitchhiker is involved; no Iowa insurer will be subjected to a "collusive suit" since the insurer is a New Jersey corporation; there is no "Good Samaritan" Iowa host-driver to be protected; and finally, there is no Iowa guest displaying his 'ingratitude' by suing for ordinary negligence.

18. Id. at 132.

19. Id. at 135.

20. Id.
In *Pfau*, however, plaintiff was not a domiciliary of New Jersey, but rather of Connecticut. Justice Proctor considered whether this fact sufficiently altered the law-fact pattern to change his conclusion that Iowa law was inapplicable. To do so, he examined Connecticut law. He found that Connecticut had repealed its guest statute in 1931, and since that time had permitted guest-passengers to recover from their host-drivers for ordinary negligence. Thus, looking only at its domestic law, Justice Proctor concluded that "if this plaintiff-guest had been injured in a Connecticut accident by a Connecticut host-driver, there would be no bar to recover for ordinary negligence if suit were brought in that state."

This analysis suggests that plaintiff could recover in New Jersey under Connecticut law. Although it is not entirely clear from the record, the appellate court opinion suggests that plaintiff did not rely on Connecticut law; instead, he had invoked the law of the forum—New Jersey. Under those circumstances, what interest, if any, did New Jersey have in applying its law?

At this point in his opinion, Justice Proctor turned for guidance to another state court that had adopted governmental interest analysis—the opinion in *Reich v. Purcell*, written for a unanimous California Supreme Court by its distinguished Chief Justice, Roger J. Traynor. Like *Pfau*, *Reich* involved an automobile collision in one state (Missouri), a negligent driver from a second state (California), and a plaintiff from a third state (Ohio), in which only the state of injury imposed a limitation on recovery. *Reich* differed from *Pfau* in that plaintiff's suit was for the wrongful death of his wife and child, and the statute relied upon by the negligent driver was a limitation on damages for wrongful death rather than a statute barring a guest's recovery from a host for ordinary negligence. In both cases, however, the sole issue

21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
27. *Id.* at 728-29.
28. Another factual difference between the two cases was that plaintiff's decedent, at the time of the collision in Missouri, had been en route to California where she and her family were thinking of relocating. By the time suit was filed in California, plaintiff and his surviving son had settled in California. This factual difference, and Chief Justice
before the court was whether the defense based on the statute in force at the place of the injury applied to prevent (in Pfau), or to limit (in Reich), plaintiff's recovery.

Chief Justice Traynor's approach to determining the respective policies of the three states was similar to that used by Justice Proctor. He turned first to an analysis of the Missouri statute limiting damages for wrongful death to twenty-five thousand dollars. Although he did not cite Missouri cases as authority for his analysis, as Justice Proctor had done in approaching the Iowa statute, Traynor drew on well-recognized characteristics of such limitation statutes. He identified two such purposes: to determine "how survivors should be compensated" and "to avoid the imposition of excessive financial burdens on [defendants]." Considering those policies in light of the law-fact pattern of the case, Chief Justice Traynor, like Justice Proctor, found that they would not be advanced by their application to the nonresident parties in a lawsuit brought outside Missouri. As to the first purpose, Missouri, as the place of wrong, "has little or no interest in such compensation when none of the parties reside there." As to the second, "[t]hat concern is also primarily local and we fail to perceive any substantial interest Missouri might have in extending the benefits of its limitation of damages to travelers from states having no similar limitation."

Having eliminated Missouri as an interested state, Chief Justice Traynor had been confronted, as Justice Proctor was, with the question of whether the forum, as the domiciliary state of the defendant driver, had an interest in applying its own law to allow full recovery. Here Chief Justice Traynor was presented with an argument that Justice Proctor did not have to resolve: whether plaintiffs' change of domicile from Ohio to California between the time of the occurrence and the time suit was filed brought them within the ambit of California's policy of full

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29. Reich, 432 P.2d at 730-31. Professor David Currie observed that the California court's analysis of the policies underlying the wrongful death laws and their damage limitations "is a standard one, so much so as to raise a danger signal. For no Ohio or Missouri materials are cited in explanation of these policies . . . ." David P. Currie, Comments on Reich v. Purcell, 15 U.C.L.A. L. Rev. 595, 598 n.20 (1968). Justice Proctor's analysis is not subject to a similar criticism.
30. Reich, 432 P.2d at 731.
31. Id.
32. Id.
33. Id.
34. Id.
compensation. Traynor’s answer to this question was clear, yet controversial. He wrote:

Although plaintiffs now reside in California, their residence and domicile at the time of the accident are the relevant residence and domicile. At the time of the accident the plans to change the family domicile were not definite and fixed, and if the choice of law were made to turn on events happening after the accident, forum shopping would be encouraged. (See Cavers, [The Choice of Law Process (1965)], p. 151, fn.16.) Accordingly, plaintiffs’ present domicile in California does not give this state any interest in applying its law, and since California has no limitation of damages, it also has no interest in applying its law on behalf of defendant. As a forum that is therefore disinterested in the only issue in dispute, we must decide whether to adopt the Ohio or the Missouri rule as the rule of decision for this case.

Chief Justice Traynor went on to hold that Ohio law applied to provide unlimited damages to plaintiffs, thus treating the case, in Currie’s terminology, as a false conflict in a disinterested third state.

