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Gene R. Shreve

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Notes From the Eye of the Storm

by Gene R. Shreve*

When the Currie theorists redecided a series of famous cases in the symposium program, they reflected little of the confusion and tumult that grips conflicts scholarship. The participants appeared to have few doubts about the soundness of Brainerd Currie's governmental interest analysis.¹ They tended merely to differ on whether particular case results are faithful to Currie's approach. Such concord was by happenstance rather than design. Lea Brilmayer (a foe of interest analysis²) and Larry Kramer (an interest analysis revisionist³) would have presented more contrasting views had they accepted invitations to appear. Currie's true believers on the panel were left to describe (with an understandable lack of conviction) the attacks of others on the great man's work.

Yet the fact that discussion was rather like-minded need not prevent us from enjoying the transcript. Nor should the fact that Brainerd Currie's choice-of-law package has never been adopted by an American court and probably never will be. Informed and thoughtful discussion among the program participants helps us to understand a little better

* Richard S. Melvin Professor of Law, Indiana University School of Law at Bloomington. University of Oklahoma (A.B., 1965); Harvard Law School (LL.B., 1968; LL.M., 1975).

1. For the particulars of Currie's approach, see BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963) [hereinafter CURRIE, *ESSAYS*]; Brainerd Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROBS.* 754 (1963); Herma H. Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 *RECUEIL DES COURS* 19 (1989).

2. See, e.g., Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 *MICH. L. REV.* 392 (1980); Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 *OHIO ST. L.J.* 459 (1985).

3. See, e.g., Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 *U. CHI. L. REV.* 1301 (1989); Larry Kramer, *Rethinking Choice of Law*, 90 *COLUM. L. REV.* 277 (1990).

what Currie was driving at. That matters because Currie's ideas are still important to conflicts thinking.⁴

Besides, judging from some of the contemporary conflicts writing to be found elsewhere, we could have done a great deal worse. The program panelists know their subject inside out and are in conflicts for the long haul. Therefore, we encounter none of the naiveté and arrogance that afflicts some conflicts writing by those who reason from their immediate failure to understand conflicts law and theory and believe that the subject is not understandable, who venture briefly into the conflicts literature to denounce the subject and to ridicule serious conflicts scholars. At the same time, the symposium panelists usually managed to avoid some of the problems that often plague conflicts insiders. That is, we find in the transcript a minimum of impenetrable analysis, harsh dismissal of opposing views, and hollow claims of victory.

Serene in the turbulent field of conflict of laws, the symposium program was like the quiet encountered in the eye of a hurricane. The balance of this Essay attempts to place Currie's symposium in context; it considers the storm of conflicts debate and how it affects our understanding of the subject.

Modern conflicts law has had a prolonged adolescence. For about fifty years, it has pursued multiple, perhaps competing objectives in theory, and has often appeared uncertain in application. This has prompted innumerable debates over what conflicts law is or should be. Some commentators view the varied, contingent character of choice of law as actually beneficial. Others disagree, believing conflicts law is badly flawed. These critics disagree among themselves about how to reform conflicts law, or whether it is even worth saving. Reform-minded critics offer competing proposals for revamping the subject. More pessimistic critics simply reject conflicts law. They are primarily interested in ways to confine or marginalize the subject.

To find the last decisive and intelligible development in the history of conflicts theory, we must go back to the collapse of the *lex loci delicti* approach to choice of law. *Lex loci* was a strong statement of multilateralism—that is, a body of rules designed to be administered throughout a community of jurisdictions.⁵ The object was to secure the same choice-

4. Currie's ideas were discussed at length in an earlier symposium, *Interest Analysis in Conflict of Laws: An Inquiry into Fundamentals with a Side Glance at Products Liability*, 46 OHIO ST. L.J. 457 (1985) (contributions by P. John Kozyris, Lea Brilmayer, Robert A. Sedler, Russell J. Weintraub, Friedrich K. Juenger, Dimitrios Evrigenis, Donald H. Berman, George A. Zaphiriou, Gene R. Shreve, William V. Luneburg, and Symeon Symeonides).

