

BOOK REVIEWS

SELECTED ESSAYS ON THE CONFLICT OF LAWS. By Brainerd Currie.¹
Durham, North Carolina: Duke University Press, 1963. Pp. x,
761.

The gentle scholar, Brainerd Currie, is of that rare company who can articulate great thoughts as well as think them. His trenchant discourse has cut swath after swath across babble and cant in conflict of laws. It is his way to arrive upon a scene quietly, to survey it, and if need be, to change it for the better. He entered upon the fusty panorama of conflicts unaccompanied by committees and unarmed with authority. He advanced and took the measure of the little fences that supposedly insured a place for everything and everything in its place.

Actually things were in a state. Most observers who had come upon the scene were baffled, if not blinded. Though none were born baffled in conflict of laws, most achieved bafflement early or had it thrust upon them. Baffling, said the judges;² Baffling, said the lawyers; Swamp, said the professors;³ and Echo answered, *Lex Loci*.

Her answering service was of supreme simplicity, but not less confounding for that. It evinced little concern to develop fair and rational answers comparable to those developing in other branches of the law. The answers had an assurance, however, that many came to equate with a beneficent reassurance of certainty. The impression of stability was beguiling, but all was turmoil inside the premises. Nevertheless, conflicts were far enough removed from the ordinary life of the law that few were heard to say, though some did say it, that the premises were unsound.

In time the premises gave way under the repeated onslaughts of Walter Wheeler Cook and Ernest G. Lorenzen. David Cavers took timely note that scholars would now have the responsibility of redevelopment,⁴ and such men as Albert Ehrenzweig joined in that concern and turned their attention to the new responsibility.⁵

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² See, e.g., CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 67 (1928).

³ See, e.g., Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

⁴ Cavers, Book Review, 56 HARV. L. REV. 1170, 1172-73 (1943).

⁵ EHRENZWEIG, *A TREATISE ON THE CONFLICT OF LAWS* (1962).

To the rugged pioneering that lay ahead, Brainerd Currie brought varied gifts: his sharp vision, his talent for recording the sad and the merry aspects of Establishments, his stamina for the long pull in legal analysis. The smoke of baffle began to dissipate as he published one lucid essay after another, distinguished not merely by profound and imaginative scholarship, but by the courageous presentation of experimental propositions, by the patient testing of their implications, and by the percolating style of his persuasive language. One is moved to wonder where we would now be drifting in conflicts were it not for Brainerd Currie.

Because of his guidance we have become cognizant of where we can head, not as in a coffle, but with some latitude. In a country with fifty states, that latitude is a boon. In a world of many countries it may also prove a boon. If we make good use of our elbowroom for learning, it is a fair speculation that *le droit international privé* will take some useful lessons from our developing law on conflicts.

It is significant that Brainerd Currie's book, which he describes as "tentative and exploratory," is a collection of his essays, in the tradition of Cook and of Lorenzen. In his own forewords:

It is no accident that years of study tend thus to result in miscellany. Under analysis, the subject tends to come apart, and systematic, comprehensive treatment recedes as a practical possibility. For some of us it will never be possible, at least in anything like the traditional form.

Transposed, the message is that a conflict of laws, like any other conflict, lends itself to solution by evolutionary reasoning, not by ante-bellum pronouncements.

Currie's book begins at the beginning. He inquires into the rules that determine how the forum informs itself of foreign law.⁶ In his sensible view, the rules should insure the fairness of procedure and should also promote rational decision. They should then be formulated by those who are experts not only in procedure and evidence but also in conflict of laws. Are they? It is a good question, and Currie is eminently qualified to ask it. He gets down to cases. He examines *Walton v. Arabian Am. Oil Co.*⁷ and *Cuba R.R. v. Crosby*,⁸ cases in which the plaintiff loses because he fails

⁶ CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* ch. I (1963).

⁷ 233 F.2d 541 (2d Cir.), cert. denied, 352 U.S. 872 (1956).

⁸ 222 U.S. 473 (1912).

to prove the law of the place of the tort. These were not the first times, nor would they be the last, to afford *lex loci delicti* an opportunity to rear its addled head. The damage they did was beyond repair. Currie's exhaustive report, however, aroused lawyers to a realization that damage on the roads could be compounded by damage in court. He demonstrated that the dogmatic invocation in those cases of the rules governing burden of proof rested on the discredited vested-rights doctrine in conflict of laws. Moreover, he made it clear that the various presumptions, invoked to aid the party with the burden of proof, in fact operated so erratically as to make rational decision turn on chance. Though the artificial plants of procedure are hardy enough, even they can wither when transferred to a strange environment.

