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Choice of Law: How it Ought Not To Be

by Friedrich K. Juenger*

I.

When the *Mercer Law Review* sent me the transcript of the October 1996 Roundtable at the Walter F. George School of Law, I was curious to learn what progress interest analysis has made since the death of its founder, Brainerd Currie, more than thirty years ago. Alas, the transcript confirmed my suspicion: there is nothing new to be found in that corner of conflicts methodology. The participants discussed shopworn cases and produced period pieces that might as well have been written in the sixties. But while that era's symposia sparked lively differences of opinion on essential points, the Mercer discussants, being True Believers in Currie's methodology, all agreed on fundamentals. Their choice of cases, hoary chestnuts from the fifties, sixties, and seventies (only *Schultz v. Boy Scouts of America, Inc.*¹ is of a more recent vintage, although it, too, was decided well over a decade ago), conveys the impression that that methodology is stuck in a time warp.

Currie's school may not be the only one to delight in anachronisms. For instance, Cavers' landmark article, written in 1933, dealt with married women's disabilities, a topic that had already inspired Benedikt Carpzov in the seventeenth century. But Currie did appreciate such fusty relics. In fact, he picked the very same issue as the topic for the seminal piece he published in the late fifties, a time when married women had long been emancipated. Given this antiquarian bent, it seems that the obsolescence of an issue is a virtue rather than a vice in the eyes of interest analysts. That would explain why Currie's disquisition on Massachusetts women still occupies a prominent place in

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1. 480 N.E.2d 679 (N.Y. 1985).

a recent casebook and why the analysts insist on discussing conflicts problems such as those posed by the long extinct caps on wrongful death recovery and guest statutes, a species of legislation dating back to the thirties that has succumbed to law reform in all states except Alabama.

Alas, the academicians' enchantment with legal fossils has a drawback. Time spent on quaint oddities from the past is bound to distract them from the issues of our days. For instance, they are bound to overlook changes in the law that convert their favorite specimens into ghost cases. Thus, no one at Mercer considered, in discussing *Walton v. Arabian American Oil Co.*,² the effect of Federal Rule of Civil Procedure 44.1 on the resolution of the foreign law issue the case presented. More importantly, scholars preoccupied with past problems are wont to pay little attention to such current conflicts issues as those created by the so-called "reform" that has balkanized American tort law, or the choice-of-law conundrums posed by mass disasters. As far as the latter are concerned, of course, interest analysts may do well to avoid them. As the Mercer Roundtable shows, their methodology complicates the resolution of even run-of-the-mill two-party situations and would therefore only heap further complexities on already complex cases.

II.

Practical considerations, in any event, do not seem to be uppermost in the analysts' minds. Apparently, they look upon choice of law not so much as a means to accommodate the exigencies of interstate and international disputes than as a titillating intellectual exercise, a haven far removed from real-world concerns, in Posnak's words, the "wacky, zany, problematically wonderful world of choice of law."³ With little regard for Rosenberg's admonition that "the game is not being played so [scholars] can flex their jurisprudential muscles," the analysts enjoy their "three-dimensional chess games."⁴ Given the amorphous nature of the two concepts that are central to their methodology—policies and interests—there is an almost inexhaustible array of moves and countermoves available to keep them entertained. Thus, any run-of-the-mill traffic accident can serve as the basis for a long and erudite analysis of the policies and interests at stake.

Law review articles, as well as reported cases, reveal considerable differences of opinion on what policies inform a particular statutory or common law rule because, as David Currie notes, ascertaining these

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

3. Transcript, *Choice of Law: How It Ought to Be*, 48 MERCER L. REV. 639, 642 (1997)

4. Maurice Rosenberg, *Comments on Reich v. Purcell*, 15 UCLA L. REV. 641, 644 (1968).

policies is a highly subjective matter.⁵ In addition, there is room for disagreement on the interests a state may have in effectuating whatever policies it may espouse. It should therefore come as no surprise that interest analysis is not a unitary methodology but rather an agglomeration of "stagnant pools of doctrine, each jealously guarded by its adherents."⁶ Although this diversity of opinion offers much fodder for publications, it is a bit of an embarrassment. After all, interest analysis is designed to vindicate state policies and interests, a purpose it cannot possibly serve well unless there is agreement on what these policies and interests are. If such agreement is lacking, courts that follow Currie's approach will inevitably sacrifice these precious commodities by misjudging what particular policies and interests are at stake. If even the analysts cannot agree, judges—invariably lost in our mysterious science—can hardly be expected to figure out what the gurus cannot divine.

III.