Justice Proctor reported this analysis accurately, but he was not disposed to follow it in *Pfau* by declaring New Jersey a disinterested forum. Because of its importance to the question of how interests are identified by a court following Currie’s approach, it is worth quoting Proctor’s reasoning in full. He wrote:

> It may well be that in this case, however, New Jersey has an interest. We are not certain that a defendant’s domicile lacks an interest in seeing that its domiciliaries are held to the full measure of

35. *Id.* at 730.


38. *Id.* at 731.

damages or the standard of care which the state's laws provide for. A state should not only be concerned with the protection and self-interest of its citizens. See Tooker v. Lopez, 249 N.E.2d [394] at 399 [1969]. In Cohen v. Kaminetsky, ... [176 A.2d 483 (1961)], we emphasized a host's duty to his guests. There we said: "We see no reason why the host should be less vigilant for his own guest than he must be for the guest in another car. The duty to exercise reasonable care is as appropriate in the one situation as in the other." 176 A.2d at 487. It would not seem just to limit the imposition of this duty to instances where a New Jersey host negligently injures a New Jersey guest in a state which has a guest statute. See Mellk v. Sarahson, ... [229 A.2d 625 (1967)]. Therefore, if Connecticut had a guest statute in this case, we would be forced to choose between our state's policy of holding our hosts to a duty of ordinary care and Connecticut's policy of denying a guest recovery for the ordinary negligence of his host and we might have a true conflict. But since Connecticut has the same policy of applying principles of ordinary negligence to the host-guest relationship as does New Jersey, this case presents a false conflict and it is unnecessary for us to decide whether this state has an interest sufficient to warrant application of its law. See Leflar, American Conflicts Law at 328-29.40

In Justice Proctor's view, Pfau presented the equivalent of a common domicile case in which a New Jersey resident had injured another New Jersey resident in Iowa.41 His dictum concerning New Jersey's possible interest in imposing a duty of care on New Jersey hosts for the benefit of their guests, regardless of the domicile of the guest or the place of injury, has been followed by at least one other court.42

III. THE OBJECTIVE IDENTIFICATION OF INTERESTS

Brilmayer has challenged my clarification of Currie's method of identifying interests, noting that I argue "that while the determination of policies is responsive to legislative wishes, the determination of interests is not."43 She goes on to quote in full a passage in which I observe that "although the state can create its governmental policy

40. Id. at 136 (emphasis in original) (parallel citations omitted).
41. Id. at 137.
42. Labree v. Major, 306 A.2d 808, 817, 818 (R.I. 1973) (holding a Rhode Island host-driver who injured a Massachusetts guest-passenger liable despite a Massachusetts guest statute because "[a] Rhode Island driver has the same duty of care towards a Massachusetts passenger whether he is driving in Rhode Island or Massachusetts," and citing Pfau in support of this conclusion).
43. Brilmayer, supra note 5, at 85.
through its legislatures, its executive, or its courts, it cannot create a governmental interest through its own actions." She then observes:

[If one thing follows from the just-quoted passage, it is that States cannot create interests simply by declaring or wishing them into existence. It is hard to believe that the interest analysts are really finding the answers in the statute when the statute's authors have no control over the answers that the interest analysis uncovers. They are definitely finding something in the statute that the legislature did not put there.]

I propose to test the validity of this critique against the methodology used by Justice Proctor and Chief Justice Traynor in identifying the interests of their respective states in *Pfau* and *Reich*.

Both *Pfau* and *Reich* were cases in which an out-of-state plaintiff sought recovery from a local defendant for injuries resulting from the defendant's negligence in a third state. In both cases, the forum's tort law provided for full recovery, but the law of the place of injury prevented (*Pfau*) or limited (*Reich*) plaintiff's recovery. If the forum's legislative policy of allowing full recovery is understood to be designed to make injured persons whole, such a policy will be furthered whenever the law is applied to permit recovery by a person who is within the group of local residents over whom the legislative power extends and for whom the policy was designed. If, however, the plaintiff is not within that group, then application of forum law to hold a local defendant liable will not advance the domestic legislative policy. Both Justice Proctor and Chief Justice Traynor demonstrated familiarity in their respective opinions with this line of analysis. Yet Chief Justice Traynor decided that California had no interest in applying its law, while Justice Proctor determined that New Jersey did have such an interest. Did the two jurists differ in the way they identified state interests in these cases?

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44. *Id.*
45. *Id.* at 86.
46. This method of statutory interpretation is not unique to choice of law. Indeed, Justice Proctor used it in *Pfau* to rule out as irrelevant Iowa's policy of preventing recovery by hitchhikers against their hosts: because plaintiff was not a hitchhiker, he reasoned, application of the Iowa guest statute to plaintiff would not achieve that legislative purpose. *See supra* note 17. Similarly, application of the Iowa guest statute to a New Jersey defendant would not achieve the legislative policy of protecting Iowa hosts against claims from ungrateful guests. Whether constitutional principles of equal protection or privileges and immunities require Iowa to extend the benefit of its guest statute defense to nonresident hosts who have injured nonresident passengers in Iowa is a question that Brainerd Currie and I have explored elsewhere. *See BRAINERD CURRRE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 445-525 (Privileges and Immunities), 526-83 (Equal Protection) (1963); Kay, supra note 6, at 145-49.*
Though that might appear to be so, a more careful analysis indicates that the difference lies in the interpretation each judge gave to his state's domestic policy, not in the way each articulated the state's interests.