The perceptive scholar called out other danger signs, notably those emanating from the indiscriminate resort to judicial notice as a substitute for problem-solving. He has analyzed the various statutes as well as legislative proposals that permit or require the forum to take judicial notice of foreign law, and he has noted how great is the need for procedural safeguards against the misuse of judicial notice. Characteristically he proposes remedies. Thus, he would have a party seeking to have a court take judicial notice of foreign law give timely notice. Such notice would be conducive to a fair determination of what the foreign law is. Moreover, failure to give such notice would preclude a party from insinuating a new legal theory into the case via judicial notice once the issues were joined and the case was tried. There is no good reason to depart in a conflicts case from rules of pleading and practice designed to insure timely definition of the issues to be tried. In other cases it is left to the litigants to invoke the rules of law on which they rely, with only occasional exceptions in deference to some public policy such as that against enforcement of illegal contracts.

The need for adequate procedural safeguards in conflicts cases is the greater because judicial notice of foreign law can then prove a valuable tool. It can put an end to the absurdity of trying issues of foreign law before a jury as questions of fact. It can put an end to needless formalities that are wont to encumber proof of the content of foreign law. There can be too much of a good thing, however. Currie proposes that statutes on judicial notice should not require or even permit a court on its own motion to take judicial notice of

foreign law unless under comparable circumstances in a non-conflicts case it could on its own motion take judicial notice of local law or of a legal theory that the parties had overlooked.

The Currie essays advance into an inquiry concerning the bases for judicial choice of forum or foreign law for the rule of decision. Are these bases rational? Now we have more than a good question. We confront the key question, choice of law, and we are indeed in swampland. Our knowledgeable guide, however, gives us helpful direction. We are to understand immediately that foreign law is sometimes invoked, not for a rule of decision, but for a datum point in the decisional process. For example, a forum rule allowing benefits to a widow might require reference to foreign law to determine whether the claimant was a widow.⁹ Similarly, a mistake of foreign law might be the operative fact necessary to bring into play a local rule governing restitution.¹⁰ Again, a local statute relating to inheritance might provide for reference to foreign law to determine whether a reciprocal right to inherit is recognized in a foreign jurisdiction.¹¹ Ubiquitous traffic churns up another example: a court applying the forum law of negligence would still refer to the rules of the road of the place where the accident occurred to determine whether there was a violation thereof such as would constitute negligence under the law of the forum.¹²

Currie knows full well the recurring sub-problems of datum points. When the local legislature provides workmen's compensation benefits for widows, does it envisage only those who are lawfully married according to the law of the place of marriage or also anyone who would qualify as a widow under forum law?¹³ When a local legislature provides that an acknowledged illegitimate child may inherit, does it envisage acknowledgment only within the jurisdiction probating the estate or does it refer to acknowledgment regardless of place?¹⁴

Not all conflicts problems can be solved at once, and Currie does well to make haste slowly in the datum-point cases, which he sets apart for further study. His primary concern is with the rehabilita-

⁹ CURRIE, *op. cit. supra* note 6, at 70, 178.

¹⁰ *Id.* at 66, 177.

¹¹ *Id.* at 67.

¹² *Id.* at 69.

¹³ *Id.* at 70-71.

¹⁴ See *Estate of Lund*, 26 Cal 2d 472, 159 P.2d 643 (1945).

tion of the major area where choice of law determines the rule of decision.¹⁵

Again he has a guide's sure sense of where to establish footing. He will not lead us astray with such categorical imperatives as have too long dictated choice of law. He posits a forum that arrives at a decision in conflict of laws in much the same way as in other areas. If the purported conflict proves to be only a mirage no choice of law problem arises. If there is a bona fide conflict, compelling the forum to make a choice of plausibly applicable laws, the forum is to make the choice by legal reasoning. In the process a judge may ponder available precedents, but he will be on guard against the lacquered language of *legislative jurisdiction* and *vested rights*, of lingering influence still.