Worse yet, the Mercer Roundtable makes one wonder whether the analysts actually possess the skills necessary to ascertain the policies behind particular rules of decision. Certainly, their attempts to determine the purpose of, say, guest statutes are not encouraging. As a glance at Prosser's treatise will instantly reveal, these enactments lacked any plausible policy; they were the product of relentless and effective lobbying by insurance companies. In fact, the "policies" underlying such legislation are sufficiently untenable that many courts have held them unconstitutional. Assuming, however, that guest statutes do represent a policy, whom was it designed to benefit? Because the enterprises that lobbied them operate nationwide, the argument that these enactments protect only "local" insurers (Allstate, Nationwide!) against "collusion" (another unwarranted assumption, as Prosser shows) is unconvincing. Similarly unconvincing are the speculations of the participants in the Mercer Roundtable, in discussing *Grant v. McAuliffe*,⁷ about the former Arizona law that abated tort actions upon the tortfeasor's death. That obsolete rule never served any discernible purpose; it merely attested to the remarkable staying power of the old common law adage *actio personalis moritur cum persona*, as yet another glance at Prosser would have shown.

5. Transcript, *supra* note 3, at 656, 670, 698 (Currie).

6. Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577, 615 (1980).

7. 264 P.2d 944 (Cal. 1953).

When analysts attempt to fathom the reasons behind the laws of foreign countries, their efforts become wholly implausible. Take the Zacatecan cap on tort damages, which was at issue in *Hurtado v. Superior Court of Sacramento County*.⁸ Apparently none of the Roundtable participants even realized that he was not dealing with "Mexican law," but rather with the civil code of a constituent Mexican state (yes, our southern neighbors do have a federal system). Also, the pertinent provision is not "a wrongful death statute" as some of them seemed to think; the civil law was never burdened by as questionable a precedent as *Baker v. Bolton*.⁹ Rather, the Zacatecan Civil Code ordained an across-the-board limitation on recovery for both personal injury and death. To determine the policy behind it would of course require a careful study of Mexican legal history rather than the guesswork that mars the opinion in *Hurtado* and the pages of the *Mercer Law Review*. To date, however, no analyst has undertaken such a study.

IV.

Looking at such examples of policy analysis done by Brainerd Currie's followers, one may well doubt whether the analysts will ever get it right. After all, they had thirty years to figure out the "policy" behind guest statutes and, as the Roundtable discussion of *Babcock v. Jackson*¹⁰ shows, they still are at a loss to explain what it is. Nor have the analysts ever managed to demonstrate that the notion of "interest" has any substance, or even to explain what it actually means (in fact, some of them seem to be uncomfortable with the term). Brainerd Currie used to anthropomorphize states, depicting them as a bunch of egotistical beings who are eager to have their law rather than someone else's apply. The Hobbesian state of nature he hypothesized is hardly an accurate depiction of our federal system. Nor does the tableau of warring states he painted reflect the fact that the conflict of laws, for centuries, has attempted to alleviate conflicts rather than to exacerbate them.

For these reasons, I doubt that interest analysis, taken seriously, has much to offer courts called upon to resolve problems posed by real-life interstate and international transactions. That methodology produces an intolerable lack of certainty, predictability, and uniformity of result, which is the inexorable consequence of an approach premised on empty imagery. The social cost of such an approach is great: counsel may commit malpractice if they settle; run-of-the-mill traffic accidents must be litigated up to the highest state court. Shrugging off such criticism,

8. 522 P.2d 666 (Cal. 1974).

9. 170 Eng. Rep. 1033 (1808).

10. 191 N.E.2d 279 (N.Y. 1963).

the analysts argue that uncertainty also characterizes other fields of law. They overlook, however, that uncertainties usually can be cleared up by one supreme court decision. In contrast, because it requires an ad hoc assessment of each case, interest analysis creates a *perpetuum mobile* for stirring up conflicts litigation; supreme courts using that approach do not settle issues but create them. But that does not seem to faze even David Currie, who teaches at the University of Chicago, home of the Coase theorem, where transaction costs are taken seriously.

V.

Given its obvious defects, what reasons can possibly explain the ready acceptance of interest analysis by the judiciary? There must, of course, be something about a loose and open-ended analysis that tempts judges. Interest analysts are prone to invoke "legal realism," as several of the Roundtable participants did, in support of their doctrine. But, how realistic is the analysts' appreciation of the courts' handiwork? Of the group assembled at Mercer, only Felix and Posnak acknowledged that the intrinsic quality of conflicting rules of decision can play a role in deciding choice-of-law cases. However, the judicial tendency to pick the better law should be obvious to anyone who looks not only at opinions but also at holdings.

The large majority of cases in which courts adopted the new learning dealt with guest statutes (or their functional equivalent, intrafamily immunity) and caps on wrongful death recovery. In most of these cases, the courts skillfully employed interest analysis or other modern approaches to avoid application of such "drags on the coattails of civilization."¹¹ The true significance of the "conflicts revolution" was to reflect, on the choice-of-law level, the substantive tort law revolution that swept the country during the sixties and seventies. Because of their indeterminacy, the new methodologies could serve the function that the classical escape devices of yore used to serve, namely to enable judges to reach the right result, in a much more effective fashion.