Chief Justice Traynor implicitly viewed the policy underlying California's law of unlimited liability for wrongful death as designed to make plaintiffs whole, and because plaintiff was not a Californian at the time of the accident, he concluded that California had no interest in applying its law for the benefit of an Ohio plaintiff.47 Justice Proctor, however, did not interpret New Jersey law as designed only to provide recovery for New Jersey plaintiffs. Rather, he noted that the New Jersey court in a prior case48 had "emphasized a host's duty to his guests."49 Justice Proctor evidently inferred from this emphasis that New Jersey's law permitting unlimited recovery to guests had two purposes: to benefit guests by making them whole and to regulate the conduct of hosts by imposing on them a duty of ordinary care. The New Jersey policy, thus defined, would be furthered by its application either to permit recovery by a New Jersey guest, or to enforce an obligation of care against a New Jersey host.

Justice Proctor's reliance on the New Jersey defendant's domicile as the basis for suggesting that New Jersey might have an interest in applying its law flowed directly from his interpretation of New Jersey's domestic policy. Chief Justice Traynor's rejection of the California defendant's domicile as leading to the recognition of a California interest stemmed from his interpretation of California's domestic policy. Given Justice Proctor's view of New Jersey law, its policy would be furthered by its application to a New Jersey defendant, although Chief Justice Traynor's view of California law meant that its policy would not be furthered by its application to a California defendant.

In both Pfau and Reich, the first analytical task for a judge following Currie's approach is to identify the policy underlying the laws invoked by the parties. The policy is expressed, either implicitly or explicitly, in

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47. Reich, 432 P.2d at 730.
48. Cohen v. Kaminetsky, 176 A.2d 483 (N.J. 1961). Cohen did not present a conflict of laws problem. Both host and guest were residents of New Jersey and the injury occurred in that state. The issue was whether a host owed the same duty of care to a passenger, regardless of whether the host had invited the passenger along or whether the passenger or someone on his behalf had asked for the ride. The court held that the host owed both sets of passengers "a duty to exercise reasonable care." Id. at 487. In the course of its opinion, the court rejected the "ungrateful guest" rationale for limitations on a guest's recovery. Id.
49. Pfau, 263 A.2d at 136 (emphasis in original) (citing Cohen, 176 A.2d at 487).
the domestic law. Once the policy has been identified, the next analytic task is to determine whether the policy will be advanced by its application to the facts of the particular case. That inquiry focuses on whether the fact pattern engages the policy so as to achieve the underlying purposes of the law. It is the objective confluence of policy and fact that produces the interest. Without Justice Proctor's determination that the New Jersey policy was one of creating a duty of care for hosts, the fact of defendant's domicile would have been as irrelevant in Pfau as Chief Justice Traynor found it to be in Reich. Conversely, Chief Justice Traynor's determination that the California policy was limited to providing full recovery meant that defendant's domicile did not trigger its application. In both cases, the legislature had declared the state law, the court had interpreted that law to discover its underlying policy, and then had identified the state's interest in achieving that policy by reference to the unique factual circumstances.

Brilmayer, however, offers another critique of my position that legislatures do not create interests, as that term is used in interest analysis. Citing part of a passage in which she claims Currie supports "certain sorts of legislative choice of law pronouncements," she argues that his invitation to legislatures to "cultivate the practice of adding to specific enactments a section specifying the extent to which the law is intended to apply to cases involving foreign factors means that,

50. Brilmayer's repeated charge that interest analysts "are making their own decision and not finding in a statute something that the legislature put into it," Brilmayer, supra note 5, at 108, apparently is directed at the identification of interests, not the determination of policies.

51. Brilmayer, supra note 5, at 86 (quoting B. Currie, supra note 46, at 171). Here is the passage as she quotes it:

There is a contribution that legislatures can make to progress in this troubled field. They can cultivate the practice of adding to specific enactments a section specifying the extent to which the law is intended to apply to cases involving foreign factors . . . . These would not be choice-of-law rules, in the sense of universals assigning "jurisdiction" to the only competent state. They would simply be exercises of the lawmaking power, directed to local courts, providing aids of statutory construction. Their great value would lie in the fact that they would make explicit the policy expressed in the statute, and the mode of application that will promote that policy . . . . If legislatures were to state their policies explicitly, in such a way as to reveal the significant factors that should bring those policies into play, the remaining task of the courts—to apply the law so as to effectuate that policy where no constitutional barrier is presented, and to avoid applying it needlessly to the impairment of interests of other states—would be a comparatively simple one.

Id. at 86-87.

52. Id.
contrary to my position, legislatures do control the determination of state interests after all.

But Currie was talking about legislative specifications of policy, not of interests. In my view, he meant the sort of specification that Justice Proctor supplied for the New Jersey law governing a host's liability to a guest: that the law should be applicable whenever a New Jersey host negligently injures a New Jersey guest. Assume the New Jersey legislature, had it accepted Currie's invitation, might have made that specification itself. Had it done so, as Currie observed, "the remaining task of the courts—to apply the law so as to effectuate that policy where no constitutional barrier is presented, and to avoid applying it needlessly to the impairment of interests of other states—would be a comparatively simple one." Brilmayer says that "[t]he end result of this passage is not clear." If so, it is because she does not draw a distinction between a territorial directive and an elaboration of domestic policy. She reads the passage as calling for a "decision about which geographical connecting factors ought to matter." Currie meant, rather, a specification of the breadth of the legislative policy. Such specifications are not directions concerning territorial application. They are, instead, to use Currie's words, "aids of statutory construction." Had the New Jersey legislature specified that it intended to impose a duty of care on New Jersey hosts wherever the host and guest travelled together, Justice Proctor would have been spared the necessity of inferring that purpose in Pfau.