Currie subscribes to the thesis that the rule of the forum prevails unless there is good reason why it should be displaced by a foreign rule. Evidently it does prevail most of the time, given the scarcity of appellate decisions on choice of law despite a highly mobile population. Thoughtful counsel may discount the speculative benefits of a possibly applicable foreign rule, either because there are attendant uncertainties or because there is such broad similarity between the foreign and the forum law as to minimize the benefits.¹⁶

In my own state the courts may take judicial notice of foreign law, but they regularly permit the parties to agree to try their case according to California law even though it appears that the rule of another state might properly be applicable.¹⁷ There is wisdom in this open recognition of the competence of the parties in this respect. A court might otherwise feel obliged to raise a choice-of-law problem on its own motion for no better reason than to avert captious criticism that it overlooked an issue. Moreover, when the parties have agreed between themselves that the local law is applicable, without involving the court, no precedent arises to haunt the court if the issue of choice of law is later contested. There is certainly nothing inimical to the public policy of the forum in an agreement to invoke its rule, which expresses that very policy.

¹⁵It has been noted that his work in this area may yield fresh insights into the datum-point cases as well. M. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845, 873-75 (1961).

¹⁶See, e.g., *Hamilton v. Abadjian*, 30 Cal. 2d 49, 51, 179 P.2d 804, 806 (1947).

¹⁷*Lein v. Parkin*, 49 Cal. 2d 397, 399, 318 P.2d 1, 2 (1957).

Currie ably sustains the proposition that if a party seeks to invoke a foreign rule of decision different from the forum rule, a court should then go through the usual process of construction and interpretation to arrive at the policies underlying the rules. It should determine whether the local policy encompasses more than strictly local situations. If so, it should apply the local rule if the forum has enough contacts with the case to give it a reasonable interest in applying its policy.¹⁸

One must welcome an approach that so effectively disposes of false conflicts cases, the cases in which it becomes apparent that only one state has an interest in applying its rule. *Babcock v. Jackson*,¹⁹ *Grant v. McAuliffe*,²⁰ and *Emery v. Emery*,²¹ are good examples. In each of these cases the plaintiff was injured in an automobile accident in another state or country as a result of the negligence or wilful misconduct of a fellow resident of the forum state. In each, the defendant asserted an immunity based on the law of the place of the wrong. In *Babcock* it was a guest statute; in *Grant* it was the rule that tort actions do not survive the death of the tortfeasor; and in *Emery* it was a rule of intra-family immunity. In none of these cases did the jurisdiction where the injury occurred have any interest in having its immunity rule applied in an action between residents of the forum. Accordingly, it would have been folly for the forum court to make its own policy a sacrificial offering to a magic rule that the law of the place of the wrong must govern.

There remain of course real conflicts. Analysis of the laws of the respective states may demonstrate that each has an applicable policy and a reasonable interest in having it applied. *Kilberg v. Northeast Airlines*²² is a good example. An airplane operated by a Massachusetts corporation crashed in Massachusetts at the end of a regularly scheduled flight from New York. A wrongful death action was brought in New York to recover damages for the death of a New York resident. New York's theory of damages for wrongful death was compensatory, and its constitution provided that its legislature

¹⁸ CURRIE, *op. cit. supra* note 6, at 183-84. See also Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflicts of Laws*, 63 COLUM. L. REV. 1212, 1242 (1963).

¹⁹ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

²⁰ 41 Cal. 2d 859, 264 P.2d 944 (1953).

²¹ 45 Cal. 2d 421, 289 P.2d 218 (1955).

²² 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961)

could not impose a ceiling on such damages. Massachusetts' theory of damages was punitive, and its wrongful death act imposed a \$15,000 ceiling. In the *Kilberg* case the New York Court of Appeals held that the Massachusetts ceiling should not apply. Had the action been brought in Massachusetts, the Supreme Judicial Court might well have held that the ceiling did apply. In Currie's view this is as it should be. Once a court determines that the forum has a reasonable interest in applying its own policy and concludes that its policy extends to the case before it, it must give effect to its policy. To weigh the respective interests of the two jurisdictions with an eye to the possibility of subordinating the policy of the forum to the policy of another state would require the exercise of a political judgment that the court is not competent to make. If the conflicting results engendered by each state's application of its own law to actions brought in its courts create serious practical difficulties, Congress can exercise its own power under the full faith and credit clause to resolve the issue of which state's interest must give way.²³

