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Allison Dunham is counsel for the Institute of Law Research and Reform at the University of Alberta. He taught at the Law School from 1951 to 1979 and is the Arnold I. Shure Professor Emeritus.

Brainerd Currie
by Herma Hill Kay

The task given to the authors of these tributes to great Chicago law professors—that of capturing the essence of a scholarly career in 2,000 words—is a challenging one. In Brainerd Currie's case, it is not made less difficult by the relative brevity of his career. In contrast to Judith Wax's description of her long-postponed work as a writer, entitled Starting in the Middle,1 Brainerd Currie's work as a scholar ended in the middle, cut short by his untimely death at the age of 53. Yet such was the measure of his creative intellect that in the 30 short years between his first law teaching job at Mercer in 1935 and his death in 1965 while holding the William R. Perkins Professorship at Duke, Brainerd Currie had changed the direction of the law in one field—conflict of laws;2 had left his mark on significant developments in two others—civil procedure3 and admiralty;4 and had documented the early efforts to recognize another—legal education—along more functional lines. Under these circumstances, selection is necessary. I have chosen to give prominence to Currie's work in the conflict of laws, both because I think that his contributions there are fundamental ones with enduring impact, and because most of this work was done during the eight years (1953-61) that he spent at Chicago.

Currie announced his governmental interest analysis for choice-of-law problems in 1958.6 Conceived during what must have been an extraordinary period of scholarly productivity that commenced with his year of fellowship at the Center for Advanced Study in the Behavioral Sciences at Palo Alto in 1957, the theory appeared in four major articles7 published in 1958, followed by three8 in 1959, four more (three with co-authors)9 in 1960, two (including

1Currie's major writings in the conflicts field are collected in his Selected Essays on the Conflict of Laws (1963).


3E.g., V. R. Currie & B. Currie, Cases and Materials on Admiralty (1965).


5The following account of Currie's work is drawn from Kay, Theory into Practice: Choice of Law in the Courts, 34 Mercer L. Rev. 521, 538-40 (1983). It is used here with the permission of the Mercer Law Review.


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a reply to an earlier critic)\(^{10}\) in 1961, three (including a brief comment in a symposium discussing a leading case decided by the New York Court of Appeals)\(^{11}\) in 1963, and a final piece on the Full Faith and Credit Clause in 1964.\(^{12}\)

Currie developed his governmental interest analysis as a critical denunciation of the traditional choice-of-law rules based on Professor Joseph Beale's vested rights theory\(^{13}\) and embodied in the 1934 Restatement of Conflict of Laws. Currie's major insight was that these rules "create problems that did not exist before,"\(^{14}\) and that they solve the false problems in irrational ways, by nullifying capriciously the interest of one state or another whose laws were said to be in conflict without analysis of their underlying policies. He therefore suggested that choice-of-law rules be abandoned,\(^{15}\) and he vigorously opposed the ongoing effort of the American Law Institute to produce a new set of such rules in Restatement Second.\(^{16}\)

Currie's ultimate hope was that congressional legislation might provide a solution for truly conflicting state interests. But, in the meantime, he offered a method for courts faced with the need to decide conflicts cases that would eliminate the false conflicts by applying the law of the only interested state, while permitting differing outcomes in true conflicts cases depending on where the suit was brought. His initial suggestion was that a forum, faced with a choice-of-law problem, should investigate the foreign law only when asked to do so by the parties, and should apply that law only in cases where the forum had no interest in applying its own law\(^{17}\)—the "false conflict" case where only one state had an interest in furthering the policy embodied in its local law. This method was subsequently modified to take account of cases where the ostensibly conflicting interests of two or more states created an apparent true conflict: in such cases, he suggested, a "more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose"\(^{18}\) might avoid the conflict. If the conflict of policy and interest persisted, however, the forum was faced with a "true conflict" case and it should choose its own law in order to advance its state's interest.\(^{19}\)

It is not an exaggeration to say that no development of significance that has occurred in choice-of-law theory in the United States in the 25 years since Currie announced his governmental interest analysis has failed to take account of his views. To be sure, the scholarly verdict has not been a harmonious one: while some writers have taken Currie's analysis as the starting point for their own work,\(^{20}\) others have rejected it as a false guide to solutions they view as unduly narrow.\(^{21}\) As I have demonstrated elsewhere,\(^{22}\) only the courts of two states—California and New Jersey—continue to proclaim their adherence to his method in the decision of actual cases (even while, in California's case, rejecting his suggested solution to true conflict cases). But Currie's distinction

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\(^{10}\)Currie, Justice Traynor and the Conflict of Laws, 13 Stan. L. Rev. 719 (1961); The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws, 28 U. Chi. L. Rev. 258 (1961).


