Chief Justice Traynor and Choice of Law Theory

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Chief Justice Roger J. Traynor's contributions to the field of conflict of laws have been widely recognized. His opinions as a member of the California Supreme Court from 1942 to 1961 were analyzed in extensive detail by Professor Brainerd Currie over twenty years ago. Other commentators have also called attention to the significance of Traynor's work in this field. Traynor's last choice of law opinion, *Reich v. Purcell*, was the subject of an academic symposium, and participants in the Round Table on Conflict of Laws held at the 1962 meeting of the Association of American Law Schools discussed Traynor's accomplishments. In my view, Traynor's retirement from the California Supreme Court in 1970 marked the beginning of a decline in the clarity and precision of that court's choice of law opinions, which in turn has stimulated confusion in the lower California courts.

Traynor broke new ground in many areas of the conflict of laws, including jurisdiction over nonresident defendants, the recognition of sister state judgments, and interstate child custody disputes. His in-

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3. [Hereinafter cited as Currie, *Justice Traynor*].


5. See infra note 186.


fluence was greatest, however, in the development of choice of law theory. Here, Traynor's name has been associated with that of Currie and the governmental interest analysis that Currie advocated. Several writers have noted Traynor's judicial reliance upon Currie's academic theories. Indeed, Traynor himself stated, in an article written six years after his retirement from the California Supreme Court, that he "came to rely most heavily on Professor Brainerd Currie's interest analysis, with some modification and amplification" in his choice of law opinions.

But the story of Roger Traynor's interaction with Brainerd Currie is not a tale of a respected and influential jurist who came to proselytize the controversial views of a brilliant academic among his judicial colleagues. Rather, the story bears the traces of a collaboration between giants—an creative intellectual colleagueship that was deepened by strong personal friendship. The narrative also contains a darker motif: the academic rivalry between Currie and Professor Albert A. Ehrenzweig. Both advocated new approaches to choice of law theory that were fundamentally different in conception, but similar enough in presentation to be classified together as forum-oriented approaches. Traynor and Ehrenzweig were also friends, as the latter

11 (1957) (holding that a court with the parties before it can compel a land conveyance in the form required by the law of the situs, and the conveyance will be recognized there).
10. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963) [hereinafter cited as B. CURRIE, SELECTED ESSAYS].
13. I have touched on this theme in Kay, Theory Into Practice: Choice of Law in the Courts, 34 Mercer L. Rev. 521, 540-42 (1983) [hereinafter cited as Kay, Theory Into Practice].
had joined the law faculty of the University of California, Berkeley, eight years after Traynor left to assume his judicial seat in 1940. Traynor's influence was so great among judges in the United States and abroad that his approval and citation of academic work was enough to recommend it to other courts. He was careful to cite the work of both men, as well as that of others, in his later opinions, and his first written acknowledgment that he had placed primary reliance on Currie's work in his judicial thinking was not published until after both scholars had died.

A final theme in this account of Traynor's contribution to choice of law theory lies in his membership from 1963 to 1980 on the Council of the American Law Institute (A.L.I.). Under the guidance of its Reporter, Professor Willis Reese, the A.L.I. was engaged from 1953 to 1971 in producing the *Restatement (Second) of Conflict of Laws*. This endeavor was bitterly opposed by Ehrenzweig, who made frequent pleas that the project be abandoned, and was scathingly criticized by Currie. Traynor became an Adviser to the Reporter in 1966, and was instrumental in effecting the famous compromise that infused the *Restatement Second*’s “significant contacts” approach with governmental interest analysis. Traynor, however, apparently was not persuaded except that Ehrenzweig's is more accessible since it is in a treatise. It is to the theoreticians in the field, to students who, like Ehrenzweig and Currie, are interested in final principles, that their differences will be important.

Id. at 238-39.


22. For a brief history of this project, see Kay, *Theory Into Practice*, supra note 13, at 552-56.


25. The compromise is embodied in the addition of § 6 to the *Restatement Second*. See
that the Restatement Second's method was the most promising one. His own judgment was that governmental interest analysis, as he and Currie had developed it in collaboration, was "the most rational approach to conflicts that we now have, and a method that may well develop principles of its own that will have a long and rational life."26 Characteristically modest, however, he warned that:

A caveat precedes the synopsis. I should no more want it to be a final view than I should want the world to come to an end. No more can be said for it than that it proceeds from experience and reasoning, not dogma, and recognizes that from the Isle of Man to the Isle of Manhattan, from the Commonwealth termed British to the un-commonwealth termed Arabian, from Alaska to Zambia, in all aspects of the law from A to Z, there will be conflicts that know no bounds.27

This Article traces Chief Justice Traynor's significant contribution to choice of law theory. The Article first examines the early development of Traynor's choice of law approach, as exhibited in his first five choice of law opinions written from 1940 through 1958. It then recounts Currie's announcement of his governmental interest analysis in 1958 and Justice Traynor's response in 1959. The Article next looks at the collaboration between Traynor and Currie from 1960 through 1965 and the development of their respective approaches through Traynor's opinions and speeches and Currie's writings. The Article then discusses Traynor's refinement of his choice of law theory during 1966-1970 after the collaboration had ended with Currie's death. It details the culmination of Traynor's theory after he retired from the bench, focusing on a key lecture that spelled out his approach. Finally, the Article evaluates Traynor's approach and concludes that it can withstand critical attacks and endure as an outstanding contribution to choice of law theory.

Traynor Takes the Lead: 1940-1958

During his thirty years on the California Supreme Court, Traynor wrote only seven opinions dealing with choice of law theory.28 Five

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27. Id. at 123.
were handed down before Currie's first article announcing his governmental interest approach was published in 1958. For seventeen years, then, Justice Traynor struggled with the conceptual problems of choice of law without the benefit of Currie's academic theories. That he did struggle is evidenced both by the slow progress he made away from the conceptual rigidity of the traditional vested-rights approach to choice of law theory in those five cases and by a statement he made in a speech delivered on April 13, 1956, as part of the dedication ceremonies of the new law school building at the University of Illinois.

Speaking of areas in which judges sorely needed the aid of academics, Traynor highlighted conflict of laws: In certain fields, as currently in Conflict of Laws, the wilderness grows wilder, faster than the axes of discriminating men can keep it under control. The concepts in the Restatement have been shattered by the devastating attacks of Cook and Lorenzen, and the compelling logic of the proposition that in the area between the prohibition of the due process clause and the mandate of the full faith and credit clause, local law is supreme, has made it necessary to search for acceptable doctrines to govern the making of exceptions to the local law, and serve as the basis of a new and realistic system of conflict of laws.

At the time he delivered this speech, Traynor had entered the "wilderness" of choice of law theory on four occasions.


Currie, in his analysis of Traynor's conflict of laws opinions, also counted among Traynor's choice of law cases Intagliata v. Shipowners & Merchants Towboat Co., 26 Cal. 2d 365, 159 P.2d 1 (1945). See Currie, Justice Traynor, supra note 1, at 729 n.40. Since Intagliata involved a choice between state and federal law, and mentioned conflict of laws principles only by analogy, I do not include it in this discussion.

29. The five cases were People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480 (1957); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Grayhill Drilling Co. v. Superior Oil Co., 39 Cal. 2d 751, 249 P.2d 21 (1952); Ohio ex rel. Squire v. Porter, 21 Cal. 2d 45, 129 P.2d 691 (1942), cert. denied, 318 U.S. 757 (1943) (dissenting opinion).


31. For a brief description of the traditional vested-rights approach to choice of law, see E. SCOLAS & P. HAY, supra note 15, at 13-14.


The first occasion was a dissenting opinion in *Ohio ex rel. Squire v. Porter*. Porter involved the application of a California statute of limitations to a suit brought by the State of Ohio’s Superintendent of Banks to enforce a one hundred percent assessment against the California stockholders of an Ohio bank. The California statute commenced its three-year limitations period as of the date when the liability was created, while the relevant Ohio statute of limitations would not have barred the suit until six years after the cause of action accrued. Looking to Ohio law to determine when the liability had been created, the majority decided that the triggering event was the date on which the bank had failed to meet its obligations in the regular course of business, rather than the date on which the Superintendent had taken possession of the bank for the purpose of liquidation. Because the former date was more than three years from the time the suit had been filed in California, the claim was held to be barred by the California statute of limitations.

In his dissent, Justice Traynor looked beyond the words of the California statute of limitations to its underlying purpose when enacted in 1872: to facilitate investment in California businesses by artificially restricting the time within which the constitutionally-imposed unlimited proportional personal liability of stockholders in California corporations might be enforced. Since the three-year period commenced on the date that the liability was created, irrespective of when the cause of action accrued, the action might be barred before the right to sue arose. The problem of the financial impediment to California’s growth created by unlimited liability had been solved permanently in 1930, when the state constitutional provision that had imposed it was repealed. The statute of limitations, however, remained on the books although its utility in this regard had ended. The application of the statute to California stockholders of Ohio corporations whose liability was limited by Ohio law to a single one hundred percent assessment in Porter served no legislative purpose whatsoever. Traynor thus con-

34. 21 Cal. 2d 45, 129 P.2d 691 (1942), cert. denied, 318 U.S. 757 (1943).
36. Porter, 21 Cal. 2d at 47, 129 P.2d at 693.
37. Id. at 55, 129 P.2d at 697 (Traynor, J., dissenting).
38. Id. at 47-50, 129 P.2d at 693-95.
39. Id. at 52, 129 P.2d at 695.
40. Id. at 53, 129 P.2d at 696 (Traynor, J., dissenting).
41. Id. at 52, 129 P.2d at 695.
42. Id. at 53, 129 P.2d at 696 (Traynor, J., dissenting).
cluded: "California has no policy necessitating the destruction of the substantive right of the foreign bank depositor to enforce the liability imposed upon the bank's stockholders, and no interest in riding over such rights."\(^4^3\)

Traynor neither elaborated on his use of the terms "policy" and "interest" nor explained why he chose those terms to denote the absence of a relevant state regulatory purpose as well as the lack of any factual basis for applying the state statute that was invoked to bar the claim. Moreover, no authority, scholarly or precedential, was cited to support the suggested analysis. In retrospect, however, Traynor's formulation is striking in its anticipation, by sixteen years, of Currie's chosen terminology.\(^4^4\)

**Grayhill, Grant, and Emery**

Ten years separated the Porter dissent from the next Traynor choice of law opinion in *Grayhill Drilling Co. v. Superior Oil Co.*\(^4^5\) *Grayhill* illustrates Traynor's application of the traditional approach, as he routinely applied the law of Oklahoma because it was the place where the written contract and its oral modification were made and were to be performed, as well as the place where the acts relied upon to establish an accord and satisfaction as a defense to the oral modification occurred.\(^4^6\) No claim was made that California law should be applied, or that its application would have produced a different result.

Nor did Traynor continue to develop the policy and interest analysis that he had suggested in his Porter dissent in his next two choice of law opinions, *Grant v. McAuliffe*\(^4^7\) and *Emery v. Emery*.\(^4^8\) Both *Grant* and *Emery* were interstate torts cases and, while Traynor's majority opinions in both cases rejected the traditional approach in important respects,\(^4^9\) both accepted as governing law the rule adopted by the California Supreme Court in *Loranger v. Nadeau*\(^5^0\) that the law of the place

\(^{43}\) *Id.* at 55, 129 P.2d at 697 (Traynor, J., dissenting).

\(^{44}\) The Porter dissent lay undiscovered by conflicts scholars until 1961, when Currie gave it prominence in his discussion of Traynor's contributions to choice of law. See *Currie, Justice Traynor, supra* note 1, at 723-31. See infra text accompanying notes 113-16.

\(^{45}\) 39 Cal. 2d 751, 249 P.2d 21 (1952).

\(^{46}\) *Id.* at 754, 249 P.2d at 22.

\(^{47}\) 41 Cal. 2d 859, 264 P.2d 944 (1953).


\(^{49}\) Neither opinion commanded the votes of the full court. *Grant* was a 4-3 decision, while *Emery* was unanimous at 5-0 with two of the *Grant* dissenters, Justices Edmonds and Schauer, not participating.

\(^{50}\) 215 Cal. 362, 10 P.2d 63 (1932).
where a tort occurred created the cause of action.51 But Traynor's adherence to the traditional vested-rights ideology ended at that point.

Neither in Grant nor in Emery did the California Supreme Court reach the result preordained by the traditional view. In Grant, the Restatement would have dictated that the law of the place of the wrong should decide whether the cause of action in tort survived the death of the tortfeasor.52 Instead of following this dictate, Traynor recharacterized the question of survival of causes of action as procedural rather than substantive and the underlying problem as one of the administration of decedents' estates rather than of tort liability, and applied the law of the forum where the estate was being administered.53 In Emery, Traynor could have applied any of three potentially available choice of law rules governing the capacity of family members to sue one another: 1) the place of family domicile; 2) the place of the wrong, the rule apparently preferred by the Restatement54; or 3) the law of the forum, a choice which would have been consistent with a characterization of the capacity problem as procedural.55 Traynor chose the least traditional rule: the place of family domicile.56

Traynor's remarkable achievement in Grant and Emery was that he produced sensible results in both cases while managing to remain at least superficially within the framework of the rigid traditional choice of law approach. Referring to the two cases in his University of Illinois speech, Traynor pointedly observed: "The demolition of obsolete theories makes the judge's task harder, as he works his way out of the wreckage; but it leaves him free to weigh competing policies without preconceptions that purport to compel the decision, but in fact do not."57

The "preconceptions" so easily avoided in the confusion created

51. Id. at 366, 10 P.2d at 65. The Loranger court's holding is comparable to a later statement in Restatement of Conflict of Laws § 378 (1934) ("The law of the place of wrong determines whether a person has sustained a legal injury.") [hereinafter cited as Restatement]. In neither Grant nor Emery did Traynor cite the Restatement in support of the choice of law rule for torts adopted in Loranger.

52. Restatement, supra note 51, § 390 ("Whether a claim for damages for a tort survives the death of the tortfeasor or of the injured person is determined by the law of the place of wrong.").