Since it is the everyday business of courts to weigh conflicting interests and policies, we must ask why Currie insists that they should not do so in true conflicts. If we posit that most statutory and common law is articulated with only purely local cases in mind and that courts must usually determine for themselves how far local rules extend when more than one jurisdiction is involved, is not the area particularly appropriate for the weighing of conflicting interests? In the ordinary conflicts case are not two local interests usually involved? There is an interest underlying the local rule of decision, and there is an interest in living harmoniously in the federal union and in the world community.²⁴ Currie's argument that conflicts between the applicable policies of different states constitute a political question beyond the purview of courts, however, does not preclude a court's canvassing all possibly conflicting interests in the process of construction and interpretation to determine to what extent local rules apply in cases with foreign contacts.²⁵ The court of a disinterested forum, with no applicable policy of its own, may also be justified in making a choice between the conflicting policies

²³ CURRIE, *op. cit. supra* note 6, at 119-20, 126, 160, 181-82, 278, 357, 599. See also Currie, *supra* note 18, at 1242-43.

²⁴ See M. Traynor, *supra* note 15, at 852.

²⁵ CURRIE, *op. cit. supra* note 6, at 146, 368-75, 498, 592, 604.

of the interested jurisdictions involved.²⁶ One must therefore take account of how he reconciles what appear at odds. It is one thing, he says, to consider the interests of other states in the context of interstate harmony and thus to arrive at a restrained and enlightened definition of forum policy. It is quite another to subordinate forum policy to the interest of another state or to some mechanistic principle of conflict of laws.²⁷ If a court, whether articulating the forum's common law or interpreting statutes that are silent as to their conflicts applications, concludes that the local rule extends to the conflicts case at bar, it must apply its own rule just as it would had its legislature specifically directed it to do so. There is no room for further balancing of interests in derogation of applicable local policy.²⁸

Of course the choice, whether made by the court or by the legislature, must not violate the Constitution. Currie has devoted several essays to the constitutional limitations on the choice-of-law rules.²⁹ He sets forth the constitutional issues lurking beneath mindless applications of traditional choice-of-law rules. He demonstrates how analysis in terms of governmental interests can give impressive guidance to courts as they determine the constitutional limits of the states' freedom of choice in conflicts cases.

The United States Supreme Court has left the states great freedom in this respect.³⁰ I disagree with the criticism that Currie's approach invites or compels the forum to exercise this freedom in favor of its own rule without adequate reason. It is one critic's view that

[if Currie's] teaching were ever fully accepted and became the exclusive basis for handling choice-of-law problems American thinking would, in my judgment, have adopted 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. Moreover, Currie's analysis, which compels him to give to the forum's law such broad effects, would tend to fasten upon the international

²⁶ *Id.* at 607, 721; Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 777 (1963).

²⁷ CURRIE, *op. cit. supra* note 6, at 604; Currie, *supra* note 26, at 759.

²⁸ CURRIE, *op. cit. supra* note 6, at 705-06.

²⁹ *Id.* at chs. 5, 6, 10, 11.

³⁰ *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964); *Richards v. United States*, 369 U.S. 1 (1962); *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66 (1954); *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n.*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Industrial Acc. Comm'n.*, 294 U.S. 532 (1935).

and the interstate communities—except to the extent that the balance can be redressed in the latter context by constitutional controls—a legal order characterized by chaos and retaliation.³¹

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. It is a large assumption, in my view substantially more vulnerable than the contrary one, that courts, once freed of the restraints of a superlaw of conflicts, will apply their local law with gross disregard for its reasonable limitations.³² In any event, given the broad freedom of choice allowed by the Constitution, it would hardly be possible to formulate any rules on conflict of laws that would insure a uniform code of cosmopolitanism. Nevertheless, it is better to expect the best at the risk of some disappointment than to be so afraid of the worst as to cut off any opportunity for the best to materialize. Of course:

a responsible court will have to be on its mettle. It must be prepared to reject unrealistic rules, yet cautious enough not to make formulations that reach too zealously into the future or give too zealous a scope to local policy. It must distinguish between real and spurious conflicts at the outset. It must temper its freedom to declare local policy and its scope with a sense for harmonious interstate relations as well as for the justifiable expectations of the parties.