5. For more on multilateralism in choice of law, see FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 13-14 (1993); Gene R. Shreve, *Choice of Law and the*

of-law result for a particular kind of case, wherever that case might be tried. Strong in the nineteenth century,⁶ the approach reached its zenith through adoption in 1934 of the American Law Institute's original *Restatement of the Law of Conflicts*.⁷ The *Restatement* was a series of jurisdiction-selecting rules derived from the geographical location of an event common to a particular type of case (e.g., the law of the place of contracting governs issues of contract validity).

Even before adoption of the original *Restatement*, writers had begun to question both the theoretical underpinnings of *lex loci delicti*⁸ and its reliability in operation. Judicial rejections of the original *Restatement* began later and were widespread by 1971, when the ALI backed away from *lex loci* through publication of the *Restatement (Second) of Conflicts*. Brainerd Currie may have been the critic most responsible for this conflicts revolution. In his own choice-of-law approach (exercised at length by the symposium panelists), Currie perfected the concept of interest analysis.

Just as *lex loci delicti* is a species of multilateralism, interest analysis represents unilateralism. That is to say, interest analysts measure a law's applicability not by jurisdiction-selecting rules but by asking whether the case at hand is one the law is designed to govern.⁹ If so, the sovereign creating that law may be said to be "interested" in having

Forgiving Constitution, 71 IND. L.J. 271, 282-84 (1996).

6. The most influential work was JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834), described in Kurt H. Nadelmann, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL HIST. 230 (1961); Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15 (1934).

7. RESTATEMENT (FIRST) OF CONFLICTS OF LAWS (1934). Joseph H. Beale, the first great academic theorist, guided the original conflicts *Restatement* through the American Law Institute. Descriptions of Beale's views and his role in shaping the *Restatement* appear in HERBERT F. GOODRICH, YIELDING PLACE TO NEW: REST VERSUS MOTION IN THE CONFLICT OF LAWS (1950).

8. For example, several scholars, working prior to or at the same time as Currie wrote, captured something of Currie's approach by questioning the indifference of *lex loci delicti* to the purposes of the laws in conflict. See, e.g., David F. Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173, 192-93, 197-200 (1933); Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 380-81 (1945); Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 750-51 (1924).

9. For more on unilateralism in choice of law, see Juenger, *supra* note 5, at 14, 33-34; Shreve, *supra* note 5, at 284-86. Cf. Gene R. Shreve, *The Odds Against Teaching Conflicts*, 27 U. TOL. L. REV. 587, 592 n.10 (1996) ("In a unilateral approach, the sovereign jurisdiction entertaining the particular case may sacrifice the transjurisdictional goals of comity, reciprocity, and uniformity in order to recognize local interests and advance them by the decision.").

it applied. This is an inquiry about the spatial reach of substantive law—will the policies accounting for the existence of that law be sacrificed if it yields to conflicting law? The contact, or geographical feature, of a case most likely to generate interest is the domicile of the parties. Thus, interest analysis is sometimes called a personal law approach¹⁰ (*lex loci* is, correspondingly, a territorial approach¹¹). Currie divided cases into those involving false conflicts (only one sovereign interested), true conflicts (two sovereigns interested), and unprovided-for cases (neither sovereign interested).¹²

For all his influence, Currie was not a consensus builder. Among the controversial features in his approach were his relative indifference to party expectations in choice of law, his refusal to compare intensities of interests in true-conflict cases, his refusal to permit conflicts judges to be influenced by their substantive preferences, and his insistence that the interested forum always apply its own law. Currie's particular views induced attack by opponents of interest analysis across a wide front, and they prompted many other interest analysts to distance themselves from Currie.

The latter employ interest analysis in ways Currie and his followers would regard as revisionist. Some reject Currie's teaching that the interested forum must apply its own law. They maintain instead that interest analysis can support a forum-neutral balancing approach to choice of law.¹³ Similarly, some who value interest analysis believe that it can be consolidated with choice-of-law policies differing from Currie's, like territorialism and substantivism (the policy that conflicts judges, whenever possible, should apply the best available substantive law¹⁴), to form an eclectic choice-of-law approach.¹⁵

10. Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 10-12 (1984).

