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# RESPONSES TO TRANSCRIPT

## Back to the Past: Anti-Pragmatism in American Conflicts Law

by Patrick J. Borchers\*

I am grateful to the editors of the *Mercer Law Review* for the opportunity to comment upon the symposium honoring Brainerd Currie. As one would expect given the fine panel assembled, the discussions were lively, well-informed, thoughtful, and thought-provoking. And, of course, it is well to honor Currie, who was perhaps the father—at the very least the midwife—of the conflicts revolution.

There is no denying that Currie's "interest" vocabulary helped American courts escape the grip of the place-of-the-injury rule in tort conflict cases.<sup>1</sup> His tripartite division between true conflicts, false conflicts, and unprovided-for cases is orthodoxy to most American

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1. See, e.g., *Babcock v. Jackson*, 191 N.E.2d 279, 282 (N.Y. 1963).

conflicts academics and many courts. The influence of interest analysis with courts is undeniably broad in tort cases, though less so in other areas.<sup>2</sup> Although I find myself in strong disagreement with Currie and his followers on many points, he helped usher in an era of fairer results, particularly for interstate tort victims.

What, then, could one possibly find to disagree with in a theory that was the product of the labors of a brilliant, moderate man and has produced fairer results than its predecessor? Well, at least in my case, the answer is "quite a lot."

Let us begin by examining the fundamental premises of interest analysis. Notwithstanding the elegant vocabulary in which it is draped, Currie's theory largely—at least in tort cases—involves substituting personal connecting factors for territorial ones. In other words, interest analysts faced with an interstate tort case are usually much more concerned with where the parties are residents, domiciled, incorporated, or headquartered than they are with where the injury took place. Of course, the analysts are not always just concerned with personal connecting factors, and they do not always ignore the territorial ones. But for Currie's followers, the priority of personal over territorial is the rule, not the exception.

Thus, for instance, the panelists largely agree that the Arizona nonsurvival rule protected Arizona heirs in *Grant v. McAuliffe*,<sup>3</sup> that the Ontario guest statute protected Ontario defendants and their insurers in *Babcock v. Jackson*,<sup>4</sup> that the Oregon spendthrift rule at issue in *Lilienthal v. Kaufman*<sup>5</sup> protected Oregon spendthrifts, that the charitable immunity rule in *Schultz v. Boy Scouts of America, Inc.*<sup>6</sup> protected New Jersey charities, that the New York rule of unlimited recovery for wrongful death in *Rosenthal v. Warren*<sup>7</sup> protected New York plaintiffs, and so on. Given that, Arizona lacked an interest in *Grant* because no Arizona defendants were involved, Ontario had no interest in *Babcock* because of the absence of an Ontario defendant or insurer, Oregon had an interest in *Lilienthal* because an Oregon spendthrift was a party, New Jersey had an interest in *Schultz* because of the New Jersey defendant, and New York had an interest in *Rosenthal* because the decedent was a New Yorker.

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2. Patrick J. Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883 (1993).

3. 264 P.2d 944 (Cal. 1953).

4. 191 N.E.2d 279 (N.Y. 1963).

5. 395 P.2d 543 (Or. 1964).

6. 480 N.E.2d 679 (N.Y. 1985).

7. 475 F.2d 438 (2d Cir. 1973), *cert. denied*, 414 U.S. 856 (1973).

The panelists are in good company in making this assumption, because this is precisely what Currie said in a famous passage that Harold Korn<sup>8</sup> quite rightly calls one of the most seductive ever written. Discussing hypothetical variants on the conflicts chestnut *Milliken v. Pratt*,<sup>9</sup> Currie wrote the following assessment of the even-then-abolished Massachusetts rule of contractual disability for married women: "The [Massachusetts] legislature decides in favor of protecting married women. What married women? Why, those with whose welfare Massachusetts is concerned, of course—i.e., Massachusetts married women."<sup>10</sup> This beguiling, but ultimately parochial, premise that states acquire interests only in their own is the nub of Currie's theory.