There are always some to remind us that those who make decisions on our courts, like those who make decisions elsewhere, may sometimes be provincial in outlook. They say no more than that there is always a shortage of wise men. It is answer enough to the misanthropes that the forces against provincialism are strong today and that a judge trained to look through partisan wrappings of a conflict will be inclined to look through provincial wrappings as well. There is no reason why he should be less dispassionate in a conflicts case than in any other. The hazard is less of impassioned provincialism than of the lingering ills of a passive formalism.³³

We are still close to the wreckage of the past, and accordingly, we cannot expect to achieve more than reasonable *ad hoc* solutions

³¹ von Mehren, Book Review, 17 J. LEGAL ED. 91, 96-97 (1964).

³² See, e.g., *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rep. 266 (1961); *People v. One 1953 Ford Victoria*, 48 Cal. 2d. 595, 311 P.2d 480 (1957); *Kinney Loan & Fin. Co. v. Sumner*, 159 Neb. 57, 65 N.W.2d 240 (1954).

³³ Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657-675 (1959)

to specific conflicts problems until we have more experience in intelligent decision-making than is now available. We must be on guard against substituting new mechanical rules for discredited old ones. No one understands this better than Currie. He cautions against substituting a clutch of contacts or a center of gravity for the discarded single contact.³⁴ He cautions against seeking out the place having "the most significant relationship with the occurrence and with the parties,"³⁵ unless we thus determine the scope of local policy as a means of unmasking false conflicts. Of course the more contacts there are in one jurisdiction and the less there are in another, the greater the probability that the former is the only jurisdiction with an interest in applying its policy. It can happen, however, that the jurisdiction having only one or a minority of the contacts is the only one with any interest in the particular issue involved. In other cases, such as *Kilberg*, where the contacts are distributed in such a way that each jurisdiction can reasonably claim to be the center of gravity or to have the most significant relationship with the occurrence and the parties, neither a most-significant-relation rule nor any other rule can resolve the conflict on a percentage basis. The stubborn fact is that each state can constitutionally apply its own rule and must do so once it determines that it is applicable.

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 support of such rules may be relevant in determining the scope of local policy.³⁶ 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 judg-

³⁴ CURRIE, *op. cit. supra* note 6, at ch. 14; Currie, *supra* note 18, at 1233-43.

³⁵ RESTATEMENT (SECOND) CONFLICT OF LAWS, § 379, at 3 (Tent. Draft No. 9, 1964). See also RESTATEMENT (SECOND) CONFLICT OF LAWS, § 332b, at 30 (Tent. Draft No. 6, 1960).

³⁶ See, *e.g.*, *Bernkrant v. Fowler*, 55 Cal 2d 588, 596, 360 P.2d 906, 910, 12 Cal. Rep. 266, 270 (1961), *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

ments still emerge through obsolescent language. Currie's *SELECTED ESSAYS* demonstrate how courts have thus managed to arrive at eminently reasonable results, hobbled though they were by a lexicon that had not proved serviceable but had yet to be renounced.³⁷

Now 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. They will note, as conduct becoming a scholar of the first rank, how forthrightly he disclaims perfection and reveals the doubts and questions that hagrade his reflection.³⁸ No one could acknowledge more freely that his work is work in progress. No one could set forth more generously what he has learned, unlearned, and relearned.

It is no longer the same old fusty panorama in conflict of laws since Brainerd Currie's landing. He arrived upon the scene unheralded and changed it grandly for the better. Every court in the land is in his debt.

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RELIGION AND AMERICAN CONSTITUTIONS. By Wilber G. Katz.¹ Evanston, Illinois: Northwestern University Press, 1964. Pp. 114.

RELIGION AND THE SCHOOLS: THE GREAT CONTROVERSY. By Paul Blanshard.² Boston: Beacon Press, 1963. Pp. 265.

Few areas of American law are as emotionally charged as the relationship between government and religion. This fact renders political solutions to many problems in the area extremely difficult, and accentuates the importance of careful and dispassionate legal analysis. Professor Katz's book consists of the 1963 Rosenthal lectures at Northwestern University School of Law. At that time, the author was chairman of the National Commission on Church-State Relations of the Protestant Episcopal Church. Although brief, the book covers all the significant aspects of the church-state problem.

³⁷ See, e.g., CURRIE, *op. cit. supra* note 6, at 50, 138-39, 181, 350, 575-76, 695, 729.

³⁸ *Id.* at ch. 9, pp. 571-72, 593, 599, 627, 739.

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