54. Restatement, supra note 51, § 384(2) ("If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.").

55. See supra note 53.

56. Emery, 45 Cal. 2d at 427-28, 289 P.2d at 222-23.

57. Traynor, Law and Social Change, supra note 33, at 234 (footnotes omitted).
by the "demolition of obsolete theories" were cherished, however, by those who prized uniformity in choice of law above flexibility. Traynor's effort to point the way for others to escape the confinement of traditional theory did not itself escape criticism. The *Grant* opinion, in particular, was criticized by several law review notewriters for its unorthodoxy,58 was thought to be unconstitutional by Professor Sumner,59 and was nearly overturned by legislative action.60

Criticism of Traynor's choice of law work should not have been surprising. At the time Traynor wrote these two pathbreaking opinions in *Grant* and *Emery*, only one other state court judge, Chief Justice Frank N. Richman of the Indiana Supreme Court, had attempted to deal with "the unsatisfactory state of the decisions . . . [by] resort to a method used by modern teachers of Conflict of Laws in rationalizing the results obtained by the courts in decided cases." W.H. Barber Co. v. Hughes, 223 Ind. 570, 585-86, 63 N.E.2d 417, 423 (1945). In *Hughes*, Richman adopted a "center of gravity" approach to choice of law that he had discovered in a law school casebook, see F. Harper & C. Taintor, Cases on Conflict of Laws 173-75 (1937), in order to test the validity of a contract containing a cognovit provision. *Hughes*, 223 Ind. at 585-87, 63 N.E.2d at 423-24. This center of gravity approach is described in Kay, Theory Into Practice, supra note 13, at 525-27. But Richman's *Hughes* opinion posed no challenge to the traditional conflict of laws structure comparable to that contained in Traynor's *Grant* opinion. Indeed, Richman cited Professors Goodrich and Beale, stalwarts of the traditional approach, as authorities supporting his analysis, and he used the new center of gravity approach only as an additional test of the correctness of his conclusion that the contract was valid. *Hughes*, 223 Ind. at 581-87, 63 N.E.2d at 421-23.


Fuld's more significant opinion in Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), which moved away from the contact-counting methodology of the center of gravity approach towards an analysis of underlying state policy and interest in an interstate guest statute case, was not published until 1963. See Cavers, Comments on Babcock v. Jackson: A Recent Development in Conflict of Laws, 63 Colum. L. Rev. 1219, 1220-21 (1963); Currie, Comments, supra note 24, at 1233-34. Fuld's *Babcock* opinion cited both *Grant* and *Emery* in support of a new approach to choice of law that "rejected the inexorable application of the law of the place of the tort where that place has no reasonable or relevant interest in the particular issue involved." 12 N.Y.2d at 481 & nn.10-11, 191 N.E.2d at 283 & nn.10-11, 240 N.Y.S.2d at 749 & nn.10-11. *Grant* was also cited as part of a judicial trend towards the abandonment or modification of the traditional choice of law rule in tort cases. *Id.* at 478 & n.5, 191 N.E.2d at 281 & n.5, 240 N.Y.S.2d at 747 & n.5.

Other judges, such as Wisconsin Justice George R. Currie, see Haumschild v. Continental Casualty Co., 7 Wis. 2d 130, 134, 95 N.W.2d 814, 816 (1959) (citing *Emery* as the "first

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60. Id. at 144 (reporting the narrow decision of the California Law Revision Commission not to recommend legislation specifying what law should govern survival of actions arising elsewhere when suit is brought in California).
More than a year after his *Emery* opinion was published and nearly six months after his University of Illinois speech was delivered, Traynor met Currie for the first time. The occasion was another public address by Traynor, entitled “Some Open Questions on the Work of State Appellate Courts,” delivered at the University of Chicago Law School on November 8, 1956. Traynor’s description of their meeting suggests that it led to an invitation to him to give a summer course in conflict of laws at Chicago. Before accepting that invitation, however, Traynor wrote the last of his five choice of law opinions handed down prior to the publication of Currie’s first article on choice of law theory.

*Ford Victoria*

*People v. One 1953 Ford Victoria* did not present a classic choice between the competing laws of two states. Indeed, in his subsequent analysis of Traynor’s conflict of laws cases, Currie did not include the opinion in his section on “Choice of Law.” Rather, he mentioned it briefly under the sub-heading “Criminal Matters” in his section on “Miscellaneous Cases.” Traynor’s later treatment of this opinion, case to break the ice” in intrafamily torts conflicts), and Pennsylvania Justice Samuel J. Roberts, *see* Griffith v. United Air Lines, Inc., 416 Pa. 1, 17, 203 A.2d 796, 803 (1964) (citing *Grant* as a “leading case”), followed Traynor’s lead, but, as Traynor himself identified the sequence, “[a]fter *Grant v. McAuliffe*, the stones began to roll.” *Traynor, War and Peace, supra* note 12, at 144.

Professor Harold L. Korn has provided a comprehensive re-analysis of the choice of law opinions decided by the New York Court of Appeals, in which he asserts that “the New York Court of Appeals enjoys the distinction of not only having been the first openly to admit the new learning into the courts but also of having explored its ramifications more thoroughly and wrestled with them more earnestly than any other state court.” Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 776 (1983) [hereinafter cited as Korn, *Critique*]. As I show in this Article, Korn’s statement ignores Chief Justice Traynor’s prominent role in the development of choice of law theory, both in his opinions for the California Supreme Court and in his articles. Despite my own criticism of that court’s choice of law opinions following Traynor’s retirement in 1970, *see* Kay, *Comparative Impairment, supra* note 6, I consider the California Supreme Court a better guide to the current use of governmental interest analysis than the New York Court of Appeals ever was, except for the brief period when Judge Keating’s influence was paramount, *see* Kay, *Theory Into Practice, supra* note 13, at 536-38.


62. *Traynor, In Memoriam,* supra note 14, at 12 (“In the crash of counter-questions that followed, I declared that no judge really knew what he was judging about unless he renewed his education regularly and that there was no better way of relearning a subject than to teach it. Oh, just for a summer, of course, and just a fairly easy subject, like conflict-of-laws. The twinkle of Brainerd Currie’s glance should have been fair warning.”).

63. 48 Cal. 2d 595, 311 P.2d 480 (1957).

64. *Currie, Justice Traynor,* supra note 1, at 748-49.
both in a subsequent case\textsuperscript{65} and in his articles,\textsuperscript{66} indicates that it played
a significant role in the development of his approach to choice of law
theory—a role that Currie did not fully appreciate.\textsuperscript{67}

The case itself was relatively uncomplicated. Willie Smith bought
a car on credit from a dealer in Texas. Despite a provision in the chattel mortgage that prohibited removal of the car from Texas without the
written consent of the mortgagee, Smith took the car to California and
used it there to transport marijuana.\textsuperscript{68} The Ford was seized and the
California Attorney General filed notice of his intent to forfeit the au-
tomobile pursuant to a statute permitting forfeiture of the purchaser's
interest if the automobile had been used to transport narcotics unlaw-
fully. The statute also permitted forfeiture of the mortgagee's interest
as well unless the mortgagee had made a “reasonable investigation” of
the purchaser's moral responsibility, character, and reputation.\textsuperscript{69} The
Texas mortgagee, which had made no such investigation, nevertheless
asserted the validity of its mortgage in Texas.

Traynor treated the issue as one posing a question of statutory in-
terpretation: did the “reasonable investigation” requirement apply to a
Texas mortgagee?\textsuperscript{70} To answer this question, he first examined the un-
derlying legislative purpose. Traynor reasoned that the provision “in
effect regulates the conduct of persons financing, and thereby facilitat-
ing the sales”\textsuperscript{71} of automobiles, while at the same time it implicitly pro-
tects public safety by requiring a character investigation “to diminish
the possibility that automobiles will be placed in the hands of persons
likely to use them to transport narcotics unlawfully.”\textsuperscript{72} The require-
ment, as interpreted, was a reasonable one to place on California mort-
gagees, but not on out-of-state mortgagees.\textsuperscript{73} Traynor concluded:

A person financing the sale of an automobile in Texas for use exclu-
sively in that state will look to the laws of Texas for the determina-
tion of his rights and duties. He cannot reasonably be expected to
familiarize himself with and comply in Texas with the statutes of the
48 or more jurisdictions into which the automobile could possibly be
taken without his consent and in violation of express contractual

\textsuperscript{65} Bernkrant v. Fowler, 55 Cal. 2d 588, 594-95, 360 P.2d 906, 909-10, 12 Cal. Rptr. 266, 269-70 (1961).
\textsuperscript{66} Traynor, \textit{War and Peace, supra} note 12, at 132-33; Traynor, \textit{Is This Conflict Really Necessary?}, 37 Tex. L. Rev. 657, 672-73 (1959) [hereinafter cited as Traynor, \textit{Necessary}].
\textsuperscript{67} \textit{See infra} notes 233-309 & accompanying text.
\textsuperscript{68} \textit{Ford Victoria, supra} note 12, at 132-33.
\textsuperscript{69} \textit{Id.} at 596-98, 311 P.2d at 481-82.
\textsuperscript{70} \textit{Id.} at 598, 311 P.2d at 482.
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} Id.
\textsuperscript{73} Id.
prohibitions. Not only is section 11620 not made expressly applicable to an innocent mortgagee financing the sale of an automobile in another state for exclusive use there, but the statutory enumeration of relationships between the mortgagor and the state of California in the 1955 amendment to that section . . . plainly indicates that in requiring a "reasonable investigation" to avoid forfeiture, the Legislature was preoccupied with California mortgagors and mortgagees.\textsuperscript{74}

Did Traynor apply Texas law in \textit{Ford Victoria}, or did he simply hold that the California statutory requirement of a character investigation did not apply, consequently giving effect to the California legislature's "plain . . . purpose not to forfeit the interests of innocent mortgagees"?\textsuperscript{75} Apart from noting that the mortgage was valid in Texas, the opinion did not discuss Texas law. But a potential conflict between Texas and California law was asserted by the Attorney General's argument that the statute applied to all vehicles used to transport narcotics unlawfully in California.\textsuperscript{76} That conflict was avoided by Traynor's narrow reading of the statutory purpose. If the opinion had a broader significance, it would be revealed only in future cases.

Between 1942 and 1957, Justice Traynor commenced a critical examination of the traditional mode of thinking about choice of law. The five opinions he produced during that period did not rely on any modern conflict of laws scholars for authority.\textsuperscript{77} Traynor's accomplishments during this period were impressive. First, he had planted the seeds of a new and positive approach to choice of law in his \textit{Porter} dissent. Second, he had turned the traditional method against its own preferred solution to achieve a sensible result in \textit{Grant}. Third, he had selected a choice of law rule in \textit{Emery} that gave primary weight to a relevant territorial factor, family domicile, rather than to an arbitrary one, the place of injury. Finally, he had introduced in \textit{Ford Victoria} the technique of construing the interstate reach of a local statute in light of its legislative purpose, taking into account the reasonable expectations of

\textsuperscript{74} \textit{Id.} at 599, 311 P.2d at 482.

\textsuperscript{75} \textit{Id.} at 599, 311 P.2d at 483.

\textsuperscript{76} \textit{Id.} at 597, 311 P.2d at 481.

\textsuperscript{77} Traynor did mention in his University of Illinois speech the work of Walter Wheeler Cook and Ernest G. Lorenzen. \textit{Traynor, Law and Social Change, supra} note 33, at 234 (citing W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942), and E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947)). He also cited in footnotes to the published version of that speech the work of Ehrenzweig and Chief Justice Harlan Fiske Stone's influential \textit{Yarborough} dissent. \textit{Id.} at 234 nn.4-5 (citing Ehrenzweig, \textit{American Conflicts Law in Its Historical Perspective—Should the Restatement Be "Continued"?}, 103 U. PA. L. REV. 133 (1954), and \textit{Yarborough v. Yarborough}, 290 U.S. 202, 214 (1933) (Stone, C.J., dissenting)).
nonresident parties. These accomplishments were Traynor's independent work.

During the summer of 1957, Traynor taught conflict of laws at the University of Chicago Law School. He later described the interaction between Currie and himself that summer:

In the learning process I came to know the magnitude of scholarship and soul of the full-time professor of conflict-of-laws. In our frequent meetings I soon learned that here was no grum groovedigger. Here was no confirmed classifier attributing to judicial opinions a neutralism or activism, with the notion of distinguishing them on the basis of classificationisms that would square unto themselves all the convolutions of a reasoning process.

... One always talked law with him, and it was like advancing in good company to new ground in mountain territory.

The collaboration thus began.

Currie Announces Governmental Interest Analysis—And Traynor Responds: 1958-1959

In the fall of 1957, Brainerd Currie went to Palo Alto, California, to take up an appointment for the academic year 1957-1958 as a Fellow at the Center for Advanced Study in the Behavioral Sciences. Currie later described how he had spent that year:

I regarded my troubles with conflict of laws as sufficiently important to justify the devotion to them of this rare opportunity to spend a year in undistracted reflection. The outcome was the series of [three] articles... [T]he earliest of the articles laid down the basic lines of the analysis. Later articles have in the main adhered to the fundamentals, with some modification and elaboration.

Thus, Currie's first three articles announcing his governmental interest approach to choice of law, all published in 1958, were written at the Center.

The second of these three articles was devoted to an analysis of the problem presented in Grant and of Justice Traynor's opinion in that case. In contrast to previous commentators who had criticized the

81. B. CURRIE, SELECTED ESSAYS, supra note 10, at viii.
82. Currie, Survival, supra note 30.
court for its unorthodoxy in *Grant*, Currie had praise for its innovations and sympathy for its plight. He stated:

The California Supreme Court is one of several courts in this country which are making serious efforts to break away from sterile formalism and to develop a rational approach to conflict-of-laws problems . . .