Brilmayer betrays her confusion when she observes that Currie "does not use the word 'interest' in the above passage, leading to the possibility that he might have been in favor of statutory enactments even though they do not necessarily give rise to interests." Currie's statutory specifications were neither choice of law rules nor interests. Instead, they were elaborations of domestic policy. Thus, in Pfau, even if the New Jersey legislature, rather than the New Jersey Supreme Court, had indicated that its policy of imposing a duty of care on hosts should be observed regardless of where the injury to the guest occurred, that indication would not have created a New Jersey interest. The interest flows from the facts of the case—defendant's New Jersey domicile—and that interest must still be determined objectively by the court.

53. Pfau, 263 A.2d at 136.
54. B. Currie, supra note 46, at 171 (quoted in Brilmayer, supra note 5, at 87, and reproduced in note 51).
55. Brilmayer, supra note 5, at 87.
56. Id.
57. B. Currie, supra note 46, at 171.
58. Brilmayer, supra note 5, at 87.
Brilmayer appears to grasp that this might be so, for she observes that "[p]erhaps the quoted language is totally separate from the question of whether an interest exists." But she then goes on to question that observation by referring to my analysis of the "appropriate relationships" that give rise to interests. She says:

But the fact that Kay refers to the ascertainment of legitimate interests as "clearly" the same as "the constitutional standards that control the state's capacity to apply its own law" suggests otherwise. Under Kay's formulation, the ability of a State to apply its own law would depend on whether the State had a legitimate interest in the sense that concerns her, a legitimate interest that arises out of the existence of an "appropriate" connection between the dispute and the State. If Currie meant that State legislatures should integrate explicit choice of law provisions into their statutes, and did not think that doing so gave rise to an interest, then if Kay is correct, he was advising State legislatures to enact unconstitutional statutes.

The hypotheses on which this conclusion is based are not supported by the passages quoted either from my work or from that of Currie. The misstatement of Currie's position is the most glaring: Brilmayer's speculation, quoted above, that Currie might have meant that state legislatures should integrate explicit choice of law provisions into their statutes follows immediately after her quotation from the passage in which Currie says of the statutory specifications under discussion, "These would not be choice-of-law rules, in the sense of universals assigning 'jurisdiction' to the only competent state."

The point becomes even clearer when one consults Currie's example of what he meant by such a statutory specification, which Brilmayer omits from the passage as she quoted it:

Thus, California might reasonably specify that its law on the survival of personal injury actions is intended to apply to all cases in which the injured person is a resident of California, and also to all cases in which the injured person, though a nonresident, is present in California at the time of the injury. The Arizona legislature, if such should be its will, could specify that its law abating such actions is intended to apply to all cases in which the action is brought against a local executor or

59. Id.
60. Kay, supra note 6, at 53-54.
61. Brilmayer, supra note 5, at 87-88.
62. B. CURRIE, supra note 46, at 171 (quoted in Brilmayer, supra note 5, at 87).
administrator, or to all cases in which the deceased tort-feasor was domiciled there, or both.63

These specifications indicate the legislature's thoughts on the persons to whom the law it has enacted should be applied, not its decision as to territorial connecting factors. As Currie noted, in the passage that Brilmayer does quote, "[t]hey would simply be exercises of the lawmaking power, directed to local courts, providing aids of statutory construction."64 Armed with these aids, the comparatively simple, but vitally important, judicial task remaining is "to apply the law so as to effectuate that policy where no constitutional barrier is presented, and to avoid applying it needlessly to the impairment of interests of other states."65

This judicial task is the same one that I identified in my Hague Lectures, and the one Brilmayer refers to in the statement quoted above and discusses more fully a few pages earlier.66 As applied to Pfau, the New Jersey court would look to three conceptually distinct, but related elements. First, it would ascertain what factual relationship exists between the state and the transaction. In Pfau, the defendant host was a New Jersey domiciliary who is being sued in the New Jersey courts. Second, the court would examine that factual relationship in light of the legislative policy to determine whether the factual relationship implicates the policy. In Pfau, the "specification" made earlier by the New Jersey court in Cohen indicates that the policy of imposing a duty on hosts will be advanced by applying it to a New Jersey host.67 Third, the relationship must be an "appropriate" one so that it will survive

63. Id. Currie's example is based on Grant v. McAuliffe, 264 P.2d 944 (Cal. 1953), a case involving a collision in Arizona between two cars registered in California. The California tortfeasor died before suit was filed against him in California by the injured California plaintiff. Arizona, but not California, abated tort actions that were not commenced prior to the tortfeasor's death. Mr. Justice Traynor, writing for the California court, applied California law to permit the suit to proceed against the tortfeasor's estate. Id. at 946, 949.
64. B. CURRIE, supra note 46, at 171 (quoted in Brilmayer, supra note 5, at 87).
65. Id. at 172.
66. Kay, supra note 6, at 53-54.
constitutional scrutiny of the state's decision to apply its own law. In Pfau, the state's application of its law to its domicilliary being sued in its courts would survive the rather minimal constitutional limits imposed by the United States Supreme Court's current interpretation of the Due Process and Full Faith and Credit Clauses.\footnote{Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).}

