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Roger J. Traynor

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BRainerd CURRIE

MAN

'Day in and day out he worked at putting together paragraphs that would abate the muddle of years.'*

By Roger J. Traynor**

It was only last year that I was reviewing Brainerd Currie's *Selected Essays on The Conflict of Laws* for the *Duke Law Journal*, and memories of happy encounters with their gentle author were surging through the reading of his original and profound and constructive work. Now as I write of Brainerd Currie, whose life began in Georgia in 1912 and came to a close in North Carolina in 1965, it seems impossible to dispel sadness in coming to terms with the harsh loss of such a friend. Yet one hears his soft-spoken words, no less real because they are imagined, and they alleviate the hurt of loss with their sweet raillery: I expect better of my friends than that they should mourn me, for mourning is no way to celebrate a fine friendship.

Fine, in all its radiant meaning, is the word for all the aspects of Brainerd Currie's life. The *Selected Essays* and comparable works on civil procedure and on admiralty evince the finest scholarship. The scholar had the fineness of temperament requisite for a deeply happy life with family and friends. There was gentleness in his outlook, even in his quizzical, ironic insights, and extraordinary combination of finesse and *gentillesse*. There survived in the man the quality of a gifted child who perceives things all too clearly, free of sophistic gloss, and does not misuse his advantage.

There was a merry streak too, in Brainerd Currie. He would find cause for laughter, surveying this writing-table strewn with his own writings, at the jostling of his disparate creations. There is a translation of his American-born language, *Note Sui Metodi E Gli Scopi Del Diritto Internazionale Privato*.¹ It overlaps his version of *gli scopi* of Rose of Aberlone, the majestic cow whose unexpected fertility wrought havoc with the sale contract in *Sherwood v. Walker*. The intrepid scholar is a polysemantic challenger to would-be legal scholars. They must know how to utilize all the

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** Chief Justice, Supreme Court of California, 1964-1970; Associate Justice, 1940-1964. In this tribute to our friend, Madeleine Traynor has joined with me to convey the riches of his friendship as well as of his work.

1. Estratto da "Diritto Internazionale," Anno XIV, n.4, 335, 345 (1960) (Istituto Per Gli Studi Di Politica Internazionale, Milano).

resources "*della filosofia del diritto, della scienza politica, della cultura.*"
Restated:

And even the reluctant drone
Must cope with Rose of Aberlone.
She rules the cases, she stalks the page
Even in this atomic age.
In radioactive tracts of land,
In hardly collectible notes of hand,
In fiddles of dubious pedigree,
In releases of liability,
In zoning laws unknown to lessors,
In weird conceits of law professors,
In printers' bids and ailing kings,
In all mutations and sorts of things"²

It is relevant to Brainerd Currie's special concerns with the laws of the land, as to much else in his life, that he was born and brought up in the South. One does not leap from such detail to facile characterization of either the procedures or the substance of his work; stereotypes are archaic in an age of near, though not quite bright, enlightenment, and heredity, with its myriad quirks, still appears to have the last laugh on more or less identifiable environments. Nonetheless, a man of genius is better able than most to be father to the child, to know by heart the inflections of speech and manner of the child's region, to draw upon his special knowledge of home even when he is at great remove from it.

Brainerd Currie came from the region whose society was seemingly the most settled in the United States and in reality the most unsettled. Tumult lay close to the surface of its convivial living and found expression in perceptions ablaze with imagination, in a fiercely observant speech and literature without parallel in this country. It was a land where gracious manners commanded as much interest as money, fostering provincial loyalties and also, not inconsistently, an outgoing worldliness. City dwellers maintained close communication with country cousins and, like them, took time out to meander, for in more ways than one, even in speech and writing, a meander could prove to be the shortest distance between two points of view.

In this land one learned early that the polite term for the Civil War is The War Between The States. The sense of the land at large could be painfully clear, though land titles might now and then be more blurred than in some tight little old new island. One could envisage the developing western regions from the agrarian South more sharply than from the smoky cityscapes of the Northeast.

In the South the compass did not necessarily point northeast as it was

2. 10 STUDENT LAW. J. 4, 8 (1965); Harv. Law Rec., March 24, 1960, p. 16.

made to do in the North. One knew that though Nantucket antedated Cape Charles on the discovery map of America, Jamestown antedated Plymouth as a settlement. One could tuck Nantucket away on the map, along with such new towns as Boston, with drawling, wry versions of the New England lullabies that twanged of Domicile. One could reflect to good purpose on disharmonies in the United States, on failures of communication, on conflict of laws. A prescient habitant had many intimations that the times they were a-changing, and the land was bursting its bounds.

In conflict of laws, however, the clock was running slow. Brainerd Currie knew it as only an imaginative scholar can, and I was bound to learn it as a judge, and so it was that our paths eventually crossed. They began to converge after the 1953 opinion of the California Supreme Court in *Grant v. McAuliffe*,³ which phrased its ratio decidendi in hereditary patois, via a classification of the issue as procedural, and thus quit itself of the orthodox Restatement view that the law of the place of the wrong governed. In a nutshell, it made use of a wooden convention to take leave of a deadwooden concept.