I believe not only that the actual result in the *Grant* case was "justifiable" on the facts, but also that the approach to conflict-of-laws problems which the California Supreme Court adopted in that case is sound, constructive, and likely to prove fruitful in the search for more intelligent ways of handling such problems. But Currie’s praise was not without reservation. He “conceded that the opinion in the *Grant* case is not one which gives clear guidance as to the future course of development of conflict of laws in California concerning survival of actions.” Currie recognized that the *Grant* court’s use of “the traditional escape device of novel characterization” had aroused criticism. Instead of chastising the *Grant* court, however, Currie laid at least partial blame at the feet of legal scholars, who he felt had “not provided the courts with a systematic method of analysis whereby the sound instincts employed by a sensitive court in the adjudication of conflict-of-laws cases can be fitted into the conventions and the terminology of the legal order.” Currie concluded that the scholars had not “suggested any method whereby the courts could select the appropriate law objectively,” and he was determined to try his hand at proposing such a method. The result was governmental interest analysis.

83. *See supra* text accompanying notes 58-60.
85. *Id.* at 208-09. Currie continued:

The reason for that is understandable. Confronted with a situation in which the result dictated by the orthodox system of conflict of laws was manifestly absurd, and in which the just and rational result was clear, the court availed itself of one of the several escape devices which are built into the system itself. It characterized the problem differently, and the different characterization produced the result which had previously been recognized as the sound one. This is a device which has long been used by the courts. It is far from an ideal way of dealing with such situations. Certainly it would be better if the courts could state explicitly the considerations which led them in the first place to determine what the result should be, and indicate clearly how those considerations will be appraised in other cases.

*Id.* at 209.
86. *Id.* at 209.
87. *Id.* at 209-10.
88. *Id.* at 210.
Currie's Methodology

The three articles Currie produced at the Center, including the *Grant* article, set forth the basic core of his governmental interest analysis. While a comprehensive statement of Currie's theory is unnecessary in an article devoted to a study of Traynor's contributions to choice of law, it is necessary to give enough information to permit the reader to compare and contrast the ideas of the two men. Perhaps because interest analysis abandoned so much of traditional thinking about choice of law that he felt a simplified methodological statement would make the analysis easier to use, or perhaps merely because his mind had an orderly turn, Currie set out his theory in a series of steps that could be followed by a court desirous of adopting the approach. Currie produced three of these methodological statements, the first two of which it is appropriate to review briefly at this point.

These first two statements of the methodology of governmental interest analysis were virtually identical. The first, published in 1959, appeared in a short paper devoted to choice of law methods and is the one most commonly cited as setting out Currie's approach. It reads as follows:

1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.
2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.
3. If necessary, the court should similarly determine the policy ex-

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90. Currie's third methodological statement, and Traynor's response to it, are discussed *infra* notes 162-91 & accompanying text.

pressed by the foreign law, and whether the foreign state has an interest in the application of its policy.

4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.

5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.92

The second statement,93 which bears a 1958 publication date but actually was written after the version published in 1959,94 contains a more detailed description of the terms "policy" and "interest," which were not defined in the first statement. It also omits the reference to statutory construction contained in step two of the earlier statement.95 These two statements represent Currie's original view of what a court should do when confronted with a choice of law case.

Currie's initial statement drew criticism from academics,96 much

92. Id. at 178.
94. B. CURRIE, SELECTED ESSAYS, supra note 10, at vii, ix.
95. The second methodological statement reads as follows:
1. Normally, even in cases involving foreign factors, a court should as a matter of course look to the law of the forum as the source of the rule of decision.
2. When it is suggested that the law of a foreign state, rather than the law of the forum, should furnish the rule of decision, the court should first of all determine the governmental policy—perhaps it is helpful to say the social, economic, or administrative policy—which is expressed by the law of the forum. The court should then inquire whether the relationship of the forum state to the case at bar—that is, to the parties, to the transaction, to the subject matter, to the litigation—is such as to bring the case within the scope of the state's governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance.
3. If necessary, the court should similarly determine the policy expressed in the proffered foreign law, and whether the foreign state has a legitimate interest in the application of that policy to the case at bar.
4. If the court finds that the forum state has no interest in the application of its law and policy, but that the foreign state has such an interest, it should apply the foreign law.
5. If the court finds that the forum state has an interest in the application of its law and policy, it should apply the law of the forum even though the foreign state also has such an interest, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.
Currie, Judicial Function, supra note 30, at 9-10 (footnotes omitted).
96. See, e.g., Hill, Governmental Interest and the Conflict of Laws—A Reply to Professor Currie, 27 U. CHI. L. REV. 463, 479-81 (1960). Professor von Mehren characterized Currie's theory as "a point of view that is in its way as narrow and as dogmatic as the approach of the original Restatement which Currie so effectively attacks." Von Mehren, Book Review, 17 J. LEGAL EDUC. 91, 96-97 (1964). This criticism was rejected by Traynor in his review of
of it directed at his failure to seek interstate solutions, which may differ from domestic outcomes, to the interstate problems presented in choice of law cases. His ultimate response to these latter objections was reflected in his third methodological statement, which was made in 1964 and drew heavily upon Traynor's 1961 opinion in *Bernkrant v. Fowler*.

**Traynor's Response**

Currie did not claim that Traynor had used his proposed method of analysis in *Grant*, but he did suggest that the result in that case could be restated in terms of governmental interest analysis:

The decision in the *Grant* case is consistent with a method of analysis which I think holds promise of considerable utility in the intelligent and objective adjudication of conflict-of-laws cases. I do not suggest that the California court consciously employed any such analysis. I suggest that the result which that court recognized on common-sense grounds as the sound one, and then justified by a traditionally authorized manipulation of the concepts of the system, can be explained and justified by objective analysis.

Thus Currie, in his second major article setting out his theory of choice of law, identified Traynor as the judge whose work was consistent with that theory.

Because no choice of law cases came before the California Supreme Court between 1958 and 1961, Justice Traynor did not immediately embrace Currie's theory and methodology from the bench, but he warmly applauded Currie's theory from the podium. Delivering the Law Day Address at the University of Texas School of Law on April 24, 1959, Justice Traynor chose to focus his remarks on conflict of laws and to highlight the announcement of Currie's governmental interest analysis. Moreover, Justice Traynor went further: he reformed the holdings of *Grant*, *Emery*, and *Ford Victoria* in interest analysis terms. *Grant*, he said, had posed "no real conflict of laws." Justice Traynor thus classified the case, as Currie had done in his sec-

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**Currie's Selected Essays:** "On the contrary, Currie's brilliant essays have led us away from the narrow and dogmatic. They should do much to encourage consideration by the forum court of all relevant factors as it delineates the reach of local policy in conflicts cases." Traynor, Book Review, 1965 Duke L.J. 426, 434 [hereinafter cited as Traynor, Review].

97. See infra text accompanying notes 165-66.
101. *Id.* at 667-68.
102. *Id.* at 670.
ond article,103 as a "false conflict."104 In a footnote, Traynor acknowledged that the opinion had not been "ideally articulated"105—a graceful bow to Currie's gentle criticism of the Grant reasoning.106

Traynor restated the Emery holding in terms of policy and interest: "because of its substantial contacts with the case, the state had enough interest in the application of its policy to invoke local law as the appropriate law."107 Traynor, however, did not repudiate his acceptance of a choice of law rule based on family domicile.108 Ford Victoria now appeared to Traynor to have been a false conflict case. Once the California policy had been appropriately limited, "[t]here was thus no conflict between the restricted local policy and the Texas policy of protecting a mortgagee's contractual rights. The parallel lines never met."109 In this speech, Traynor did not mention his dissent in Porter.

Thus, in the year following Currie's announcement of governmental interest analysis, Traynor took the opportunity presented by a public lecture to hail the new method and to reconceptualize three of his own choice of law opinions in light of that theory. The stage was set for further collaboration.

The Collaboration at Work: 1960-1965

Currie Evaluates Traynor's Work

In his 1959 University of Texas speech, Traynor had referred to five of Currie's articles on choice of law theory.110 During 1960, Currie published four more.111 In 1961, as part of a symposium in the Stan-

104. A "false conflict" case is one in which only one state has a legitimate interest in having its policy applied in the case. See Kay, Comparative Impairment, supra note 6, at 578 & n.10.
105. Traynor, Necessary, supra note 66, at 670 n.35.
107. Traynor, Necessary, supra note 66, at 669.
108. Id.
109. Id. at 673.
110. Traynor, Necessary, supra note 66, at 667 n.28. The articles mentioned were Currie, Married Women's Contracts, supra note 30; Currie, Survival, supra note 30; Currie, Displacement, supra note 30; Currie, Judicial Function, supra note 30; and Currie, Notes, supra note 91.
ford Law Review honoring Traynor, Currie contributed an article analyzing all of Traynor's published opinions in the field of conflict of laws. While working on this article, Currie "discovered" Traynor's dissent in Porter and immediately recognized the similarity between Traynor's analysis and his own theory. Quoting the passage cited above, Currie excoriated legal scholars—himself presumably included—for failing to recognize the significance of Traynor's words at the time they were written:

He did not develop this theme at length; after all, he had forty-two other opinions to write in 1942. But what are law reviews for? Here was a quite indefensible decision, purportedly dictated by conflict-of-laws principles; here also, in the dissent, were common sense, insight, and guidance as to how a rational method of analyzing conflict-of-laws problems might be developed. If legal scholars had been on the alert, might they not have been inspired by this dissent to turn away from the banalities and the logic chopping of the conventional system, and to develop a method of analysis in terms of the policies and interests of the states involved?

Revisiting Traynor's opinion in Grant, Currie once again defended Traynor's alternative characterization of the problem in that case—as one involving decedents' estates rather than torts, or as one relating to procedure rather than substance—as being "sound." At the same time, Currie permitted himself the indulgence of wishing for something better:

Still, one regrets that he chose this technique instead of spelling out the considerations of policy and interest involved, as he had done in the Porter case. But more than a decade had elapsed since that case was decided, and the legal scholars who might have developed his approach into a substitute for the capricious traditional system had done little or nothing in that direction. To win acceptance, the opinion had to wear traditional dress.

Currie took comfort in the fact that Traynor, in his University of Texas speech, had "stated [Grant's] rationale explicitly in terms of govern-

113. Id. at 723-29.
114. Id. at 727. See supra text accompanying note 43.
115. In an earlier description of his research into the historical origins and modern rediscovery of an analysis based on state policy and interests, Currie did not cite the Porter dissent, nor did he mention Justice Traynor. Instead, he credited United States Supreme Court Justice Harlan Fiske Stone with the "modern rediscovery of the importance of governmental interests" in choice of law. See Currie, Verdict, supra note 80, at 282-84.
117. Id. at 730. Currie did find it "regrettable," however, that Traynor chose to utilize the technique of alternative characterization in rationalizing his result. Id.
118. Id.
mental policies and interests," and noted with delight Traynor's wry observation that the opinion might have been more "deft."

Turning to Traynor's Emery opinion, Currie emphasized the "consequences of the classification" of the problem as one of capacity to sue, rather than the fact that the opinion had adopted a choice of law rule. Drawing on Porter, which had not been cited in Emery, and Grant, which had been, Currie concluded, "[t]hus the opinion employs a combination of the techniques used in Porter and Grant v. McAuliffe: alternative characterization, supported by pragmatic inquiry into the respective interests of the states."

In the "choice of law" section of his article, Currie discussed only Traynor's Porter, Grant, and Emery opinions. Traynor's opinion in Ford Victoria was given one paragraph in a later subsection entitled "Criminal Matters." Currie's evaluation of Ford Victoria was that "[t]he case is a fine illustration of how a court may, by defining local interests with moderation and restraint, avoid conflict with the interests of another state." This point, although mentioned only briefly, is significant. It suggests that Ford Victoria was not a false conflict case, like Grant or Emery. Rather, Currie saw Ford Victoria as a case in which a potential conflict had existed, but had been avoided by Traynor through moderation and restraint in the definition of local interests. By noting that Traynor had restated the rationale of the case in terms of governmental policy and interest in his University of Texas speech, Currie tacitly acknowledged that Traynor did in fact view the case as one involving choice of law theory. But Currie did not proceed further to reflect on the implications that such a view of the case might hold for his own methodology. The insight produced by such reflection would await Currie's analysis of Traynor's subsequent opin-

119. Id. at 730. See Traynor, Necessary, supra note 66, at 670.
120. Currie, Justice Traynor, supra note 1, at 730 (quoting Traynor, Necessary, supra note 66, at 670 n.35).
121. Id. at 732.
122. Emery, 45 Cal. 2d at 425, 289 P.2d at 221.
123. Currie, Justice Traynor, supra note 1, at 732.
124. Currie discussed Grant only briefly, referring to his earlier article for a full analysis. See id. at 729 & n.43 (citing Currie, Survival, supra note 30).
125. Id. at 723-33. Currie cited two additional California cases: Grayhill Drilling Co. v. Superior Oil Co., 39 Cal. 2d 751, 249 P.2d 21 (1952), and Intagliata v. Shipowners & Merchants Towboat Co., 26 Cal. 2d 365, 159 P.2d 1 (1945). Grayhill is discussed supra text accompanying notes 45-46; Intagliata is not discussed here because it did not involve choice of law theory. See supra note 28.
126. Currie, Justice Traynor, supra note 1, at 748-49.
127. Id. at 749.
128. Id. at 749 n.119 (citing Traynor, Necessary, supra note 66, at 672-73).
ion in *Bernkrant v. Fowler*.129

Thus, in his analysis of Traynor's conflict of laws cases, Currie gave prominence to those concerned with choice of law, noting that "some of Justice Traynor's boldest and most controversial opinions have dealt with this problem."130 Currie emphasized Traynor's use of the concepts of policy and interest in his *Porter* dissent, and he noted Traynor's reconceptualization of *Grant, Emery,* and *Ford Victoria* in terms consistent with his own theory. He hailed Traynor as one who had "earned a place of distinction in [the] select group"131 of "modern American judges whose work has contributed to enlightenment and to the cause of justice and reason in the conflict of laws."132 Finally, as he had done in his earlier article on *Grant,*133 Currie acknowledged the constraints that prevented judges from building systematic conflict of laws theories,134 and placed the blame squarely on academics for failing to give judges like Traynor the help they sought.135 Given the public statements of mutual esteem expressed by Currie, in his *Stanford Law Review* article, and by Traynor, in his University of Texas speech, it may not be amiss to surmise that Currie hoped—"expected" may be too strong—that Traynor would adopt his approach to choice of law when the next opportunity arose. That opportunity presented itself in *Bernkrant.*