11. Juenger, *supra* note 5, at 91.

12. Illustrated explanations of the three categories appear in William M. Richman, *Diagramming Conflicts: A Graphic Understanding of Interest Analysis*, 43 OHIO ST. L.J. 317 (1982).

13. See, e.g., David E. Seidelson, *Resolving Choice-of-Law Problems Through Interest Analysis in Personal Injury Actions: A Suggested Order of Priority Among Competing State Interests and Among Available Techniques for Weighing Those Interests*, 30 DUQ. L. REV. 869 (1992); Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493 (1985).

14. For more on substantivism in choice of law, see Juenger, *supra* note 5, at 165-73; Shreve, *supra* note 5, at 282.

15. See, e.g., Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966) (combining multilateralism, unilateralism, a concern for party expectations, and substantivism in a single choice-of-law approach); Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952)

From a different angle, other scholars attack the very concept of interest analysis.¹⁶ Questions raised by their arguments include whether it is possible consistently to determine the intended reach of substantive rules, whether interest analysis has the structure and stability necessary in a choice-of-law approach, and whether interest analysis is not an open door to local favoritism and forum shopping in choice of law.

Interest analysts do not really deny that the technique can be a means for judges to give preferential treatment to local litigants under local law. Rather, they differ with opponents of interest analysis over the importance of, and answers to, a number of questions: Is not at least a small amount of local favoritism inevitable in choice of law, given the federal, rather than unitary, character of government in the United States? How much local favoritism is excessive? How much excessive forum favoritism actually occurs in American choice of law? Would excessive forum favoritism diminish significantly if courts did not employ interest analysis?

Opponents of interest analysis also tend to be critical of the formalistic regime of *lex loci delicti* that preceded it. Interest analysts use this to set up the challenge: Do the critics really have a different and better alternative of their own to offer?¹⁷ Some interest analysts suggest that no third option exists, that options are limited to interest analysis or some form of territorial rules, and that to choose the latter is to return to the discredited past.¹⁸

Both differences among interest analysts and those between the multilateral and unilateral wings of the conflicts community became intractable years ago. So did differences over the legitimacy of substantivism in choice of law.¹⁹ Thus, our conflicts literature has

(combining multilateralism, unilateralism, and a concern for party expectations).

16. See, e.g., P. John Kozyris, *Postscript: Interest Analysis Facing Its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability?* 46 OHIO ST. L.J. 569 (1985); Brilmayer, *supra* note 2; Juenger, *supra* note 5; Maurice Rosenberg, *Two Views on Kell v. Henderson: A Comment*, 67 COLUM. L. REV. 459, 464 (1967); Aaron D. Twerski, *Neumeier v. Kuehner: Where are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104 (1973).

17. See, e.g., Bruce Posnak, *Choice of Law: Interest Analysis and Its "New Critics"*, 36 AM. J. COMP. L. 681, 684-89 (1988).

18. See, e.g., Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 133 (1989).

19. The debate concerns whether or how the choice-of-law process should be manipulated to secure particular substantive results. Compare Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105 (1989); Leflar, *supra* note 15; Willis L.M. Reese, *Substantive Policies and Choice of Law*, 2 TOURO L. REV. 1 (1986); Arthur T. Von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and*

become not only fractious but a little stale. This may explain two further developments.

First, several scholars have written massive articles attempting to reconceptualize the subject.²⁰ These exercises in conflicts metatheory are erudite and highly ambitious. But they are also abstruse, contentious, and virtually impossible to convert into practice or to assimilate into a more catholic understanding of conflicts theory. To be fair, each author faced profound difficulties perhaps inherent in any contemporary attempt to reconceptualize American conflicts law. For as confused and controversial as conflicts law always has been, the subject became far more difficult after the collapse of *lex loci delicti*. "More recently," acknowledges one metatheorist, "choice of law has sometimes resembled the law's psychiatric ward. It is a place of odd fixations and schizophrenic visions."²¹ There is now in our conflicts literature such a disparate, often contradictory, accretion of policies, rules, systems, catchphrases, diagnoses, and proposed cures that it seems almost impossible for theorists now writing to demonstrate with complete success how their ideas are new, helpful, or even intelligible.