In many cases the theory works in a fairly straightforward fashion and leads to intuitively appealing results. Tort cases in which all of the parties are domiciled in one state, and the accident occurs in another state, are almost invariably classified as false conflicts. Thus, for example, the panelists have little cause for disagreement in their discussion of *Grant v. McAuliffe*<sup>11</sup> because, to use their terminology, only California has an interest in applying its law. I would submit, however, that the factor that makes *Grant* such an easy case is not the common domicile of its parties, but its avoidance of the anachronistic, unfair Arizona rule the traditional methodology would have chosen. No right-thinking judge wants to apply a rule like the Arizona nonsurvival rule, a guest statute, a cap on wrongful death damages, or any of the others in the unholy collection of capricious tort rules that dotted the map in Currie's era.

Although interest analysis is celebrated for its handling of cases such as *Grant*, its fabric frays elsewhere. Suppose one turns *Grant* upside-down, and places the accident in California, but the forum and the domicile of both parties is in Arizona. The old place-of-injury rule would have led to the application of the fairer, more progressive California rule, but it is now Currie's theory that must swallow the bitter pill of choosing the Arizona rule. *Schultz v. Boy Scouts of America, Inc.*<sup>12</sup> resembles this upside-down variation on *Grant*. It is interesting to observe that in contrast to the blissful unanimity of the panelists on *Grant*, they diverge sharply when discussing *Schultz*. Some, because of the common domicile of the parties, treat the case as a false conflict, while others attempt to

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8. Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 812 (1993).

9. 125 Mass. 374 (1878).

10. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 85 (1963).

11. 264 P.2d 944 (Cal. 1953).

12. 480 N.E.2d 679 (N.Y. 1985).

turn the case into a true conflict by imagining a generalized New York interest in deterring illegal conduct within the state's borders.

The problem, ultimately, is that interest analysis is just as tied to geography as the approach it replaced.<sup>13</sup> At least at the theoretical level, it has no innate tendency to select the better, fairer, more compassionate tort rules. It is worth noting that in the real *Schultz* case, the New York Court of Appeals—purporting to apply interest analysis—ultimately applied New Jersey's rule of charitable immunity, leaving the parents of the young boys (one of whom was ultimately driven to suicide by the molestation he suffered) without any redress for their grief. It seems sadly ironic that had the New York court adhered to the old place-of-the-injury rule the parents would not have been left empty-handed.

Why is it, then, that—in practice—interest analysis has led to fairer results? The reasons are at least two. First, by preferring the application of forum law in all cases in which the forum has an interest, interest analysis has a very strong tendency to result in the application of forum law.<sup>14</sup> Armed with the knowledge that courts are likely to apply their own law, plaintiffs' counsel can and do forum shop to avoid unsavory tort rules. Second, the notion of what constitutes an "interest" is sufficiently vague that it leaves courts with a large amount of discretion in the classification of cases. Given that courts have great leeway in classifying cases under Currie's system, their preference for arriving at a just result often can be realized even while maintaining the appearance of applying Currie's tripartite classification.<sup>15</sup>

Yet the best feature of interest analysis in practice—the cloak it gives to courts to apply the better substantive law—is the one that the analysts try the hardest to avoid in theory. Although Currie certainly did not have any trouble classifying some tort rules as "better," "sounder," and "more deserving"<sup>16</sup> than others, he adamantly denied that the relative quality of the rules ought be a factor in deciding which one to choose. And each panelist—with the possible exception of Professor Felix—follows Currie in denying the appropriateness of the better law consideration.

All of this leads to an oddly inverted relationship between courts and much of the conflicts academy. The analysts find themselves in the anti-pragmatic position of promoting a theory that if applied in the ruthless,

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13. FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 131-39 (1993).

14. For empirical verification, see Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 374 (1992).

15. See, e.g., *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721 (Cal. 1978).

16. CURRIE, *supra* note 10, at 705.

result-blind manner they urge will lead to the application of unjust tort rules. In a very real sense, the courts are in front of the academy, because they have to deal with the real parties involved in the cases. Reckoning up interests is fun in the abstract, but the possibility that a grieving spouse will be left without recovery raises the stakes.