**Bernkrant**

*Bernkrant v. Fowler,*136 Traynor's first choice of law opinion to be

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131. *Id.* at 721.
132. *Id.* at 720-21.
134. Currie, *Justice Traynor,* supra note 1, at 721 ("Like other judges, he lacks leisure to develop a comprehensive philosophy of conflict of laws while scores of cases of all kinds press for his attention.").
135. Currie wrote:
   If, therefore, we of the cloistered precincts have fault to find with Traynor's opinions in conflict-of-laws cases—if we sometimes think his methods disingenuous, if he is suspected of indulging a predilection because there is no articulated general principle on which he can rely—the fault is our own. We have failed to do the part of the job that judges cannot be expected to do. While it is true that a great judge's flashes of intuition can accomplish more than could a brace of pedants in a decade, it is only those who have both professional competence and time for research and reflection who can be charged with responsibility for systematic improvement of the law.
   *Id.* at 723.
published after Currie's announcement of his governmental interest analysis, was handed down on April 13, 1961. The California Supreme Court declined to apply the California statute of frauds to protect the estate of a California decedent against an oral contract to forgive indebtedness by will entered into in Nevada, where the oral contract would have been valid.\(^1\)

There was little in the Bernkrant opinion itself to discourage the hopes of Currie or any of the other modern choice of law theorists for Traynor's ultimate endorsement of their proposals. Departing from his previous practice of not citing conflicts writers in his opinions, Traynor mentioned works by Professors Currie,\(^1\) Ehrenzweig,\(^1\) Lorenzen,\(^1\) and Cheatham and Reese.\(^1\) Traynor placed greatest reliance in his structuring of the opinion, however, on his own previous reasoning in Ford Victoria.\(^1\)

Just as the California legislature had failed to specify the interstate reach of the forfeiture statute at issue in Ford Victoria, it also had not "spelled out the extent to which the statute of frauds is to apply" in conflicts cases such as Bernkrant.\(^1\) Therefore, in Bernkrant, as in Ford Victoria, the court's task was to "determine its scope in the light of applicable principles of the law of conflict of laws."\(^1\) The principles of construction adopted in Ford Victoria meant that if all parties to the contract were Nevada residents, as they had been when the original contract of sale had been made, the California statute of frauds should

\(^{137}\) Id. at 594-96, 360 P.2d at 908-10, 12 Cal. Rptr. at 269-70.
\(^{138}\) Id. at 594-96, 360 P.2d at 909-10, 12 Cal. Rptr. at 269-70 (citing B. Currie, SELECTED ESSAYS, supra note 10; Currie, Married Women's Contracts, supra note 30).
\(^{139}\) Id. at 596, 360 P.2d at 910, 12 Cal. Rptr. at 270 (citing Ehrenzweig, The Statute of Frauds in the Conflict of Laws, 59 COLUM. L. REV. 874 (1959)).

Currie had not been alone in hoping for Traynor's endorsement of his theory. In April 1962 Ehrenzweig published his Treatise on Conflict of Laws. After much indecision, he had decided not to dedicate the volume to Traynor. But the preface prominently cited Traynor's work, see A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS at vii (1962) [hereinafter cited as A. EHRENZWEIG, TREATISE], and Ehrenzweig provided his own analysis of Traynor's choice of law decisions, see id. at 313 (Grant), 581 (Emery), particularly Bernkrant, which he claimed in support of his proposed "Rule of Validation" for contracts conflicts cases, see id. at 475. A court following the "Rule of Validation" in contracts conflicts cases, if faced with a reasonable choice between conflicting laws, should choose the law that validates the contract.

\(^{140}\) Bernkrant, 55 Cal. 2d at 596, 360 P.2d at 910, 12 Cal. Rptr. at 270 (citing Lorenzen, The Statute of Frauds and the Conflicts of Laws, 32 YALE L.J. 311, 328 (1923)).
\(^{141}\) Id. (citing Cheatham & Reese, Choice of the Applicable Law, 52 COLUM. L. REV. 959, 979-80 (1952)).
\(^{142}\) See id. at 594-95, 360 P.2d at 909, 12 Cal. Rptr. at 269.
\(^{143}\) Id. at 594, 360 P.2d at 909, 12 Cal. Rptr. at 269.
\(^{144}\) Id.
not be interpreted to upset their normal expectation that Nevada law governed their agreement.\textsuperscript{145} Even if the decedent had become a California resident by the time the oral contract was made, the result should not be different. Like the Texas mortgagee in \textit{Ford Victoria}, the Nevada purchasers should not be required to anticipate the laws of all the possible places their vendor might choose to settle before his will became effective. Considering "both the policy to protect the reasonable expectations of the parties and the policy of the statute of frauds,"\textsuperscript{146} Traynor concluded that California "would have no interest in applying its own statute of frauds unless [the vendor] remained here until his death."\textsuperscript{147}

Even though the vendor in \textit{Bernkrant} did die in California, Traynor's analysis of California policy was confined to the circumstances as they existed at the time the oral agreement had been made, not at the time of the vendor's subsequent death. At the time the oral contract had been made, he concluded, the "plaintiffs were not bound to know that California's statute might ultimately be invoked against them."\textsuperscript{148} Instead, they were entitled to rely on the application of their own law. Accordingly, the California statute did not apply. Unlike the opinion in \textit{Ford Victoria}, however, the \textit{Bernkrant} opinion made clear which law was being applied:

\begin{quote}
Since there is thus no conflict between the law of California and the law of Nevada, we can give effect to the common policy of both states to enforce lawful contracts and sustain Nevada's interest in protecting its residents and their reasonable expectations growing out of a transaction substantially related to that state without subordinating any legitimate interest of this state.\textsuperscript{149}
\end{quote}

This language suggests that Traynor may have viewed \textit{Bernkrant}, like \textit{Grant} and \textit{Emery}, as a false conflict case. Currie's response to this implicit suggestion formed a major part of his reaction to \textit{Bernkrant}, and produced a significant change in his choice of law methodology.

\textbf{Currie's Response to \textit{Bernkrant}}

Currie's initial brief response to Traynor's \textit{Bernkrant} opinion appeared in his 1961 \textit{Stanford Law Review} article analyzing Traynor's conflict of laws opinions.\textsuperscript{150} Because \textit{Bernkrant} was decided while Cur-
rie's article was in the process of publication, Currie was unable to do more than mention the new opinion in his final footnote. His praise was unrestrained:

[S]o revolutionary an opinion cannot go unremarked. It is probably the only judicial opinion concerning the Statute of Frauds in the conflict of laws that does not so much as mention the substance-procedure dichotomy. The analysis is explicitly in terms of governmental policies and interests. The problem is approached as one of statutory construction. The restraint and moderation with which domestic interests are defined raise a standard to which the wise and honest can repair, and should be a reproach to those who feel that the method of governmental-interest analysis must necessarily produce egocentric or provincial results. 151

This appraisal suggests that Currie believed that Traynor had adopted his governmental interest analysis approach to choice of law. But Currie's subsequent study of the opinion seems to have changed his mind.

Currie's more considered appraisal of Traynor's Bernkrant opinion appeared in 1963 when he observed, in response to Traynor's apparent view of Bernkrant as a false conflict case, that it was not helpful to speak of cases like Bernkrant as "false problem" cases. 152 Instead, analysis showed that Bernkrant "was a case in which the forum state could reasonably assert an interest in the application of its law and policy; it was only after painstaking analysis that the court could say, because of its delimitation of local interests," that no conflict existed between the law of California and the law of Nevada. 153

If Bernkrant did not fit neatly into Currie's announced interest analysis method for deciding choice of law cases, then he was not loath to change his methodology to accommodate Traynor's analysis. Currie reformulated his prior division of choice of law cases into false problems and true conflicts cases to include three categories:

(1) Those in which analysis indicates that only one state has an interest in the application of its policy; (2) those in which it appears that each state would be constitutionally justified in asserting an interest, but on reflection conflict is avoided by a moderate definition of the policy or interest of one state or the other; (3) those in which a conflict of interests persists despite efforts to avoid it by moderate definition of policies and interests. 154

151. Currie, Justice Traynor, supra note 1, at 778 n.236.
152. Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROBS. 754, 763 (1963) [hereinafter cited as Currie, Disinterested].
153. Id.
154. Id. (citing B. CURRIE, SELECTED ESSAYS, supra note 10, at 616). Currie explained that "[t]here is, unfortunately, such a thing as limited insight. In my earlier writings I concentrated the analysis on a hypothetical state that could be counted on to assert its interests
Currie identified *Bernkrant* as an illustration of the newly-created second class of cases.\(^{155}\)

Currie refrained from claiming that Traynor had adopted governmental interest analysis in *Bernkrant*, noting that "'[i]n the reasons for the result there is something to comfort each of the contending camps but triumphant satisfaction for none.'\(^{156}\) He added: "I find the opinion congenial because it speaks in terms of governmental interests and because the method is explicitly that of statutory construction."\(^{157}\) Ehrenzweig, for his part, had previously rejected any such claim with the flat assertion that "Justice Traynor's use of these terms [*i.e.*, governmental policies and interests] is his own rather than Currie's."\(^{158}\) But Traynor himself never used any of the potentially available labels\(^{159}\) in his subsequent discussion of his *Bernkrant* opinion.\(^{160}\) He continued to refer to *Bernkrant* and *Ford Victoria* as paired examples of judicial interpretation of local statutes to determine their application to interstate circumstances.\(^{161}\)

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155. In other cases analysis may at first indicate an apparent conflict of interests; specifically, it may be clear that if the forum were to assert an interest in the application of its policy, it would be constitutionally justified in doing so. But no principle dictates that a state exploit every possible conflict, or exert to the outermost limits its constitutional power. On the contrary, to assert a conflict between the interests of the forum and the foreign state is a serious matter; the mere fact that a suggested broad conception of a local interest will create conflict with that of a foreign state is a sound reason why the conception should be re-examined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose. An analysis of this kind (according to my thinking, which again is perhaps wishful) was brilliantly performed by Justice Traynor in *Bernkrant* v. *Fowler*. The policy of the California statute, of which there was no counterpart in Nevada, was to protect decedents' estates from false claims based on alleged oral contracts to make wills. That policy might reasonably be said to extend to all estates being administered in California, especially those of local domiciliaries. No constitutional principle would be offended by such an application. But Justice Traynor, considering all the circumstances, concluded that no such broad application was necessary to effectuate the legislative policy. He therefore declined to apply the California statute, thus avoiding conflict with Nevada law and policy.


157. *Id.*

158. A. Ehrenzweig, TREATISE, supra note 139, at 475 n.37.

159. See also Horowitz, *Restatement*, supra note 2, at 743-44 (characterizing *Bernkrant* as a "false false-conflict").

160. See infra notes 274-88 & accompanying text.

In 1964 Currie prepared a revised statement, his third such statement, of his choice of law methodology for inclusion in a law school casebook. This statement featured a new step three based on his 1963 article analyzing Traynor’s opinion in *Bernkrant*. It also consolidated the first three steps of the previous statements into one initial step and added step five, giving directions for the forum that found itself to be disinterested, but unable to avoid decision of the case. The statement concluded with a final observation on the implications of the method. Currie’s 1964 statement, as quoted in the present edition of the Reese and Rosenberg casebook, reads as follows:

1. When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.

2. If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.

3. If the court finds an apparent conflict between the interests of the two states, it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.

4. If, upon reconsideration, the court finds that a conflict between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.

5. If the forum is disinterested, but an unavoidable conflict exists between the interests of two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum, at least if that law corresponds with the law of one of the other states. Alternatively, the court might decide the case by a candid exercise of legislative discretion, resolving the conflict as it believes it would be resolved by a supreme legislative body having power to determine which interest should be required to yield.

6. The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the court should not attempt to improvise a solution sacrificing the legitimate interest of its own state, but should leave to Congress, exercising its powers under the full faith and credit clause, the determi-

162. *See supra* notes 91-98 & accompanying text.


164. *Id.* at 470 (relying on Currie, *Disinterested, supra* note 152, at 757-64).

165. *Id.* (relying on Currie, *Disinterested, supra* note 152, at 764-85) (discussing the problem of the disinterested third state).
nation of which interest shall be required to yield.\textsuperscript{166} Thus, Currie acknowledged Traynor's influence upon his thinking by altering his methodology to incorporate a new concept—that of an apparent conflict which might be avoided by Traynor's moderate and restrained interpretation.