Brilmayer objects, however, that "[i]t has not yet been explained what makes some factors 'appropriate' and others 'inappropriate.'"\footnote{Brilmayer, supra note 5, at 86.} Yet the constitutional limits on the power of a state to apply its own law, though not free of doubt, are at least relatively well established. In Phillips Petroleum Co. v. Shutts,\footnote{472 U.S. 797 (1985).} the Supreme Court held that Kansas, the forum state, could not apply its own law given its lack of interest in claims unrelated to the state, in a case where other states with competing laws did have related claims.\footnote{Id. at 822.} In Shutts, the only relationship between Kansas and the transaction as to some of the claims was its status as the forum.\footnote{Id. at 823.} That factor was an inappropriate basis for the application of Kansas law, given the existence of other states with appropriate relationships to these claims and with conflicting laws.\footnote{Id.}

The fact that application of a state's domestic law must be tested against constitutional standards does not mean, as Brilmayer claims, that a court's satisfaction of that standard through a search for an appropriate relationship between the state and the dispute before it renders the legislative specifications Currie invited unconstitutional. Indeed, as Currie observed in the quoted passage, it is this very task—"to apply the law so as to effectuate the policy where no constitutional barrier is presented"\footnote{B. Currie, supra note 46, at 171.}—that remains with the courts after the legislature has specified the scope of its policy.

As to what factors are "inappropriate," consider what might have happened in a variant of Pfau in which both the host and guest had been Iowa domiciliaries and the Iowa plaintiff had managed to serve the Iowa defendant personally while both were temporarily present in New Jersey. Does anyone doubt that, if New Jersey decided to hear the case at all, application of New Jersey law would be inappropriate as well as unconstitutional under the Shutts test? Using my three-factor test, examination of the first factor shows that New Jersey's only factual
relationship to the transaction is its designation as forum by virtue of having obtained personal jurisdiction over the parties. Although an expansive analysis of the 'second factor might yield the conclusion that the policy of New Jersey law will be furthered by its application to all cases filed in the New Jersey courts, even a cursory reference to the third factor would make clear that New Jersey's decision to apply its own law would seriously infringe on the conflicting policy and interest of Iowa and could not be sustained either under interest analysis or the Constitution.

Brilmayer's analysis does not support her claim that Currie's invitation to state legislatures to specify the scope of their domestic policies is in conflict with my statement that state legislatures cannot enact interests. Currie was inviting legislatures to be more precise in enunciating policies; my point that those enunciations are not interests is not a refusal to honor legislative actions. Legislatures provide the basis for a court's identification of interests by their choice of domestic policies. Legislatures enact domestic laws and are encouraged to indicate the extent to which they would like to have the policies underlying those laws applied to cases that do not present purely domestic situations. When they do so, they simplify the task of courts faced with conflict of laws problems. But their specifications are not a substitute for the objective identification of interests, nor do they control the judicial duty to measure domestic law against constitutional limitations. Moreover, courts fulfilling those duties by following Currie's approach to choice of law do so in harmony with, not in defiance of, legislative will.

IV. THE RELEVANCE OF JURISDICTION-SELECTING CHOICE OF LAW RULES TO INTEREST ANALYSIS

Pfau and Reich had another feature in common. In both cases, although the state of plaintiff's domicile shared the forum's domestic tort policies of full recovery, neither had adopted a modern approach to choice of law. Both Connecticut and Ohio followed the vested rights approach to conflict of laws problems and used traditional jurisdiction-selecting choice of law rules that identified the law of the place of wrong as the governing law. Had plaintiffs brought suit in their home states, assuming they could have obtained jurisdiction over defendants there, they might have lost. If Chief Justice Traynor was aware of this circumstance, he appears not to have thought it significant: he referred to Ohio's constitutional provision prohibiting limitation of damages for
wrongful death, but he did not mention that Ohio's use of the *lex loci delicti* in torts conflicts cases might suggest that an Ohio forum would have applied Missouri law. This omission drew criticism from Professor Albert A. Ehrenzweig, who pointed out that if Ohio would have applied Missouri law to limit plaintiff's recovery, "it was hardly justifiable for the *Reich* court to speak of an Ohio interest 'in affording full recovery.'" Replying to Ehrenzweig, I observed:

I am not impressed by the consideration that Ohio, as a forum, might have applied the law of Missouri to limit plaintiff's recovery. The mere fact that Ohio might mistakenly fail to recognize her own legitimate interests need not prevent California from recognizing her interests on her behalf, at least when to do so will not defeat any opposing interest of Missouri.

The parties in *Pfau*, by contrast, made the Connecticut choice of law rule a central part of their argument, contending that if New Jersey applied Connecticut's substantive law, the court should apply its choice of law rule as well, a contention that Justice Proctor took to mean that "Connecticut's interest in its domiciliaries is identified not only by its substantive law, but by its choice-of-law rule." He went on to reject this contention on two grounds: First, he was not persuaded that a Connecticut court actually would apply Iowa law denying recovery rather than invoking one of the "traditional escape devices" to avoid that "harsh result." Second, and more importantly for this discussion, however, Justice Proctor refused to consult the Connecticut choice of law rule on the ground that it "does not identify that state's interest in the matter," going on to explain that "[*lex loci delicti* was born in an effort to achieve simplicity and uniformity, and does not relate to a state's interest in having its law applied to given issues in a tort case]."