Most of the early cases that prompted the "conflicts revolution" presented a stereotyped pattern: the defendant (or rather counsel for the defendant's insurance company) dragged in from out of state one of the various common law or statutory monstrosities, most often a guest statute, that unreasonably impeded tort recovery. In a forum that was not burdened by similar bad law, defense counsel's strategy could hardly count on the *favor iudicis*. By manipulating such easily manipulatable concepts as "interests" and "policies," judges readily avoided applying

11. Clark v. Clark, 222 A.2d 205, 209 (N.H. 1966).

substandard foreign rules that offended their sense of justice. In other words, the new approaches furnished a convenient escape device. Amazing as it may seem, while Brainerd Currie did allude to this phenomenon, most of his followers, though they claim to be legal realists, apparently fail to notice what should be obvious.

VI.

The fact that interest analysis glosses over what courts are actually doing is apparent not only from the analysts' discussion of tort cases but also from their apparent uneasiness with contract choice of law. The court decision they chose for the Roundtable discussion of this subject was *Lilienthal v. Kaufman*,¹² an oddball case that dealt with a spendthrift statute. Of far greater practical importance than the fascinating problems such enactments may pose is, however, the power of individuals and enterprise to select the law they wish to govern their agreements. This power cannot be reconciled with conflicts theories that are premised on sovereignty, be it the vested rights doctrine or interest analysis. Joseph Beale condemned party autonomy as "absolutely anomalous,"¹³ "theoretically indefensible,"¹⁴ and "absolutely impracticable."¹⁵ Brainerd Currie largely avoided the subject, but to him private interests simply did not matter, except to the extent that they benefit from some governmental policy.

While spendthrift statutes rarely pose interstate and international problems, each and every day individuals and enterprises throughout the world execute and perform millions of contracts containing choice-of-law and forum-selection or arbitration clauses. Agreements dealing with transactions that cross state and national borders usually designate the law the parties wish to apply in the case of disputes as well as the forum, arbitral or judicial, that is to decide them. Such clauses are usually upheld by the courts; the inconvenience to international trade and commerce that would follow if party autonomy were not recognized would be very serious indeed. To this day, interest analysts have had precious little to say about this fundamental principle, although it is of considerable practical importance. Presumably because it does not fit in their calculus of governmental interests, they prefer to spend their time on a more than three-decades-old Oregon case of no discernible current relevance.

12. 395 P.2d 543 (Or. 1964).

13. 2 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1080 (1935).

14. *Id.* at 1083.

15. *Id.* at 1084.

VII.

Interest analysts, focused as they are on forum law, show little regard for developments in other nations. Their lack of understanding of foreign law in general is already evident from the strange "policies" they impute to alien jurisdictions such as Zacatecas. But even comparative conflicts writing does not attract their attention. The analysts' lack of interest and understanding is apparent from Posnak's characterization (after 800 years of scholarship which has produced an enormously rich legal literature) of choice of law being "among the most or the most unthought about areas of the law."¹⁶ David Currie evidences a similarly detached attitude when he goes to some length to belabor the elementary proposition with which the glossators were already familiar (and to which they referred in terms of "real" and "personal" statutes), namely that there is a choice between territorial or personal connecting factors.

The loss of international perspective that the analysts' forum-centered approach entails is regrettable, but it is only one of the numerous defects from which Currie's methodology suffers. Having set forth, at greater length and in greater depth, the problems and pitfalls of interest analysis elsewhere, I limit my comments to specific flaws that surfaced at the Mercer Roundtable. Whether my comments will be of much use to the participants seems doubtful. As their replies to some searching questions posed by members of the audience suggest, analysts do not cherish criticism, even if it comes in the form of a polite inquiry. Perhaps their internal disagreements about such details as, for instance, how Baxter's notion of comparative impairment jibes with the call for moderate and restrained interpretation in Brainerd Currie's last article are simply too absorbing to leave much time for the queries of outsiders.

But even if the discussants may have been less than forthcoming about what others perceive as weaknesses of their methodology, the Mercer Roundtable has had the salutary, if unintended, effect of highlighting some of its flaws. While much has been written about conflicts theory in recent years, we have lacked a discussion exclusively among interest analysts in terms of their own methodology. It is commendable that the *Mercer Law Review* will not only preserve a record of such a discussion but also enable outsiders to append some critical remarks. Clearly, the time is ripe to realize the truth of the prediction Max Rheinstein made thirty-five years ago, that "American

16. Transcript, *supra* note 3, at 642 (Posnak).

conflicts law has . . . been led into a dead-end alley.¹⁷ Three-and-a-half decades of experimenting with interest analysis ought to be sufficient for the realization of the obvious fact that this is not what conflicts law ought to be.

17. Max Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 633 (1962).