This may be why the role of conflicts scholarship in judicial opinions seems to be diminishing and why most new discussion about conflicts theory seems confined to a small, if respected, academic circle. Through the ages of Story, Beale, and Currie, American conflicts law took much of its shape and energy from legal scholarship. Today's metatheorists are the Curries of our age. If they exert significantly less influence on courts than their predecessors, does that bode ill for the future? How much hope exists for clarity, coherence, and reform in conflicts theory?

Seeing very little hope, a final group of commentators urges dissolution of much or all of conflicts law as a common-law institution. Through a variety of proposals, most of these critics would either absorb conflicts law into different parts of the Constitution²² or into federal

Significance in Contemporary Choice of Law Methodology, 88 HARV. L. REV. 347 (1974) (endorsing various forms and degrees of substantivism) with Hans W. Baade, *The Case of the Disinterested Two States: Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 150, 165-66 (1973); William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); David F. Cavers, *Contemporary Conflicts Law in American Perspective*, 131 RECUEIL DES COURS 75, 175 (1970); CURRIE, ESSAYS, *supra* note 1, at 104-05; Harold L. Korn, *The Choice-Of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 958 (1983) (attacking substantivism).

20. See, e.g., Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989); Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987); Joseph W. Singer, *Real Conflicts*, 69 B.U. L. REV. 1 (1989).

21. Perry Dane, *Conflict of Laws*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 209-20 (D. Patterson ed., 1996).

22. See, e.g., John H. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Harold W. Horowitz, *The Commerce Clause as a*

statutes.²³ One alienated observer has gone further, suggesting that conflicts law is inconsequential as well as incoherent, and thus can simply be ignored.²⁴

This is the storm over choice of law that lies beyond the placid confines of the program transcript. It has proven impossible for me to perform the task of this Essay, to place Currie's symposium in context, without casting doubt over the entire academic enterprise of conflicts theory. What lies ahead? Perhaps one of two possibilities.

First, the malaise that seems to afflict conflicts scholarship may prove incurable. The failure of the commentators to follow up their defeat of *lex loci delicti* with any significant consensus weighs heavier with the passage of time. The thirty-five years since Currie's path-breaking work should have enabled the conflicts academy to progress in the process of search, deliberation, and refinement leading to a new tradition of conflicts jurisprudence. There is reason to wonder whether the academy has succeeded, or whether it has instead foundered in endless, self-perpetuating debate over the nature and value of multilateralism, unilateralism, substantivism, and the like. There is also reason to wonder whether, in its weakened state, the theoretical branch of conflicts scholarship can withstand attacks from opposite directions by the metatheorists and the conflicts marginalists. Will it simply begin to disappear?

The second possibility is that some kind of renaissance in the conflicts literature will occur. It is unclear how conflicts scholars will find their way out of the wilderness that they have created and become of greater help to each other and—as important—to the bench and bar. But it might be useful for commentators to spend more time studying the actual work of judges and less time talking down to them.²⁵ The object is not to achieve in conflicts theory a level of accord comparable to that

Limitation on State Choice-of-Law Doctrine, 84 HARV. L. REV. 806 (1971); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992); Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261 (1987); Peter D. Isakoff, *Unconstitutional Discrimination in Choice of Law*, 77 COLUM. L. REV. 272 (1977).

23. See, e.g., Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991); Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 REV. LITIG. 309 (1991).

24. Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949 (1994).

25. Encouraging in this regard is a forthcoming symposium in the *Maryland Law Review* on the work of the courts under the *Restatement (Second) of Conflicts* (contributions by Patrick J. Borchers, William L. Reynolds, William M. Richman, Symeon C. Symeonides, Louise Weinberg, and Russell J. Weintraub).

reflected in the symposium transcript. Such would be impossible and, given the difficulty of the subject, not entirely healthy. Yet it is time to consider whether we as conflicts scholars have begun to mistake disagreement for discourse. Certainly, the fervor and complexity of academic debate about choice of law is no longer proof that the debate matters to anyone but the participants. Perhaps we need to reacquaint ourselves with the shared concerns that make possible a community of conflicts scholars.