\(^{12}\)Currie, Full Faith and Credit, Chiefly to Judgments: A Role for Congress, 1964 Sup. Ct. Rev. 89.

\(^{13}\)J. Beale, Treatise on the Conflict of Laws (1935).

\(^{14}\)Currie, Notes on Methods and Objectives, supra note 8, at 174.

\(^{15}\)Id. at 177.

\(^{16}\)Currie, Comments on Babcock, supra note 11, at 1234-39.

\(^{17}\)Currie, Notes on Methods and Objectives, supra note 8, at 177.

\(^{18}\)"Currie, The Disinterested Third State, supra note 11, at 757.

\(^{19}\)Id. at 758.


\(^{22}\)Kay, supra note 6, at 540-52.
between true and false conflict cases has become so widely accepted by judges that it has found its way into courtroom applications of all the modern approaches to choice of law. Similarly, his emphasis on ascertaining the policy underlying the laws said to be in conflict is a cornerstone of modern theory and a key factor in distinguishing modern approaches from traditional jurisdiction-selecting approaches to the choice-of-law problem.

Whatever other reasons may explain the enduring quality of Currie's ideas—the force of his criticism, the keenness of his insights, and the logic of his analysis are among those that come to mind—surely one important factor is the freshness and simplicity of his writing style. A few examples may be in order. The opening sentence of his paper on legal education prepared for a 1956 Symposium on Law and the Future immediately grasped the reader's attention: "No man ever leaped clear-eyed from his bed, crying 'Go to! I will write a paper on the future of legal education,' and proceeded to do so forthwith." And here is how he persuasively demonstrated the lack of point in the traditional conflicts rule that the law of the place where a contract is made determines its validity: [24]

I suppose a case can be stated in which there is no conceivable doubt as to where the contract is made and to be performed. The parties meet in person, accompanied by their counsel, in the center of a stadium. The document is read aloud. With solemn, ceremonial flourish the document is signed, sealed, witnessed, and delivered. The parties shake hands. The document provides that when payment—the only performance called for—is due, the parties will meet again in the same place to make and receive it. To devise a rule which would admit the statement that the contract was made in any other place would challenge the ingenuity of a Lewis Carroll. If the scene is enacted in Massachusetts, the immanent law of that state, which droppeth as the gentle rain from heaven, pervades the contract, rendering it, if it is the promise of a married woman to answer for the debts of her husband, wet and void. If then, as persons seeking shelter from the rain, the parties move their solemn charade across a state line, and act out their parts in a congenially dry climate, what possible difference can that make in terms of anything that Massachusetts or any other interested state may be trying to accomplish through its laws? We may invent doctrines of local public policy and fraud on the law, and resort to other devices to contain the absurdities spawned by sanctification of the place of making; but, as we shall see, they have not been effectively contained. Why not face the fact that the place of making is quite irrelevant, why not summon public policy from the reserves and place it in the front line where it belongs?

The gift of expressing complex ideas in lucid terms is a rare one indeed. When a slightly self-deprecating sense of humor is allowed to enhance the text, the resulting effect is charming—and convincing.

How are a scholar's contributions to the growth of the law ultimately to be measured? In Brainerd Currie's case, the significance of his impact on choice-of-law theory was acknowledged during his lifetime by the award of the first Coif Triennial Book Award for outstanding legal scholarship. Presenting the award to Currie for his Selected Essays on the Conflict of Laws in 1965, Professor John Dawson commented that "[h]is central ideas are not accepted by all conflicts lawyers but it seems clear enough that after Brainerd Currie that dark science called the conflict of laws can never be the same again." [25] Dawson's prediction was an apt one. The enduring influence of Currie's work is acknowledged today by the continuing debate he began in choice of law, as a new generation of scholars seeks to probe and refine his ideas, incorporating or rejecting them in their own work. There can be no finer tribute to a great scholar than the continued power of his ideas to provoke thought.

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