In rejecting the relevance of traditional jurisdiction-selecting choice of law rules to the determination of a state's interest in applying the policies underlying its domestic law, Justice Proctor was in conformity with Currie's views on the matter. Early on, Currie noted "with some

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75. *Reich*, 432 P.2d at 729 n.2.
79. *Id.* at 136 n.4.
80. *Id.* at 137.
81. *Id.*
trepidation" that courts following his approach could dispense with "the problem of the renvoi" because

(foreign law would be applied only when the court has determined that the foreign state has a legitimate interest in the application of its law and policy to the case at bar and that the forum has none. Hence, there can be no question of applying anything other than the internal law of the foreign state."#2

This statement, however, does not meet the question posed both by Ehrenzweig and the Pfau defendants. That question is why a forum court, seeking to determine the interest of another state in the application of its domestic law, should ignore what appears to be a highly pertinent datum: the decision by that state in the multistate context not to apply its own law. The answer suggested by both questioners is that the forum should not ignore this datum, but rather should conclude that the other state has no interest in applying its law. Thus, they would argue, Chief Justice Traynor should have applied Missouri law to defeat plaintiff's recovery, and Justice Proctor should have done the same with Iowa law.#3

This argument appears plausible, and it has been endorsed both by Brilmayer#4 and by my co-author, Professor Larry Kramer, in his valuable analysis of the renvoi problem.#8 Nevertheless, I believe that the argument is mistaken, for it fails to keep separate two inquiries that occur at different points in the analysis and deal with two quite different issues: first, the identification of a state's interest in applying its domestic law, and second, if such an interest has been identified, the subsequent determination of whether the state chooses to assert its domestic interest in the multistate context. As I have indicated earlier, I believe that the first of these inquiries is objective. The second,
however, is determined by the state's approach to choice of law, and is thus within the state's control.

Kramer has rejected both the reasoning on which I argued that Chief Justice Traynor was right to ignore the Ohio choice of law rule in Reich, and my conclusion that interests, unlike policies, are defined objectively. Kramer's rejection of these points is based on what he terms the interpretative function of a choice of law rule:

A state's approach to choice of law by definition establishes the state's rules of interpretation for questions of extraterritorial scope. This is true even if the approach is not self-consciously adopted with this thought in mind, for the very function of choice-of-law rules is to define the applicability of the state's substantive laws in multistate cases. A state may, for example, reject Currie's notion that the object of choice of law is to implement domestic policies, adhering instead to the First Restatement on the ground that it furthers uniformity and predictability. Misguided or not, by this decision the state chooses to circumscribe the applicability of its laws according to these rules. The rules thus define the states "interests" in the only sense in which that concept is meaningful, and they should be respected by courts in other states.

Given this conclusion, both explanations offered by interest analysts for ignoring foreign choice-of-law rules must be rejected. The first explanation—that interests are defined objectively—is inconsistent with the premise that choice of law is a process of interpreting the relevant laws. In interpreting another state's laws, the court is asking whether that state has conferred a right, not whether the forum or an interest analyst thinks it should.

Kramer describes not "a process of interpreting the relevant laws," but a rule-based barrier that, if respected by other courts, would prevent such a process of interpretation. A court following interest analysis does not consult foreign law initially to discover "the applicability of the state's substantive laws in multistate cases." On the contrary, a court seeks to learn only the policies underlying the other state's domestic laws and whether those policies would be advanced by their application to the facts of the case at hand. The overriding point of Currie's method was that courts should begin their analysis of a conflicts problem with an examination of the domestic policies of the laws asserted to be in conflict and of the respective interests of the states in furthering those policies. Nothing in any of his extensive writings suggests that he

86. Id. at 1003 n.81. He added that "Kay may have reached the correct outcome in this case, but I offer a quite different explanation for why the court can ignore another state's rule." Id.

87. Id. at 1011 (emphasis in original).
thought traditional choice of law rules could impart any information whatsoever on that initial inquiry. Justice Proctor's reasoning follows this methodology: he aptly observed that Connecticut's decision to apply the law of the place of injury has nothing to say about "its interest in having its law applied to given issues in a tort case."\textsuperscript{88}

Brilmayer and Kramer argue that a court following this procedure necessarily asserts its own view of what the other state's interests should be, thus ignoring true legislative intent. But this argument confuses the two different inquiries described above. When performing the initial inquiry, the court is concerned with discovering the only datum required for it to determine whether the policies of the two laws are in conflict. The court does not distort the domestic policy of the other state by asking only the questions that are made relevant by its own approach to determining choice of law problems. States are free to choose different approaches to choice of law, and a decision to reject the traditional approach in favor of any of the modern, policy-oriented approaches (including interest analysis) entails a rejection of the concept that the place to begin the analysis is by identifying the jurisdiction whose law should be applied without any inquiry into the substantive policies involved. Kramer's observation that a state following the \textit{First Restatement} uses a different approach to choice of law than that of a state following interest analysis is correct, but irrelevant. Thus, Kramer's conclusion that choice of law rules "define the state's 'interests' in the only sense in which that concept is meaningful,"\textsuperscript{89} proves too much. His position would permit the choice of law rules of every state following the \textit{First Restatement} to prevent states following other approaches from inquiring into the policies and interests of those states, making any policy-oriented approach unworkable. Moreover, by lumping together the two separate inquiries described above, Kramer's position goes far beyond what is necessary for a forum court to respect the other state's right to follow its own conflicts doctrine. The fact that a Connecticut forum might choose not to assert its domestic interest in a multistate case does not mean that its (objectively identified) domestic interest does not exist or that it is somehow improper for a New Jersey court to recognize that it exists. Connecticut's decision to adopt the \textit{First Restatement} is neither an interpretation of the policies underlying the Connecticut guest statute nor a declaration of the state's domestic interests in achieving those policies. On the contrary, it is a rather direct statement that Connecticut chooses not to advance its domestic

\textsuperscript{88} Pfau, 263 A.2d at 137.