The Academic Debate

The December 1964 Conflict of Laws Round Table at the meeting of the Association of American Law Schools focused on Ehrenzweig's *Treatise*.\textsuperscript{167} The published proceedings\textsuperscript{168} include a blistering attack by Currie\textsuperscript{169} on Ehrenzweig's proposed Rule of Validation in statute of frauds cases.\textsuperscript{170} In his concluding remarks, Currie specifically rejected the claim that Traynor's *Bernkrant* opinion supported Ehrenzweig's thesis. Currie's rejection was made despite his earlier concession that Ehrenzweig "may well applaud" the reasoning in *Bernkrant*, "[s]ince the law applied was that which gave validity to the contract, to the accompaniment of references to the expectations of the parties,"\textsuperscript{171} and despite Traynor's citation of Ehrenzweig's article on the statute of frauds and conflict of laws in the *Bernkrant* opinion.\textsuperscript{172}

At the Round Table, Currie pointedly observed:

> Almost every conflict-of-laws pundit can claim some support from this catholic opinion; I have staked my own claim. Whether I have a better claim than anyone else is of course open to question; I insist, however, on one point: to cite this sophisticated opinion as one supporting a "rule of validation" regardless of the governmental interests involved is not a high compliment to its distinguished author.\textsuperscript{173}

In an accompanying footnote, Currie predicted that "[s]ome light on the question may be shed by Chief Justice Traynor's review of my *Selected Essays*, to appear in a forthcoming issue of the Duke Law Journal."\textsuperscript{174}

The reception accorded Currie's *Selected Essays*\textsuperscript{175} signalled his growing influence on American choice of law theory. This influence

\begin{footnotes}
\item 166. *Id.* at 470.
\item 167. A. Ehrenzweig, *Treatise*, supra note 139.
\item 170. A. Ehrenzweig, *Treatise*, supra note 139, at 470-75.
\item 171. Currie, *Inquiry*, supra note 152, at 758.
\item 172. See supra note 139.
\item 174. *Id.* at 339 n.316.
\item 175. B. Currie, *Selected Essays*, supra note 10.
\end{footnotes}
was recognized in December 1964 when he became the first recipient of The Order of the Coif’s Triennial Book Award for his *Selected Essays*.\textsuperscript{176} Traynor was one of two judges who served on the selection panel for the award, along with three academics and a practitioner.\textsuperscript{177} Traynor’s subsequent review of the work,\textsuperscript{178} alluded to by Currie in his footnote, was indeed laudatory. It did not indicate, however, in specific terms that Traynor had accepted Currie’s theory as the basis for his own work. Indeed, he mentioned Ehrenzweig as one of the scholars who was then working on the task of redeveloping conflicts theory after the demise of the traditional approach.\textsuperscript{179} Still, Traynor’s praise for Currie’s book was lavish. Such statements as “[o]ne is moved to wonder where we would now be drifting in conflicts were it not for Brai-nderd Currie”\textsuperscript{180} and “[e]very court in the land is in his debt”\textsuperscript{181} indicate Traynor’s high regard for Currie’s efforts. As he had done in his University of Texas speech, Traynor applied Currie’s concepts to describe his own opinions. He cited *Grant* and *Emery* as examples of “false conflicts cases, the cases in which it becomes apparent that only one state has an interest in applying its rule.”\textsuperscript{182} But he cited no California cases to illustrate the category of “real conflicts,” cases in which “[a]nalysis of the laws of the respective states may demonstrate that each has an applicable policy and a reasonable interest in having it applied.”\textsuperscript{183}

In concluding his review, Traynor commented on how courts should approach choice of law cases:

> Obviously conflict of laws is in transition. It is still too soon to determine whether any rational system of rules to govern choice-of-law problems can ever be articulated. Courts must nevertheless continue to assess the scope of their local policies in conflicts contexts; they have a responsibility to inform themselves not only of past precedents but also of the policy reasons advanced by the advocates of the new rules or postulates. Though no rules, short of constitutional command, compel the forum to restrict the scope of its own policy when it has an interest in applying it, the reasons advanced in sup-

\textsuperscript{176} ASSOCIATION OF AMERICAN LAW SCHOOLS, 1964 PROCEEDINGS PART TWO: ANNUAL MEETING 76-81 (1964).

\textsuperscript{177} Id. at 78-79. The other members of the Selection Panel were Justice Walter Schaefer of the Illinois Supreme Court, Mr. Whitney North Seymour, past President of the American Bar Association, Provost Edward H. Levi of the University of Chicago, and Professors Leo Levin and John Dawson, Chair.

\textsuperscript{178} Traynor, Review, supra note 96.

\textsuperscript{179} Id. at 426.

\textsuperscript{180} Id. at 427.

\textsuperscript{181} Id. at 436.

\textsuperscript{182} Id. at 431.

\textsuperscript{183} Id. Traynor used Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), as an example.
port of such rules may be relevant in determining the scope of local policy. At the same time the growing realization that there are no final answers to conflicts questions may cause us to take a fresh view of old precedents and to recognize that wise judgments still emerge through obsolescent language.\textsuperscript{184}

A footnote in this passage refers the reader to \textit{Bernkrant} and \textit{Babcock v. Jackson},\textsuperscript{185} two choice of law cases in which Justices Traynor and Stanley Fuld, respectively, had used the reasoning advanced by modern scholars to determine the scope of local policies.\textsuperscript{186} This general endorsement of the usefulness of modern scholarship to judges does not mean that Traynor adopted governmental interest analysis in \textit{Bernkrant}. Moreover, while his concluding prediction that “[n]ow that judges read scholarly works as regularly as scholars read opinions, one can be sure that Currie’s extraordinary insights will absorb many a judge hitherto baffled by conflicts”\textsuperscript{187} is more direct, it is no less general in its reference to judges as a group, not merely to himself.

Traynor’s review of Currie’s \textit{Selected Essays} was published in the spring of 1965. On September 7, 1965, Brainerd Currie died at his home in Durham, North Carolina.\textsuperscript{188} Traynor’s next comment on the man and his work was his contribution to the memorial issue to Currie published by the \textit{Duke Law Journal} in the winter of 1966.\textsuperscript{189} The piece was more an affirmation of the personal friendship the two men had shared than an additional appraisal of Currie’s work. But Traynor re-

\textsuperscript{184} Traynor, \textit{Review}, \textit{supra} note 96, at 435-36 (footnote omitted).
\textsuperscript{186} Traynor, \textit{Review}, \textit{supra} note 96, at 435 n.36. Traynor’s own work had been compared favorably to that of New York judges and his potential influence on the development of the law had been discussed in December 1962 at the annual meeting of the Association of American Law Schools. The Round Table on Conflict of Laws focused on the topic, “Mr. Justice Traynor and Modern Theories of Conflict of Laws.” Currie chaired the session, and Traynor appeared as a guest commentator. Traynor’s opinions in \textit{Grant} and \textit{Bernkrant} were compared favorably to two cases decided by the New York Court of Appeals, Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), and Haag v. Barnes, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961), as well as one decided by the Second Circuit under New York law, Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962). Pressing his advantage as Chair, Currie pointedly questioned one of the participants—Professor Willis Reese, Reporter for the \textit{Restatement Second}—about what the drafters intended to do with § 390 of the \textit{Restatement} after Traynor’s decision in \textit{Grant} had pointed the way to a better approach. The answer would be embodied in § 167: “The law selected by application of the rule of section 145 [concerning the determination of the applicable law in tort cases] determines whether a claim for damages for a tort survives the death of the tortfeasor or of the injured person.” \textit{Restatement Second, supra} note 25, § 167. \textit{See id. Illustration 1} (based on \textit{Grant} opinion).
\textsuperscript{187} Traynor, \textit{Review}, \textit{supra} note 96, at 436.
\textsuperscript{189} Traynor, \textit{In Memoriam, supra} note 14.
ferred to Currie’s essays as “original and profound and constructive,” going on to reiterate his judgment of Currie’s central importance to the field of conflict of laws and to repeat his earlier assessment that “every court in the land is in his debt.”

The collaboration between Traynor and Currie ended with Currie’s death. Although Traynor no longer had Currie’s assistance in developing the modern approach to choice of law, he continued to refine his own analysis, based on considerations of state policy and interest.

Chief Justice Traynor Continues to Refine His Theory: 1966-1970

The Restatement Second Compromise

In 1966, Traynor, who two years before had been elevated to Chief Justice of the California Supreme Court, was named an Adviser to the Reporter of the Restatement Second. Matters on that project had reached a sensitive point. Ehrenzweig, who had been elected to the A.L.I. in 1963, was not an Adviser to the project, but had opposed the redrafting effort from the beginning. In 1965, after the Council had rejected his proposal that a special commission of experts be appointed to re-examine the draft, Ehrenzweig published an extraordinary article that added to his scholarly criticisms a candid account of the gap between the “significant contacts” approach favored by the drafters and the more flexible analysis that characterized most of modern choice of law scholarship. A token measure to deflect this sort of

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190. Id. at 9.

191. Id. at 12.


195. Ehrenzweig, Continued, supra note 23.


197. Id. at 1234-44.

The Institute had intended to avail itself of the labors of the foremost scholars. This attempt was abandoned in the field of conflicts law for both restatements. Not only did most leading scholars refrain from participating in the First Restatement—names like Cavers, Cook, Leflar, Lorenzen, Stumberg, and Yntema immediately
criticism was attempted by the drafters in 1965 with the introduction of a new section 6, entitled “A Basic Principle of Conflict of Laws.” Section 6 provided that “[i]n formulating rules of Conflict of Laws, a state will give consideration to the interests of other states as well as to its own interests.”

There the matter might have rested, but for Traynor. Reporter Reese introduced a greatly expanded section 6 at the A.L.I.’s Annual Meeting in May 1967. Reese explained that “the Advisers, and particularly Chief Justice Traynor, felt that this matter was of some importance, and that it should be put in black letter form.” I have described elsewhere the consequences of this compromise between

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198. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, at 16 (Tent. Draft No. 12, 1965). The comment that accompanied § 6 spelled out some of its implications:

Rationale. A state, through either its legislature or its courts, will seek to formulate Conflict of Laws rules that give fair consideration to the interests of other states as well as to its own interests. By doing so, a state will in the long run best serve its own interests. Inevitably, a state’s interests will be involved in cases that come before the courts of other states. All states will profit through the development of Conflict of Laws rules in each state which require the courts of that state to give fair consideration in interstate and international cases to the interests of other states. Development of such Conflict of Laws rules is particularly important among the constituent states of a single federated nation, such as the United States.

Id. comment a.

199. Section 6 reads as follows:

Choice of Law Principles.

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

RESTATEMENT SECOND, supra note 25, § 6.

what Reese subsequently termed the "approach"201 of section 6 and the rules contained in the body of Restatement Second.202 So significant a change in the structure of Restatement Second probably could not have been accomplished without Traynor's weighty influence.

Reich

Traynor's final choice of law opinion for the California Supreme Court, Reich v. Purcell,203 was handed down on October 30, 1967. Reich was a wrongful death case. The action arose out of a fatal collision in Missouri between an automobile driven by Mrs. Reich, an Ohio resident travelling to California with her two sons, and an automobile driven by Mr. Purcell, a California resident en route to a vacation in Illinois. Mrs. Reich and one of her sons were killed. After the accident, Mr. Reich moved to California with the other boy, and the case was filed there.204

Reich presented the choice of law question in an unusually clear way. The parties had stipulated that the damages arising from Mrs. Reich's death would be set at $55,000, unless the Missouri wrongful death statute applied.205 In the latter event, the damages would be reduced to the statutory maximum of $25,000.206 Neither Ohio nor California law placed limitations on recovery for wrongful death.

Traynor's opinion treated the case as one in which the forum state, California, was "disinterested in the only issue in dispute."207 The court's task, then, was to choose between the ostensibly conflicting laws of Ohio, plaintiff's domicile at the time of the accident, and Missouri, the place of the accident. The court swiftly concluded that Missouri

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202. Kay, Theory Into Practice, supra note 13, at 555-56.
203. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).
204. Reich, 67 Cal. 2d at 552, 432 P.2d at 728, 63 Cal. Rptr. at 32.
205. Id.
206. Id.
207. Id. at 556, 432 P.2d at 730, 63 Cal. Rptr. at 34. In order to prevent forum-shopping, Traynor made his assessment of state interests as of the time of the accident. He explained that plaintiffs were not then residents of California, and their current domicile in the state did not provide a basis for California to assert an interest in applying its law. Nor did defendant's residence provide a local interest, since California had no law that limited damages. Id. at 552-53, 432 P.2d at 728, 63 Cal. Rptr. at 32.
had no interest in regulating the distribution of wrongful death proceeds to the estates of non-local decedents. Nor was Missouri concerned with limiting the liability of non-resident tortfeasors, especially those from states with unlimited liability who "would have secured insurance, if any, without any such limit in mind." Having identified Missouri as a state without an interest in having its law applied, no obstacle prevented the application of Ohio law. "Under these circumstances giving effect to Ohio's interests in affording full recovery to injured parties does not conflict with any substantial interest of Missouri. . . . Accordingly, the Missouri limitation does not apply." 

Did Justice Traynor adopt Currie's governmental interest analysis in Reich? In a later case decided after Traynor had left the court, Justice Sullivan concluded that Traynor had done so. To support his view, Sullivan cited the following sentence from Reich: "The forum must search to find the proper law to apply based upon the interests of the litigants and the involved states." But Traynor did not cite Currie's work in support of that sentence. Further, while Currie's Selected Essays are mentioned twice in the passage in Reich from which the quoted sentence is taken, they stand for limited points.

Following this passage in his opinion, Justice Traynor proceeded to do in the name of the California Supreme Court what he had already done in his articles: he reconceptualized the opinions in Grant and Emery in terms consistent with interest analysis. No citations to Currie's work appear in this part of Traynor's Reich opinion. Nor is

208. Id. at 556, 432 P.2d at 730-31, 63 Cal. Rptr. at 34-35.
209. Id. at 556, 432 P.2d at 731, 63 Cal. Rptr. at 35.
210. Id. Within this quoted passage, Traynor provided a "cf." citation to his opinion in Bernkrant. I have elsewhere noted the significance of this reference. See Kay, Comments on Reich v. Purcell, 15 UCLA L. Rev. 584, 592-93 (1968) ("The citation of Bernkrant v. Fowler at this point in the opinion seems to indicate a reference to the similar conclusion of that case that, upon analysis, no true conflict was found to exist between the laws of California and Nevada. In that case, the court was able to avoid an asserted conflict by giving effect to the common policy of both states to enforce lawful contracts. In this case, California as forum has given effect to the policy of Ohio, the only interested state." (citations omitted)).
212. Id. at 580 n.2, 522 P.2d at 669 n.2, 114 Cal. Rptr. at 109 n.2 (quoting Reich, 67 Cal. 2d at 553, 432 P.2d at 729, 63 Cal. Rptr. at 33).
213. The first reference is to document the procedural difficulties inherent in using the traditional approach, and the second is included in a general reference that also mentions the work of Cavers and Ehrenzweig. See id. at 553-54, 432 P.2d at 729, 63 Cal. Rptr. at 33.
214. See supra notes 100-09 & accompanying text.
215. Reich, 67 Cal. 2d at 554, 432 P.2d at 729-30, 63 Cal. Rptr. at 33-34.
Currie's article on the disinterested third state\textsuperscript{216} called upon to support Traynor's characterization of California as a disinterested forum at a later point in the opinion.\textsuperscript{217} In his analysis of Missouri's possible interests, Traynor did cite Currie's similar discussion of the interests of Massachusetts as the place of wrong in the \textit{Kilberg} case,\textsuperscript{218} but he did not endorse Currie's approach in general. In fact, Traynor gave equal prominence in the final paragraph of the opinion to Cavers, whose "principles of preference" analysis was cited in support of the conclusion that "[a] defendant cannot reasonably complain when compensatory damages are assessed in accordance with the law of his domicile and plaintiffs receive no more than they would had they been injured at home."\textsuperscript{219} If Currie had been available to comment on Traynor's opinion in \textit{Reich}, he might have concluded, as he had with regard to Traynor's \textit{Bernkrant} opinion, that the \textit{Reich} opinion offered "something to comfort each of the contending camps but triumphant satisfaction for none."\textsuperscript{220}

The Reaction to \textit{Reich}

Such an indeterminate conclusion would have found ample support in the varying assessments of the \textit{Reich} opinion produced by twelve contributors to a symposium on the case.\textsuperscript{221} The scholars agreed on the proposition that \textit{Reich} was a landmark case, but on little else. In particular, they disagreed about what choice of law theory Traynor and the California Supreme Court had adopted in \textit{Reich} to replace the traditional approach.\textsuperscript{222} Three writers—including, I note with some chagrin, myself—thought Traynor had adopted Currie's governmental interest analysis,\textsuperscript{223} while two others viewed the opinion as an applica-

\textsuperscript{216} Currie, \textit{Disinterested}, supra note 152.