The difference between academic and judicial thinking is well illustrated by Judge Keating's opinion in *Tooker v. Lopez*.<sup>17</sup> In the course of deciding to apply New York's rule of ordinary care, and deny effect to the Michigan guest statute, Keating was confronted with the argument that various circumstances in the case were "adventitious." Keating responded:

For all we know, [the plaintiffs' decedent's] decision to go to Michigan State University as opposed to New York University may well have been "adventitious." Indeed, her decision to go to Detroit on the weekend in question instead of staying on campus and studying may equally have been "adventitious." The fact is, however, that [she] . . . decided to go to Detroit on October 16, 1964; that she was a passenger in a vehicle registered and insured in New York; and that as a result of all of these "adventitious" occurrences, she is dead and we have a case to decide. Why we should be concerned with what might have been is unclear.<sup>18</sup>

The gulf between the analysts and courts is illustrated by the contrasting phrases "we have a case to decide" and "what might have been." Although judicial intuition is far from perfect—as cases like *Schultz* show—courts are, for the most part, on the "we have a case to decide" side of the line, whereas the analysts are preoccupied with the "might have been." The analysts wonder what purpose a rule might serve, or about the fictional desires of a hypothetical sovereign embodiment of each of the connected states, while courts have real cases to decide and *know* the effect that each competing rule will have on the parties. One can wonder, for instance, what conceivable "interest" the Michigan guest statute served, but the New York Court of Appeals knew that the *Tooker* family's interest was in a chance at recovery.

At the end of the day, I disagree fundamentally with Currie and his followers because I find their theory unsatisfying and impractical. It is unsatisfying because it fails to take account of the true, most dominant interest in adjudication, which is to achieve justice between the parties. Rather than criticizing the court in *Schultz* for failing to find some "deterrent" interest in application of New York tort law (and one

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17. 249 N.E.2d 394 (N.Y. 1969).

18. *Id.* at 399-400.

wonders what deterrence can possibly be accomplished by tort rules if the criminal laws against forcible sodomy of a minor have failed in the task), is it not more satisfying to criticize the court in *Schultz* for having botched the task of doing justice between the parties? Rather than giving controlling weight to the fact that the Schultz family decided to make its home in New Jersey, would it not be more satisfying, indeed more American, to say that the court has an overriding interest in giving all parties the same quality of justice without regard to their home state?

Even leaving to one side its unsatisfying character, each passing year makes classical interest analysis more vulnerable to attack on practical grounds. Tort law has changed radically since Currie wrote. Alabama is the only state with a guest statute that has not been repealed or declared unconstitutional; numerical caps on wrongful death recovery have disappeared; tort damages almost invariably survive the defendant's death; the number of states following contributory negligence can be counted on one hand, and so on. Interest analysis seems frozen in time, still wrestling with the problems of a bygone era. Indeed, of the cases selected for this symposium, the 1985 *Schultz* decision is the most recent, and the others were decided respectively in 1956, 1953, 1963, 1964, 1973, and 1973.

This is not to be critical of the material selected for this symposium, because there may be important lessons to be learned from the cases of this era. But one wonders whether the fixation on cases with small number of parties and outdated tort rules is not indicative of the limitations of interest analysis. How, for instance, would the analysts apply their theory to a nationwide class action brought against an asbestos or DES manufacturer? Is a court really required to take each of the thousands of parties and reckon up the interests after considering their home states and whatever other connections might give a state an interest? What if this methodology would lead to fifty or more laws being applied to the same case? And how is a court in such a case to adhere to Currie's demand that the interests must be assessed for each *issue*?

Currie remains the most important writer on American conflicts law, but largely because he succeeded in substituting a personal law orthodoxy for the previously-dominant territorial one. The fact remains, however, that American courts in conflicts cases are too pragmatic to be consistently bound by any orthodoxy, be it old or new. As a result, there is an ever widening gap between theory and practice. Ultimately, interest analysis is too narrow and antipragmatic a theory to account for the realities of today's litigation, and as such, is fast losing its power to explain and guide judicial practice in conflicts decisions.