\textsuperscript{89} Kramer, supra note 85, at 1011.
interests in the multistate setting, presumably because it has chosen to seek other goals, such as the hope of achieving uniformity, instead.

This conclusion would not have surprised Currie. The centerpiece of his attack on the First Restatement was his demonstration that a court following its precepts faithfully would reach arbitrary and irrational results contrary to the interests of one or both of two states concerned with contract or tort actions. His proposal was to counsel courts to give up the system that produced such indefensible results, and instead, to adopt a strategy of rational self-interest. A state that rejects that advice cannot, by definition, be said to be defining its interests in Currie's terms.

Moreover, Kramer himself expressly recognizes that domestic interests are defined objectively. In presenting his own description of how courts should analyze choice of law problems, he states that "[a] conflict of laws exists only when the factual contacts are distributed in such a way that more than one state wants to regulate." He then goes on to say:

[L]awmakers seldom give any clear indication about extraterritorial applications. The first step in the choice-of-law process thus calls for the court to fill this gap by identifying which contact or contacts must be located in a state for that state's law to apply. As explained above, courts accomplish this task by ascertaining the law's purpose in domestic cases and presuming that it applies only when a contact triggering that purpose is located in the state. When this condition is satisfied, interest analysts say the state is "interested." I prefer to say that the state's law is "prima facie applicable" in order to avoid some of the baggage associated with the term interest, and to emphasize that a state whose law is applicable in this sense may still choose not to enforce that law because another state's law is similarly applicable.

Regardless of terminology, Kramer here recognizes the distinction I proposed above between identifying a state's domestic interests objectively and, only thereafter, determining whether the state wishes to assert that interest. In Part IV of his paper, Kramer goes on to draw a distinction between choice of law rules that define the scope of foreign law (which he asserts should be recognized as an interpretation of the state's positive law) and choice of law rules that seek to resolve true conflicts (which he contends must win the day, if at all, on the merits of

90. B. CURRIE, supra note 46, at 81-98.
91. Id. at 141-63.
92. Kramer, supra note 85, at 1011.
93. Id. at 1013.
94. Id. at 1014.
the proposed resolution). He concedes that applying this distinction to the First Restatement's choice of law rules is difficult, precisely because that approach proceeds without taking account of domestic policies and interests. In the context of Reich, where, if Ohio's lex loci delicti rule is to be read as removing Ohio's tort law from consideration, none of the three states having contacts with the occurrence has an interest in applying its law, a court following interest analysis would probably treat the matter as an "unprovided-for" case and apply forum law if the case could be dismissed on forum non conveniens grounds—an unlikely result when the defendant is domiciled in the forum state. Kramer, however, has argued forcefully that the unprovided-for case does not exist. If his view that the First Restatement's choice of law rules are to be read as declarations of state interest is accepted, the incidence of ostensible unprovided-for cases may be multiplied.

In his first article announcing interest analysis, Currie contrasted the attitude of a state following the First Restatement with that which might be followed by "a quite selfish state, concerned only with promoting its own interests; a state, if you please, blind to consequences, and interested in short-run 'gains.'" By the time he was ready to announce his methodology about a year later, Currie defended his approach against the charge that his suggested analysis implied "the ruthless pursuit of self-interest by the states" by pointing to three restraining factors: constitutional constraints on choice of law, altruistic considerations, and the use of "restraint and enlightenment in the determination of what state policy is and where state interests lie." Several years later, he modified his approach by counseling a forum, faced with the recognition that both the forum and another state had competing policies and interests, to engage in a "moderate and restrained" interpretation of the policy and of the circumstances in which it must be applied to effectuate the forum's purpose. As I have pointed out elsewhere, this development indicated Currie's willingness to take account of the competing policies and interests of other states in an effort to avoid the impasse that a true conflict of laws determination entailed, with the

95. Id. at 1028-29.
96. B. Currie, supra note 46, at 152-56. An "unprovided-for" case is one in which no state has an interest in applying its own law.
98. B. Currie, supra note 46, at 89.
99. Id. at 185-86.
101. Kay, supra note 6, at 68-73.
forum applying its own law. I agree with Kramer that the choice of law decisions by courts following interest analysis and other "two step" policy-oriented approaches to choice of law are valuable sources of interpretation in those circumstances. They are valuable, however, not because they define the geographic limits of the state's interests, but because they provide important information about the very issue that the forum must decide: Whether the other state, faced with an apparent true conflict after a full consideration of the competing policies and interests, would choose to assert its domestic interest.