\textsuperscript{217} \textit{Reich}, 67 Cal. 2d at 556, 432 P.2d at 730, 63 Cal. Rptr. at 34.

\textsuperscript{218} \textit{Id.} at 556, 432 P.2d at 731, 63 Cal. Rptr. at 35 (citing B. Currie, \textit{Selected Essays}, supra note 10, at 702).

\textsuperscript{219} \textit{Id} (citing D. Cavers, \textit{The Choice of Law Process} 153-57 (1965)).

\textsuperscript{220} Currie, \textit{Disinterested}, supra note 152, at 758.

\textsuperscript{221} \textit{Comments on Reich v. Purcell}, 15 UCLA L. REV. 551 (1968). For convenience, references to the various contributors to this symposium are hereinafter cited by name of author, \textit{Comments}, and page number.

\textsuperscript{222} In \textit{Reich}, the California Supreme Court "overruled" Loranger v. Nadeau, 215 Cal. 362, 10 P.2d 63 (1932), and Ryan v. North Alaska Salmon Co., 153 Cal. 438, 95 P. 862 (1908). \textit{Reich}, 67 Cal. 2d at 553, 432 P.2d at 724, 63 Cal. Rptr. at 31. Ehrenzweig argued that both cases could have been distinguished on their specific facts and issues. Ehrenzweig, \textit{Comments}, supra note 221, at 570-72.

tion of Cavers' principles of preference. 224 Cavers himself made no such claim, but he did point out that the implications of Traynor's reasoning differed from that of Currie in important respects. 225 One scholar characterized Reich as Traynor's own mature and developed policy analysis which had evolved from his dissent in Porter, adding that it reflected the views of both Currie and Cavers. 226

Two commentators were less specific. One described Traynor's reasoning as a "predominant interest" approach similar to the "appropriate relation" test used by the Uniform Commercial Code. 227 The other portrayed the approach as a "functional re-analysis" of the choice of law problem. 228 One writer applauded the opinion for "the delicacy with which the Chief Justice skirts the question of whether he is concerned with 'governmental interests' of the various jurisdictions." 229 Ehrenzweig, in an unusually critical analysis of a Traynor opinion, charged that "[t]he court has undertaken to fill the gap [i.e., that created by its rejection of the place of wrong] by adopting in language, though not in fact, the 'interest' teaching of Currie, and in fact, though not in language, the approaches of the New York Court of Appeals and of the Restatement (Second) with their 'concerns' and 'significant relationships.'" 230 Professor Maurice Rosenberg, who sat with Traynor as an Adviser to the Reporter of Restatement Second, denied that Traynor had taken sides in the battle between those Rosenberg termed descriptively advocates of "The Method or The Approach" and the drafters of the new Restatement. 231

224. Gorman, Comments, supra note 221, at 606-07; Horowitz, Comments, supra note 221, at 634.
225. Cavers, Comments, supra note 221, at 648-50.
226. Scoles, Comments, supra note 221, at 564-65.
228. Weintraub, Comments, supra note 221, at 563.
229. Trautman, Comments, supra note 221, at 623. Trautman went on to observe that "[t]he current obsession with analysis in terms of governmental interests is usefully ignored by the court, which again and again speaks not only of state interests (presumably meaning, in this context, generally held views in a community) but of the interests of the individual litigants." Id. Weintraub, on the contrary, thought that Traynor's reference to the interests of the litigants was "unnecessary duplication once reference has been made to state interests in the sense discussed above. The 'interest,' meaning the policy, of any state will be to give appropriate recognition to the 'legitimate interests of the litigants.'" Weintraub, Comments, supra note 221, at 557.
230. Ehrenzweig, Comments, supra note 221, at 573.
231. Rosenberg, Comments, supra note 221, at 642-43.

What about Chief Justice Traynor, a conflicts sophisticate of unsurpassed discernment? Does he agree with the unruly approach despite his notable role as a leading mind and voice in the ALI's inner council on Restatements? He does not explicitly say, one way or the other, in Reich. Understandably, he was concerned
That Traynor's *Reich* opinion lent itself to these varying interpretations indicates both the similarity of the competing modern approaches to choice of law and Traynor's skillful use of diverse theories in support of his own reasoning. Speaking extemporaneously at the Round Table on Conflict of Laws held at the meeting of the Association of American Law Schools in December 1969, Traynor emphasized that he saw the task of discerning the policy underlying forum law as the central problem of choice of law, and that he welcomed all available academic advice on how to perform that task.\(^2\)

In 1970, without having had the opportunity to refine further his views on choice of law theory in his opinions, and without having committed the California Supreme Court to an exclusive reliance on a particular modern approach to the matter, Chief Justice Traynor retired from the bench. His judicial career had ended, but his scholarly life as a professor—left behind in 1940 when he joined the court—was about to begin anew.


Traynor returned to academic life with an appointment to the

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there mainly with deciding the case, not with writing a rule that might apply comfortably in other cases. He applied the "interests analysis" to the problem at hand, but he took careful account of potential variations in its fact-law pattern and intimated that some of them might lead to different results. *Id.* at 643. Traynor did not refer to any of the drafts of *Restatement Second* in his *Reich* opinion.


Thus the crucial problem to me is one of construction and interpretation. It is extremely difficult, in many instances, to determine what policy the legislature was trying to express, or even to determine what policy underlies a judge-made rule. Once the court comes to the conclusion that the statute was designed to apply not only to acts, events, and transactions within its territorial limits, but even to similar acts, events, and transactions having interstate elements, the court must apply the statute. The same is true with respect to a judge-made rule. The court is immediately confronted with this question: Is this rule designed to cover situations involving interstate as well as intrastate elements?

... I would be willing to invoke the aid of such tests as which state has the most substantial connection with the issue, the five principles of Leflar, David Cavers' preferred principles, and any other principle I could find that would help to determine whether the statute or judge-made rule at issue applied to a case with interstate elements. *Id.*
faculty of Hastings College of the Law in 1970. Among the courses he taught during the academic year 1970-1971 was conflict of laws. Here, Traynor as teacher confronted Traynor as judge. His opinions on choice of law, as well as those in other subfields of conflict of laws, were, and continue to be, included in the major law school casebooks on the subject and, then and now, attract the interest of many commentators.

The Debate Over Traynor’s Work Continues

In 1974, Professor Harold Horowitz decided the time was ripe for a “restatement” of the emerging California approach to choice of law. Horowitz’s “restatement” was patterned after Professor Cavers’ “principles of preference” and was phrased in terms of policies and state interests drawn largely from Traynor’s opinions in Ford Victoria, Bernkrant, and Reich. Horowitz’s analysis encompassed the theories

234. Id. at 44.
235. See supra text accompanying notes 7-9.
237. Two contributors to a symposium honoring Traynor’s judicial achievements called attention to his work in conflict of laws. Ratner, supra note 2; Weintraub, The Emerging Problems in Judicial Administration of a State-Interest Analysis of Tort Conflict of Laws Problems, 44 S. CAL. L. REV. 877 (1971).
238. Horowitz, Restatement, supra note 2.
239. Id. at 720. The “restatement” reads as follows:

I.

On any issue in a case as to which it appears that there may be a conflict of state laws, the court should determine, in light of the relationships of the parties and the transaction to the states involved, those states as to which there is a reasonable basis for applying their respective policies (i.e., laws) to the issue (i.e., those states which have an “interest” in having their respective laws applied).

II.

If only one state has such an interest, there is no conflict of state laws (a “false conflict”), and that state’s law should be applied to the issue.

III.

If more than one state has an interest in the application of its law to the issue (a “true conflict”), the court should apply that state’s law which is determined by the application of the following principles:

(a) The court should seek a reasonable accommodation of the conflicting laws’ purposes, by applying a standard of “comparative impairment”: which state’s policy will be least impaired if it is subordinated?

(b) The court should consider applicable “multistate policies,” by, for example, inquiring which choice-of-law result will best facilitate multistate transactions.

(c) The court should consider relevant interests of the parties which may suggest that one state’s policy, rather than another’s, should prevail.

Id. at 723.
of Currie and Professor William Baxter,\textsuperscript{240} and, in my view, laid the basis for the California Supreme Court's subsequent failure to distinguish between them.\textsuperscript{241}

Ehrenzweig, invited to respond to the Horowitz "restatement," found it appalling.\textsuperscript{242} He resisted Horowitz's use of Traynor's opinions to enshrine Currie's terminology in California law.\textsuperscript{243} Ehrenzweig dismissed the California Supreme Court's use of the concepts of policy and interest as dicta unnecessary to the holdings in \textit{Ford Victoria}, \textit{Bernkrant}, and \textit{Reich}.\textsuperscript{244} This he did without ever once mentioning Traynor by name. One possible explanation of this omission seems clear: destruction of the Horowitz thesis required belittling the importance and authority of Traynor's work. Ehrenzweig did not withhold his hand from what must have been a distasteful task, but neither did he exacerbate the situation by personalizing his criticism. Instead, he cast his conclusion in general terms: "Despite ambitious dicta, these cases are not only incapable of establishing 'general principles,' but they are limited in their holdings to the interpretation of three statutes of narrow import."\textsuperscript{245}

Ehrenzweig concluded his article by noting that the California Supreme Court had just granted a hearing in a choice of law case, \textit{Hurtado v. Superior Court},\textsuperscript{246} and expressed the hope that the case might prove to be a "turning point" in "the fateful confusion caused by the California courts' academic frolic."\textsuperscript{247}

Horowitz's article and Ehrenzweig's response appeared together in the February 1974 issue of the \textit{UCLA Law Review}. On May 31, 1974, the California Supreme Court reached the result in \textit{Hurtado} that Ehrenzweig had forecast: the court applied California law to provide unlimited damages to the Mexican heirs of a Mexican resident killed in California.\textsuperscript{248} In doing so, however, the court firmly identified itself as having adopted the governmental interest approach to choice of law set

\textsuperscript{240} Id. at 748-58. See Baxter, \textit{Choice of Law and the Federal System}, 16 STAN. L. REV. 1 (1963); see also supra notes 91-95 & accompanying text.

\textsuperscript{241} Kay, \textit{Comparative Impairment}, supra note 6, at 583-85.


\textsuperscript{243} Id. at 781 n.1.

\textsuperscript{244} Id. at 784-86.

\textsuperscript{245} Id. at 783.


\textsuperscript{247} Ehrenzweig, \textit{Prestatement}, supra note 242, at 794.

forth in *Reich*.

On June 4, 1974, Ehrenzweig died in Berkeley, California.

Traynor Explicates His Five-Step State Interest Analysis

Traynor spent parts of the academic year 1974-1975 in England, where he held appointments as Goodhart Visiting Professor of Legal Science at the University of Cambridge and Honorary Professor of Legal Ethics at the University of Birmingham. On February 18, 1975, he delivered a lecture entitled "War and Peace in the Conflict of Laws" at King's College, University of London. Traynor, the teacher, had decided to set the record straight about the approach to choice of law used by Traynor, the judge.

Traynor began by recalling the "Dark Age that was in great measure sustained by the enshrinement of mechanical concepts in the first Restatement of Conflict of Laws of the American Law Institute." He recounted the academic attack that had finally discredited the Restatement: "Scholars began to follow the avant-garde of Cook, Lorenzen, Ehrenzweig, Cavers and Currie against the idol with clay feet and a wooden head." Then he focused on the different roles of the scholar and the judge in such times of transition:

> When idols are demolished, a judge must work his way out of the wreckage. . . . A heavy responsibility attends his new freedom to evaluate conflicting local policies. He cannot invariably rely on scholars, who are often better at demolition than at clearing the ground to open up roads, with appropriate traffic controls, for the heavy traffic of diverse laws. When there is no clearing, he must chop his way through, however clumsily, and hope that scholars will speed their reinforcements for roadways that will bring peaceful coexistence to warring laws.

Finally, he spoke of his own experience, acknowledging both his intellectual debt to Currie and his adaptation of Currie's analysis to fit the needs of California.

As Currie had done, Traynor set out his "judicial log" in a se-
ries of steps that could be used in deciding choice of law cases:

First: The court should apply forum law and not interject a choice-of-law issue into a case when the parties have not done so.

Second: When the parties have presented a choice-of-law issue, the court should determine at the outset whether the issue is controlled by a forum statute and, if not, whether it is controlled by a forum judicial precedent.

Third: If the court concludes that a forum statute or judicial precedent does not control the choice-of-law issue, the court should determine whether the forum's policy for domestic cases should be limited to such cases or extended to cases with multi-State elements.

Fourth: If the court finds that the forum policy extends to multi-State cases, it should then determine whether the forum's contacts with the case are substantial enough to give the forum an interest in applying that policy.