Brainerd Currie was not flurried, as were some commentators,⁴ "because the decision is unorthodox in terms of current conflict-of-laws doctrine."⁵ His concern was with the scholars who "have 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."⁶ More than one judge would learn, across the chronically lean years of scholarly help, that Brainerd Currie had taken upon himself to work out one painstaking analysis after another of timely, unresolved problems, demonstrating how large and constructive a job a scholar can do to pave the way for orderly and intelligent adjudication. It is not often that one can say, as one can of him, that "every court in the land is in his debt."⁷

His was no cloistered life, criss-crossed as it was with varied law practice and with special assignments that took him to Washington, D.C., during the war years of the forties and all over the country in recent years as Reporter on Admiralty Rules for the Judicial Conference of the United States. Even his academic career made him a resident of various states: Georgia, New York, North Carolina, California, Pennsylvania, Illinois, and finally North Carolina again when in 1961 he returned to Duke University.

3. 41 Cal. 2d 859, 264 P.2d 944 (1953).

4. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 129, n.5 (1963), citing the following: 68 HARV. L. REV. 1260 (1955); 29 N.Y.U.L. REV. 1288 (1954); 27 So. Calif. L. Rev. 468 (1954); 1 U.C.L.A. L. REV. 380 (1954); and adding: "There was one sympathetic article: Shavelson, *Survival of Tort Actions in the Conflict of Laws: A New Direction?*, 42 CALIF. L. REV. 803 (1954)."

5. CURRIE, *supra* note 4, at 131.

6. *Id.* at 133.

7. Traynor, Book Review, 1965 DUKE L.J. 426, 436.

He was no less a teacher of judges than of students, and he alerted them to areas of law where houses of card-indexes swayed uneasily on sliding foundations. So I looked forward to our first meeting in 1956, when he was teaching at the University of Chicago and I lectured there on the ponderous subject of *Some Open Questions on The Work of State Appellate Courts*.⁸

In that dynamic environment it seemed appropriate to make the questions wide open, without curfew for succeeding discussion. 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. In retrospect it recalls the kindred look of a Connecticut Yankee, a year-round villager, as he heard summer visitors gurgle their enthusiasms about the balmy climate, the rise and fall of low-slung highlands, even the ubiquitous clams. "You should come here in the winter sometime," he murmured, and with his text so ended he went about his chores.

It proved to be quite a winter the following summer when I did give that course at the University of Chicago. 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.

Nor did Brainerd Currie, scorning mechanical counts of precedents and mechanical labels of opinions, ever indulge in theatrical stances of scholarship. He would not be wearing the anemic visage of one *hors de combat*, as do those who would indicate their exemption from problem-solving by virtue of the delicate condition of their noncommittal thoughts. He would not be writhing with pangs of creation each time he put pencil to paper. Neither would he be pretending that he put paragraphs together with the greatest of ease, as a gentleman's pastime. Day in and day out he worked at putting together paragraphs that would abate the muddle of years, that would rescue admiralty law far out to sea, that would ameliorate the ironic disorders of procedure, that would take unnecessary conflict out of conflict of laws. He had the staying power for his grand objectives.

One always talked law with him, and it was like advancing in good company to new ground in mountain territory. As one listened to him gently expounding problems, his mind directed to solution in a context far beyond the ken of most judges and lawyers, one could not but realize how consumed he was with law.

8. Traynor, *Some Open Questions on The Work of State Appellate Courts*, 24 U. CHI. L. REV. 211 (1957).

The lawyer par excellence, tending the law's ills with devotion, commanded affection and respect on other counts besides his professional gifts and involvement. His was not an electrifying presence but a glowing one; when he entered a room, casting a shy smile about him, his quiet manner suggested friendliness rather than reticence, and even a tender of very present help in trouble. One soon became aware of the sense he had that there was always very present trouble in the world, casting its shadow on each of us, but that, of course, we could stand together against it. Rather a challenge, was it not, to reckon with all the misfortune that could engulf us one by one or en masse, and still not let it diminish the present joyousness of good company? If there were no happy endings, there was still happiness to be seized for the occasion. So he would begin to discourse on all manner of things, on law, on some small adventure of the day, and he would bend an ear for the listener's rejoinder. There would be an *entente cordiale*, and he would warm up to his subject, and, if it was not a legal one, it usually led back to the law. His words had the sound of pebbles deftly tossed in the sea. One heard their repercussions for days.

He was nowhere more at home than in his own home, in the warm, hospitable environment that the Currie family created wherever they lived. A visit with Brainerd and Pick Currie and their children, David and Elliott and Carolyn, was an event to be remembered. One looked out on the land from their home and saw it whole, regardless of where they were domiciled. Their muted Georgia accents mingled with the speech of many regions in their apartment-home overlooking the Midway in Chicago, Chicago's bustling green plaisance. They brought their Georgia childhood home to their country house in Durham, North Carolina, together with years of living along the labyrinths interlaying Pierre l'Enfant's grid for the nation's capital; along the smog-fogged Cote d'Azur and the overbaked Cotes d'Or of the Far West; amid the mock throughfares and obscure cement trails of New York City; amid the variegated colonies of a Keystone State; in the midst of the so-called Midwest, where one can put out to sea from a lakeshore. Around their new home within the city bounds of Durham, the tall trees in groves gave proof of what the country at large could be if its habitants took thought for it. There was still space to spare for the stretch of man's imagination.

Our last visit with Brainerd Currie was in our own home last year. So much had he accomplished, though he did not say so, that there was abundant reason for his happy mood. He parried questions of others gently, reflectively; there were happy digressions, uproarious tales of a wayfarer, and then there would be law talk again, fragments of evolving essays as only Brainerd Currie could speak them.

One was reassured by his company. There was hope for the sad world if only once in a while, if only here and there, a man like Brainerd Currie appeared and worked to make it better.