The territorial, jurisdiction-selecting choice of law rules used by the First Restatement provide no such information. When Currie first announced his approach in 1958, it would have been simply wrong to attribute to a state following lex loci delicti any thought that a policy-oriented analysis was even possible, let alone a decision to reject such an analysis because the state sought thereby to advance its own multistate interests. Under those circumstances, my willingness in 1968 to permit California to recognize Ohio's domestic interests on her behalf still seems justified. Today, things are different. States have had nearly forty years to consider whether they should abandon the traditional approach to choice of law in favor of a modern, policy-oriented approach, and most of them have made informed selections. When I first tallied the states following different approaches in 1983, sixteen states and the District of Columbia still adhered to the traditional vested rights approach embodied in the First Restatement; three others had rejected that approach only in part; and in two other states, no modern cases could be found. Fourteen years later, when Professor William M. Richman and Mr. David Riley presented their updated results to the Conflict of Laws Section at the American Association of Law Schools' meeting in January 1997, sixteen states (including only twelve of my original sixteen) still followed that

103. Kay, supra note 36, at 594.
These states have relinquished, for the time being, the opportunity to adopt a modern analysis.

Under these circumstances, a court following interest analysis should still disregard the other state's traditional choice of law rule as irrelevant to its initial inquiry into the policies and interests underlying that state's domestic law. In approaching the second inquiry, however, the court should take account of the other state's choice of law rule. If that state would choose not to further its domestic interests in the interstate setting, the forum must decide what its own approach to choice of law requires. It should recognize that the situation poses a conflict of conflict of laws rules. If that conflict is treated like a true conflict of domestic interests under governmental interest analysis, each state, as forum, would presumably follow its own approach. If I understand Kramer's suggestion correctly, he would permit a forum following a policy-oriented analysis to apply its own choice of law approach rather than that of the other state's traditional rule when those approaches would produce a different outcome at the level of the second inquiry, at least if the forum "remains convinced that this rule will better maximize both states' interests in the long run."

105. William M. Richman & David Riley, The Restatement (First) of Conflict of Laws on the Twenty-Fifth Anniversary of its Successor: Contemporary Practice on Traditional Courts, U. TOLEDO L. REV. (forthcoming 1997). In Table II, Richman and Riley put my count of states following the traditional approach at twenty-eight states and the District of Columbia. They include in their count seven states that I listed as following other approaches, either a combination of two modern approaches or the Restatement Second. Even with this correction, however, the decline in the number of states following the traditional approach is striking. Moreover, no state that I showed as having abandoned the traditional approach has reversed its decision to return to the vested rights doctrine. The direction of the trend in choice of law seems clear.


Thus, suppose Michigan [policy approach] law is prima facie applicable: finding Illinois [traditional approach] law inapplicable at the first step means there is no conflict, and Michigan will apply its own law; finding Illinois law inapplicable at the second step, in contrast, means there is a conflict, and Michigan will follow its own policy-selecting rule, which may direct it to apply Illinois law even though Illinois would not do so.

107. Id. at 1043. I take it that in this passage, Kramer uses the term "states' interests" to refer both to domestic interests and interstate, or conflicts, interests. I also take it that it is on the basis of this analysis that he deemed my original suggestion that California could properly apply Ohio's domestic law as the rule of decision in Reich to be correct, but for the wrong reason. If I am correct in this assumption, it does not seem to me that our final analyses are so far apart. Indeed, Kramer hypothesizes a case in which Illinois's traditional rule points to Michigan law, but Michigan's law "is not even prima facie applicable," i.e., in Currie's terms, Michigan has no interest in having its law applied. Kramer explains: "To the extent that Illinois's one-step approach presumes that both
that view, I continue to think that Chief Justice Traynor correctly used California's approach to choice of law by disregarding Ohio's choice of law rule in Reich.

V. CONCLUSION

Brilmayer's Hague Lectures provide a convenient and valuable summary of her sustained critique of interest analysis. She deserves much credit for having forced those of us who continue to work within the framework Currie provided to re-examine our assumptions and to defend our methods. As I have tried to show in this Article, however, her continued charge that interest analysis was based on a false claim of fidelity to legislative intent that does not hold up under close scrutiny cannot itself be sustained. In particular, her rejection of my distinction between a state's subjective domestic policies and its objective domestic interests does not advance her argument that interest analysts use choice of law logic to substitute their own views for legislative "intent." Instead, her statement that "[t]he more clearly that modern theorists attempt to differentiate the 'policy' determination from the 'interest' determination (in order to explain why legislative preference matters for the first and not the second) the more evident it becomes that the second is really a standard question of choice of law,"108 falsely equates the traditional rule-based reliance on geographical connecting factors with the fact-sensitive, objective, case-by-case determination of whether an appropriate basis exists for policy implementation.

Similarly, my defense of the refusal of a forum using interest analysis to consult another state's traditional choice of law rules does not ignore either the other state's legislative purpose underlying its domestic law or its domestic interest in achieving that purpose. On the contrary, it is the other state's decision to use the traditional approach that results in the subordination of that state's domestic interests to its multistate goals. The fact that Currie thought this decision a bad idea does not

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states confer rights in this case, it simply misinterprets Michigan law." Id. at 1043 n.201. But Illinois has not "interpreted" Michigan law at all; it has simply decided that Michigan's geographical connecting factor has made its law applicable. For Kramer to conclude that this is a "misinterpretation" of Michigan law is to recognize that it is possible to identify objectively that Michigan law is "prima facie applicable," which I take to mean that Michigan has an interest in having its law applied. If Illinois's misinterpretation of Michigan law is open to objective correction, so might be Illinois's misinterpretation of its own domestic interests.

108. Brilmayer, supra note 5, at 89.
mean that, contrary to Brilmayer's characterization, interest analysis is a "well-intentioned misrepresentation."¹⁰⁹

¹⁰⁹ Brilmayer, supra note 2, at 392.