Fifth: If the court finds that the forum has an interest in applying its policy, it should ordinarily apply that policy even if it is in head-on conflict with the policy of another interested State.258

Traynor went on to "elucidate the five basic steps of [his] interest analysis [and to] illustrate how it has or could have operated in various judicial decisions, including my own."259 Both in the articulation of the five steps and in their application to specific cases, Traynor's account of the choice of law methodology he had worked out differs strikingly from Currie's 1964 statement,260 and, incidentally, from Horowitz's "restatement"261 as well.

**Step 1**

Traynor's first four steps identify with more precision the judicial tasks that are implicit in Step 1 of Currie's 1964 Statement,262 and define with greater care how these tasks should be performed. Traynor's Step 1 flatly contradicts the initial approach suggested in Horowitz's Step 1, that the court should identify the states that might have an interest in having their laws applied.263 Relying on California practice,264 Traynor made clear that the decision whether to rely upon foreign law should be left to the parties.265 Traynor's acceptance of the

259. *Id.* at 127.
260. See supra text accompanying note 166.
261. See supra note 239.
262. Step 1 in Currie's 1964 statement was itself a condensation of the first three steps contained in his 1958 and 1959 statements.
263. See supra note 239. Traynor did not refer to Horowitz's "Restatement" in his lecture.
265. *Id.* at 127-28. "There is no need for a court to make a display of its own diligence
notion that a choice of law problem should arise only if the parties create one is consistent with Currie's view that a forum should not displace its own law unless asked to do so by the parties.\textsuperscript{266} If such a stance might increase the use of forum law at the trial court level, Traynor was prepared to defend that result: "There is a beneficent conservation of judicial resources in more ways than one when a court restrains itself, for it thereby obviates making a ruling on choice-of-law that could haunt it in later cases."\textsuperscript{267}

\textit{Step 2}

Once the parties have raised a choice of law issue, Traynor directed the forum court's attention first to its own law. If there is a controlling forum statute or judicial precedent, "the governing forum law dispels the problem of choice of law."\textsuperscript{268} His discussion of Step 2 made clear that if the legislature has enacted a choice of law rule, it will be by gratuitously interjecting a choice-of-law issue that would divert the parties from the main issue." Id. at 128.

When making a similar point in his review of Currie's \textit{Selected Essays}, see Traynor, \textit{Review}, supra note 96, at 430 n.17, Traynor had used a California case in which he had participated but for which he had not written the opinion, Lein v. Parkin, 49 Cal. 2d 397, 318 P.2d 1 (1957), as an illustration. \textit{Lein} arose from an automobile accident that occurred in New Mexico involving California residents. Assessing the proffered defense that plaintiff had assumed the risk of injury, Justice Spence, writing for a unanimous court, noted that "[t]hese issues may be resolved according to California law although the accident occurred in New Mexico. The trial was conducted as if California law applied and the briefs on appeal are also predicated on the applicability of California law. We may therefore conclude that both plaintiff and defendant have agreed to have the issues determined pursuant to the law of California." Id. at 399, 318 P.2d at 2.

\textsuperscript{266} Currie, \textit{Displacement}, supra note 30, at 1027.
\textsuperscript{267} Traynor, \textit{War and Peace}, supra note 12, at 128. I once questioned the constitutionality of the forum's application of its own law when it found itself to be disinterested. See Schreter, "\textit{Quasi-Community Property} in the Conflict of Laws," 50 CALIF. L. REV. 206, 233 n.172 (1962). Currie responded that he did not share my doubts, noting the United States Supreme Court's remark in \textit{Alaska Packers Ass'n v. Industrial Accident Comm'n}, 294 U.S. 532 (1935), that "\textit{praematura facie} every state is entitled to enforce in its own courts its own statutes, lawfully enacted." Id. at 547-48. See Currie, \textit{Disinterested}, supra note 152, at 779. The subsequent decision in \textit{Allstate Ins. Co. v. Hague}, 449 U.S. 302 (1981), goes far to bolster the sentence quoted from \textit{Alaska Packers}, but the plurality reaffirmed the holdings in \textit{Home Ins. Co. v. Dick}, 281 U.S. 397 (1930), and \textit{John Hancock Mut. Life Ins. Co. v. Yates}, 299 U.S. 178 (1936), that "if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." \textit{Hague}, 449 U.S. at 310-11. A court following Traynor's method will need to guard against what the \textit{Hague} plurality went on to call such "extreme examples of selection of forum law." Id. at 311. See, e.g., \textit{Alton v. Alton}, 207 F.2d 667, 677 (3d Cir. 1953), \textit{vacated as moot}, 347 U.S. 610 (1954) (concluding that domestic relations are of paramount interest to the state where a person is domiciled and an attempt by another jurisdiction to affect such relations by granting a divorce is unconstitutional).

\textsuperscript{268} Traynor, \textit{War and Peace}, supra note 12, at 131.
followed. Traynor, noted, however, that "more often than not... a court confronts a statute that is silent about its application to matters that transcend State boundaries." What is the court to do? As if anticipating the subsequent criticism that proponents of interest analysis falsely claim to be able to identify actual legislative intent as to the territorial reach of a silent domestic statute, Traynor responded that "the court's task is to arrive at the meaning of the statute that conforms to the legislative purpose." Traynor listed the source materials for this research: the statutory language and available extrinsic aids, such as the context of the statute, its generality or specificity, the care with which it was drafted, and an analysis of the consequences of competing interpretations. Specifically excluded was a search for "hidden meanings" not suggested by these sources. Traynor mentioned, as well, judicial restraint as a guideline for statutory construction.

Traynor illustrated his discussion of his Step 2 with an analysis of *Ford Victoria* and *Bernkrant*. Both cases involved the potential application of a local statute to transactions that had been, in their inception, entirely foreign to California. In *Ford Victoria*, a car was bought and sold on credit in Texas, with Texas law defining the relationship of the parties and their obligations to each other and to the State of Texas. In *Bernkrant*, at the time of the original written contract for the sale of land, the transaction and the parties were all located in Nevada. California's factual connection with the transactions in both cases occurred later. In *Ford Victoria*, it was when the car was brought to California in violation of the Texas chattel mortgage and used in California to transport narcotics in violation of California law. In *Bernkrant*, it was when the vendor moved to California, possibly before the oral modification of the contract had been made, and remained domiciled in California until his death. Both cases reached the Califor-
nia courts as a natural consequence of these facts: the errant Ford was seized by State officials, and a forfeiture proceeding commenced in California in *Ford Victoria*, the decedent's estate was probated in California in *Bernkrant*. Neither *Ford Victoria* nor *Bernkrant* was a case of forum-shopping. The forum law would have been unfavorable to the nonresident in both cases.

Traynor's belief that the legislative purposes of the two statutes in *Ford Victoria* and *Bernkrant* would not be served by application of the statute in either case identifies the perceived unreasonable consequences of a contrary decision as the crucial factor.\(^{277}\) In both cases, the court concluded that the California legislature would not have expected parties to transactions unconnected with California in their inception to anticipate the application of California law. As Traynor indicated in his lecture, this conclusion was relatively easy in *Ford Victoria*. "If one State could reach out in such a manner, all States could, and there would be no end to the legal research incumbent upon a mortgagee."\(^ {278}\) It was somewhat more difficult in *Bernkrant*, where uncertain facts complicated the analysis. There was no finding as to whether the vendor had been domiciled in California at the time he made the oral contract with the Nevada domiciliaries regarding land located in Nevada. If so, California was not totally unconnected with the transaction. But the relevant time was that of the vendor's death, not that when the contract was made.\(^ {279}\) Traynor's conclusion was not that the California legislature actually intended the two statutes to be restricted only to domestic cases. Rather, his conclusion was that the statutory purpose expressed by the legislature for domestic cases would not be furthered by applying the statutes to the facts of these multi-state cases. In other interstate settings, however, a different factual alignment might produce a different result. Indeed, Traynor had recognized that possibility in his comments at the Round Table on Con-

\(^{277}\) The purposes were "to diminish the risk that automobiles would be sold to those who might use them for unlawful transportation of narcotics" in *Ford Victoria*, see Traynor, *War and Peace*, supra note 12, at 133, and to protect estates from "false claims based on alleged oral contracts to make wills" in *Bernkrant*, see 55 Cal. 2d at 594, 360 P.2d at 909, 12 Cal. Rptr. at 269.

\(^{278}\) Traynor, *War and Peace*, supra note 12, at 133.

\(^{279}\) Once it appeared that the contract was valid under the applicable law of Nevada it would have been ironic to invalidate it because the vendor happened to die in California. The very contract provided that the vendor's promise would become enforceable only upon his death. There was no agreement that the vendor's promise would become unenforceable if thereafter he did not choose to live or die in Nevada. There was no gamble on geography.

*Id.* at 134.
conflict of Laws in 1969: "There is, however, an element of danger in such a decision because another case might come along requiring application of the California Statute of Frauds, and it would take some whit- tling to distinguish Bernkrant."\(^{280}\)

In his lecture, Traynor presented Ford Victoria and Bernkrant as examples of "how difficult it can be to arrive at a sound interpretation of the reach of a statute."\(^{281}\) Currie's reading of Bernkrant had been more sweeping. Indeed, Currie had built a new step of his methodology—the moderate and restrained reinterpretation of policy and interest that might avoid a potential conflict between two states—around Bernkrant.\(^{282}\) Traynor's methodology contains no similar step. His discussion of the two cases was not inconsistent with Currie's characterization, as he noted that the "delimitation of the California statute [in Ford Victoria] averted conflict between local policy and the Texas policy of protecting a mortgagee's contractual rights"\(^{283}\) and observed that the decision in Bernkrant "sustained Nevada's interest in protecting its residents and their reasonable expectations growing out of transactions substantially related to that State, without subordinating any legitimate interest of California."\(^{284}\) Traynor's analysis does suggest, however, that he would insist that he was not "reconsidering" California policy in light of an apparent conflict with that of either Texas or Nevada. Instead, he was determining whether the California statute controlled the case.\(^{285}\)

Traynor's reading of the Ford Victoria and Bernkrant cases goes far towards refuting the claims of those critics who persist in characterizing interest analysis as a parochial tool.\(^{286}\) Bernkrant is an illustration of a considered decision by the forum court not to apply a local statute

\(^{280}\) Traynor, Round Table, supra note 232, at 241.

\(^{281}\) Traynor, War and Peace, supra note 12, at 132.

\(^{282}\) See supra text accompanying notes 154-56, 162-66.

\(^{283}\) Traynor, War and Peace, supra note 12, at 133.

\(^{284}\) Id. at 134.

\(^{285}\) Traynor was aware of Currie's alteration of his methodology to take account of Bernkrant, for he remarked at the 1969 Round Table on Conflict of Laws that "[a]plying Currie's original writings, I think [Bernkrant] would have been decided differently." Traynor, Round Table, supra note 232, at 241. Traynor's resolution of the choice of law problem in Bernkrant, then, must have been a departure from what he thought Currie would have done. His continued characterization of Bernkrant as an instance of statutory interpretation after Currie's analysis of the opinion as an example of moderate and restrained reinterpretation suggests that he deliberately rejected that view of the case.

to protect local residents, while *Ford Victoria* illustrates a disinclination to increase the state treasury by a modest amount. Neither opinion, in other words, is subject to the distorted characterization "that a state can be interested only in helping its own [local residents] by applying its rules so as to assure that they will win their lawsuits, that consequently it can have no interest in causing a local to lose his or her case."287

If, after performing this analysis under Traynor's Step 2, the forum court does not believe that the choice of law question is controlled by a forum statute or judicial precedent, then it should identify what the forum's policy is for domestic cases, and decide whether that policy should be limited to domestic cases or extended to the multi-state case. At this point in his analysis, Traynor appeared willing to take into account considerations that went beyond those Currie had used. He observed that, in making choice of law decisions, courts should be concerned with maintaining harmonious relations among the states, protecting the reasonable expectations of the parties in interstate transactions, and weighing the pros and cons of extending or restricting the impact of the forum's policy.288

**Step 3**

In explaining his Step 3, Traynor stressed what his successors on the California Supreme Court apparently have forgotten: "If the court finds that the forum has not yet established a policy on the basic issue, or that the forum policy is unclear or obsolete, it then has the dual responsibility of establishing a precedent for domestic cases that may have immediate multi-State effect."289 If the domestic policy is to serve as one source of the multi-state decision, then that policy must be clearly articulated. Traynor used his opinion in *Emery* to illustrate this point. But, perhaps in response to criticism of his reasoning in the choice of law parts of the *Emery* opinion,290 Traynor was prepared to abandon the choice of law rule he had once accepted as pointing to the family domicile as a connecting factor:

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290. Traynor's use of a choice of law rule based on family domicile in *Emery* had been criticized mildly by Currie, see Currie, *Justice Traynor, supra* note 1, at 732 n.58, as well as by others, see, e.g., Weintraub, *Comments, supra* note 221, at 559-61; [D.] Currie, *Comments, supra* note 221, at 598 n.19.
Although the opinion in this case is my own, and I continue to subscribe to its result, I now have the benefit of enough perspective to note that I would not today focus on the law of the family domicile as the only applicable law. . . . [M]uch is to be gained by a shift in emphasis from the State of domicile, which may not invariably have an enlightened policy, to an evaluation of competing policies. Given the California policy against family immunity, for example, that policy should prevail even if an accident occurs in California and the family domicile has a contrary policy. California's admonitory and compensatory policies, intended to cover residents and non-residents alike with respect to tortious conduct in the State, and its interest in providing a fund for medical and hospital care in California, would militate strongly for its policy as the appropriate one, even if it were not the State of domicile.291

**Step 4**

Traynor's Step 4 assumed that the court has found that the forum's domestic policy extends to multi-state cases. The court's next task is to determine whether the forum's factual contacts with the parties, the transaction, or the event in question are substantial enough to give it an interest in applying its law. Unlike Currie's statements292 or Horowitz's "Restatement,"293 Traynor did not expressly build into his methodological steps a recognition of the false conflict situation where only one state had an interest in having its law applied. In his discussion of Step 4, however, he made clear that only those factual contacts that "relate substantially" to state interests are significant.294 Traynor concluded this part of his discussion by referring to his opinion in *Grant,* once again identifying it as a case of "no true conflict."295 Expressing agreement with the result in *Babcock,* which he characterized as a false conflict case, Traynor noted that "[i]n retrospect it is shocking that it took so many generations to establish a way to achieve prompt peace whenever there was no true conflict."296 As a final point in his discussion of his Step 4, Traynor turned to *Reich.* He defended his characterization of California as a disinterested third state on the facts

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292. See supra text accompanying notes 95, 166.
293. See supra note 239.
295. *Id.* at 143. It also permitted Traynor to "wish once again that I had invoked the interest analysis adumbrated in my 1942 dissenting opinion [in *Porter*], a sleeper in the reports that scholars failed to awaken." *Id.*
296. *Id.* at 144.
of that case,\textsuperscript{297} as well as his decision not to use \textit{renvoi} to apply the Ohio choice of law rule pointing to the place of wrong, using instead Ohio's constitutional provision prohibiting limited damages in wrongful death cases.\textsuperscript{298}

\textit{Step 5}

In introducing the final step in his "judicial log," Step 5, Traynor said that the first four steps were "tests that serve to dispel false conflicts."\textsuperscript{299} As I have noted,\textsuperscript{300} Traynor's methodology contained no express provision for avoiding "apparent" true conflicts by a more moderate reinterpretation of potentially conflicting policy or interest. In his view, conflicts were either true or false. When confronted in theory\textsuperscript{301} with "the conflict pure and complicated, the conflict that cannot be dispelled or abated, the confrontation between the strong legitimate interest of the forum and that of the foreign State,"\textsuperscript{302} Traynor embraced Currie's view that the "rational course will ordinarily be to apply forum law."\textsuperscript{303}

Currie held to the view that a true conflict case could not be solved by constructing systems of choice of law rules.\textsuperscript{304} His use of forum law to decide the case was a temporary expedient to avoid damage to the forum's interests while other means of resolving these intractable problems were explored.\textsuperscript{305} Traynor added that Currie's "realistic analysis is borne out by the rational and just outcome it [i.e., application of forum law] would lead to in varying fact situations."\textsuperscript{306}

\textsuperscript{297} Id. at 147. Scoles had questioned this characterization, see Scoles, \textit{Comments, supra} note 221, at 567-68, while I had defended it, see Kay, \textit{Comments, supra} note 221, at 593-94.

\textsuperscript{298} Traynor, \textit{War and Peace, supra} note 12, at 148. Ehrenzweig had criticized the California Supreme Court for its failure "to face the fact that an Ohio court would probably have applied the Missouri limitation." Ehrenzweig, \textit{Comments, supra} note 221, at 578.

\textsuperscript{299} Id.

\textsuperscript{300} See \textit{ supra} text accompanying notes 281-86.

\textsuperscript{301} In practice, Traynor as judge never faced a true conflict case. When his successors on the California Supreme Court identified a true conflict in Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, \textit{cert. denied}, 429 U.S. 859 (1976), they applied forum law, but not for the reasons suggested either by Traynor or by Currie. See Kay, \textit{Comparative Impairment, supra} note 6, at 582-86.

\textsuperscript{302} Id.

\textsuperscript{303} Id.

\textsuperscript{304}Currie, \textit{Married Women's Contracts, supra} note 30, at 262-63.

\textsuperscript{305} Id. at 263. Juenger thus gives a misleading impression when he says that "[a]ccordng to Currie, the primacy of forum law supplies a simple solution to this seemingly intractable problem: such 'true conflicts' are resolved by letting forum law prevail." Juenger, \textit{ supra} note 286, at 12.

concluded his lecture setting forth his five-step interest analysis approach with a warning: “As we now finish one long servitude to categorical imperatives, we should be on guard against another. We have had enough of principles that embrace the law with a stranglehold. . . . Now there must be a rational evolution of principles that can survive the storms of change without distortion.”

Traynor was in residence at Hastings during the academic year 1975-1976, and he taught conflict of laws twice more during that period. He gave up classroom teaching in 1980, at the age of 80, and led a quiet and reflective life at home in Berkeley until his death on May 13, 1983. Until the end, he continued to regard choice of law as a difficult and fascinating problem. It was a problem that had yielded many of its mysteries to his keen mind and to his creative judicial leadership.

An Evaluation of Traynor's Choice of Law Theory

Traynor's final articulation of his approach to choice of law drew heavily on his experience as a judge. Eschewing the scholar's penchant for abstract reasoning, Traynor saw the choice of law problem embedded concretely in the context of lawsuits to be decided. He was unwilling to create complex decisional problems that had not been raised by the parties and that might produce—in the absence of adequate research, briefing, and argument by counsel—unsound choice of law precedent. Traynor understood that “the forum can only apply its own law” and recognized that while a foreign rule might provide a model that the forum would follow, it did so only with the forum's consent.

Ever since Currie announced his governmental interest analysis, through an analysis of Boys v. Chaplin, [1971] A.C. 356; Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970); and Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), Traynor demonstrated that a party's domicile will not always be sufficient to sustain application of forum law: “The lesson is that domicile must be viewed in the light of any other factors that enter into an evaluation of competing interests. Though domicile will often prove to be a significant factor, it may sometimes be of little or no relevance.”

307. Traynor, War and Peace, supra note 12, at 154. This point reinforces the lesson drawn earlier from Traynor's discussion of Ford Victoria and Bernkrant, see supra notes 286-87 & accompanying text, that interest analysis in his hands was no parochial system devoted solely to the protection of local residents without regard to other forum interests.


310. Reich, 67 Cal. 2d at 553, 432 P.2d at 729, 63 Cal. Rptr. at 33.
critics of forum-centered approaches to choice of law have charged, among other things, that a preference for forum law is not even-handed; that it is prejudiced in favor of the protection of local people and their concerns to the detriment of outsiders; and that it impedes the uniformity of result that makes interstate and international commerce possible.\(^{311}\) These criticisms are grounded upon an implied standard of neutrality their proponents claim arises from the uniform application of an agreed-upon law. But if judges, such as Traynor, perceive as irrational the results produced in litigation by these academic choice of law systems, no appeal to neutrality can preserve those systems. Modern critics of interest analysis who yearn for the resurrection of old-style choice of law rules appear to have forgotten that simplistic, single-factor rules like the ones contained in the first *Restatement* did not work in practice.\(^{312}\) Moreover, the more complex, multi-factor rules like those offered by the *Restatement Second* lend themselves to manipulation and to the incorporation of contradictory approaches.\(^{313}\)

Traynor’s refusal in his *Porter* and *Grant* opinions to accept the results produced by the application of neutral principles such as the use of the forum’s statute of limitations or the law of the place of wrong, respectively, should have served as a warning to those theorists who believe that rules are so necessary that an occasional indefensible result should not deter judges from following them. As Traynor later observed:

> I welcome the search of scholars for *a priori* principles, despite misgivings as to those that have thus far been proposed and a long disenchantment with rigid rules that become predictable only for their irrationality. I continue to view interest analysis as the most rational approach to conflicts that we now have, and a method that may well develop principles of its own that will have a long and rational life. There is sometimes a long wait between improvements, and I would take my chances with the best that is available rather than with newly created principles that are advocated primarily for predictability, though they carry no guarantee even of that. I am still haunted by the ghosts of the *a priori* boundaries where confusion so long

\(^{311}\) For early criticism, see *supra* note 96. More recent critics, who repeat these earlier objections as well as adding their own, include, e.g., Brilmayer, *supra* note 270; Ely, *supra* note 286; Juenger, *supra* note 286; and Korn, *Critique, supra* note 60. For a response to Ely and Brilmayer, among others, see Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics';* 34 MERCER L. REV. 593 (1983).


reigned supreme.314

It is not parochial for a judge, asked to use a foreign rule rather than a domestic one as the basis for decision, to examine the content of local law. The question for the court at that point, as I have said elsewhere, is not "whose law is to be applied," but rather "under what circumstances is a departure from local law justified?"315 Traynor's Steps 2 and 3 are an excellent framework for deciding that question. The place to begin is with an analysis of the purpose of the domestic rule, for until its domestic purpose is understood, the question of its application in the multi-state setting cannot be determined. Traynor saw this job as the most difficult problem the judge must solve. Others have contended that the problem cannot be solved at all,316 or that it can be solved only by fictional means.317 These criticisms are exaggerated or misplaced. A legal prescription, unlike a declaratory sentence, is meant to be authoritative: it creates rights and duties; it facilitates or impedes private or public planning; and it declares the limits on official or personal conduct. Communication is its aim; compliance is its goal; enforcement through the exercise of state power is its means. The rationale for creating such legal prescriptions, one hopes, is to govern justly. To argue that a law has no discernable purpose is to say that it is either unenforceable or unjust. It may indeed be difficult to identify the purpose of a domestic statutory or common law rule, but doing so is an essential part of the process of government that must be carried out by all branches of the state, including the judiciary.

Once the purpose of a domestic rule is identified, the additional task posed by the choice of law problem remains: the judge must decide whether that purpose extends beyond domestic cases. Here a significant difference between Traynor's approach and that advocated by Currie emerges. Traynor's Step 3 continues to focus on the interpretation of local law, but it takes into account local policies that would be irrelevant in domestic cases, such as maintaining interstate harmony. Currie did not examine such policies until an apparent conflict of interests had emerged, and then only as an aid to reinterpretation of local policy or interest. Traynor's approach recognizes explicitly that domestic policies include those that enable the state to function within the context of a federated union of states or a world community of nations.

Only after a judge following Traynor's methodology has deter-

314. Traynor, War and Peace, supra note 12, at 127.
315. Kay, Comparative Impairment, supra note 6, at 617.
316. Juenger, supra note 286, at 33-35.
317. Brilmayer, supra note 270, at 399-402.
mined that the forum’s domestic policy extends to multi-state cases will
the question of whether the forum has an interest in applying that pol-
icy to the case be addressed. Critics have challenged the concept of
state interests, some doubting whether such interests exist at all,318
others taking them to exist, but to be limited to a selfish concern for
ensuring the victory of local residents over outsiders in litigation.319
Traynor anticipated the first criticism and made comments that suggest
a reply to the second:

It also bears emphasis that the term State interest is one of objectiv-
ity, not provincial partiality. It connotes no more than a State’s inter-
est in carrying out a policy designed to cover those with whose
welfare or supervision it is legitimately concerned. The concept is an
old one in other areas of the law, with a respectable place in the law
reports of countless jurisdictions. Its honourable history counters
those who would debase it to mean identification with the partisan
interest of a State involved in litigation as a party, as in actions by or
against it with respect to contracts it has made, the torts of its agents,
the vindication of its property rights, or the enforcement of its crimi-
nal laws. So narrow a definition ignores the objectivity that is basic
to the judicial process in all litigation, regardless of whether or not it
has multi-State aspects. The judge is not the litigant; his allegiance is
to justice, not to local pride or prejudice.320

Traynor’s focus throughout his first four steps is entirely on forum
law. It is not until the judge has determined the content, interstate
reach, and basis for interstate application of domestic policy that Tray-
nor mentions the policy of “another interested State.”321 Yet he ob-
erved that in following his analysis, “a judge must make a painstaking
evaluation of whatever policy is expressed not only in forum law, but
also in the law of any other State involved in the case.”322 Presumably,
the judge would repeat Steps 2 through 4 from the perspective of the
state or states whose law had been invoked by a party, just as Currie
suggested should be done in Step 1 of his 1964 statement.323 After the
domestic policies of the identified states are understood, according to
Traynor the forum’s policy will ordinarily prevail, “even if it is in
head-on conflict with the policy of another interested State.”324 Unlike
his successors on the California Supreme Court who have sought other

319. Ely, supra note 286, at 196.
320. Traynor, War and Peace, supra note 12, at 124.
321. Id. at 123.
322. Id. at 124.
323. See supra text accompanying note 166.
324. Traynor, War and Peace, supra note 12, at 123.
means of resolving true conflict cases, Traynor believed that respect for coordinate branches of government required that local statutory policy prevail, once it had been found to apply, and that unclear or obsolete local common law policies be articulated or reformed to meet current needs in both the domestic and multi-state setting. To characterize this sensitivity to the division of powers among the three branches of government as following “Currie's parochial idea that courts in conflicts cases serve as mere instrumentalities of local policies” seems to me to endorse a much more dangerous alternative: that judges should be unconstrained by local law when deciding cases involving choice of law.

Conclusion

Working in two different settings—Currie in the classroom, trying to teach traditional doctrine he increasingly saw as irrational to skeptical students, and Traynor in the courtroom, trying to decide appeals from trial court decisions he perceived as encrusted with obsolete dogma—both men came to discover the rationality of examining the content of assertedly conflicting laws rather than identifying a controlling law without regard to its purpose. Their intellectual collaboration produced a method of analysis that was initially accepted by both scholars and jurists. Today, academic controversy surrounds Currie's governmental interest analysis, but its influence continues to be great among the American judiciary, who use many of its concepts even while expressly declaring that they choose to adopt other approaches. Traynor's careful analysis of the judicial role in developing choice of law theory remains a vital contribution to the on-going debate.

Throughout the course of his extraordinary career as a jurist and an academic, Traynor’s probing intellect and persuasive reasoning transformed the law in many fields. Given his vital contributions to those aspects of the law that touch directly on the personal lives of litigants, such as family law, criminal law, and tort law, it would perhaps be unduly presumptuous for a specialist in the more abstract sub-

325. See supra note 301.
326. Traynor, Round Table, supra note 232, at 242.
327. Juenger, supra note 286, at 822.
328. See supra note 311.
330. See Kay, Theory Into Practice, supra note 6, at 585-86.
ject of conflict of laws to claim that Traynor's most enduring contributions are those devoted to choice of law theory. In any event, my own professional relationships with the principal actors in the intellectual history recounted in this Article—as Currie's student and co-author at Chicago, as Traynor's law clerk on the California Supreme Court, and as Ehrenzweig's colleague at Berkeley—may have biased my judgment. Suffice it to end with the observation that Traynor's own words of appraisal concerning Currie, with only a slight amendment, aptly describe the significance of his own work in choice of law theory: "every court [and scholar] in the land is in his debt."