

REMEMBERING BRAINERD CURRIE

*Herma Hill Kay**

The following is a tribute to esteemed Law Professor, Brainerd Currie. Currie was a renowned scholar in the field of Conflict of Laws and sought to use his knowledge and passion for the law to shape the lives of his students, including Herma Hill Kay. Professor Kay highlights her relationship with Currie during her time at the University of Chicago Law School, and how Currie inspired her decision to go into legal academia herself.

I first encountered Brainerd Currie when I enrolled in his Conflict of Laws course at the University of Chicago in 1958. It was, to say the least, not your customary law school course. Currie was engaged in revising his thinking about choice of law theory, and he made full use of our class to test his emerging analysis. To enable us to provide our critiques, he gave us the draft of his first major article announcing what he called “governmental interest analysis.” That article was *Married Women’s Contracts: A Study in Conflict-of-Laws Method*.¹

The most superficial reading of Currie’s article made plain enough just how far his thinking had departed from the traditional vested rights approach to choice of law. He used the well-known case of *Milliken v. Pratt*, which involved a married woman domiciled in Massachusetts who executed a guaranty of her husband’s credit in favor of a partnership doing business in Maine, where the law of Massachusetts made her guarantee invalid for lack of capacity, but the law of Maine would hold it valid.² Currie examined the results reached through application of the traditional rule, that the validity of a contract is determined by the law of the place where the contract was made. He did so by constructing a chart setting out all of the possible factual situations that might arise using four significant factors, each of which might be domestic or foreign (to Massachusetts):

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1. Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).

2. *Milliken v. Pratt*, 125 Mass. 374, 375 (1878).

1. The domicile, or nationality, or residence, or place of business of the creditor;
2. The domicile, or nationality, or residence of the married woman;
3. The place of the transaction, i.e., the place where the contract is made, or possibly the place where it is to be performed;
4. The place where the action is brought.³

The resulting chart contained sixteen cases. In the first case all four factors were domestic to Massachusetts, while in the last case all four factors were foreign to Massachusetts. Each of the remaining fourteen cases presented conflict of laws problems. Currie asked in which of those fourteen cases the Massachusetts legislature would have wanted to have its law protecting (or disabling) married women to be applied. He answered that the legislature would want its law applied to those married women whose welfare Massachusetts is concerned about, i.e., those who reside in Massachusetts. He showed how this might be accomplished:

Assume a quite selfish state, concerned only with promoting its own interests; a state, if you please, blind to consequences, and interested only in short-run "gains." Such a state might be expected to apply its law disabling married women, or to desire its application (a) to every case in which both parties reside in the state . . . since it has decided to subordinate the interests of domestic creditors to the interests of domestic married women; and, *a fortiori*, (b) to all cases in which the married woman is domestic and the creditor foreign . . . —in short, to all cases in which the married woman is a local resident, regardless of the creditor's residence. Such a state would not be expected to apply its law to any case in which the creditor is a local resident and the married woman a foreigner. It would be indifferent, and would cheerfully apply the foreign law, to the cases in which neither party is a local resident. The question is not, for the moment, whether such an attitude would be shocking, or unwise, or unjust, or unconstitutional. The question is whether it would be rational; and the answer is that it *would*—in the sense that, in the short run, without considering how other states or higher authority might react, the state would in this manner be doing all it could to maximize its own interests.

It will be understood, I hope, that to recognize the rationality of such an attitude is not necessarily to commend it. "But a statement of what a state would do, acting solely in its own interests, may serve as a gauge to measure the extent to which states do not so act, and thus provide a basis for discussing the phenomenon of their failure to do so."⁴

Currie then painstakingly analyzed how the traditional place-of-making rule would decide these fourteen cases. He found that the rule produced

3. Currie, *supra* note 1, at 231–32.

4. *Id.* at 237.

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desirable results in only six of the cases, while it produced “perverse” results in six other cases. In the remaining two cases, the foreign interest is advanced at the expense of the domestic interest. He concluded:

The utility of a rule which operates so capriciously must certainly be suspect. That such a rule should have been announced and followed at all seems almost incredible. In fact, as everyone knows, it has not been followed consistently. When the indicated result is absurd and is perceived to be so, there are means of escaping it. . . .

Let there be no doubt, however, that courts actually do reach the results which seem so indefensible. Bad law makes hard cases. The hypnotic power of the ideas of territorial jurisdiction and vested rights is not to be underestimated. . . .

We need not pause to inquire why courts behave in such strange ways. The history of conflict-of-laws theory makes that plain enough. The question is whether there is any rational justification for their continuing to do so, now that the infirmities of the traditional method are so well understood.⁵

Coming to his own proposal, Currie drew his now-famous distinction between false conflicts and true conflicts:

The fourteen possible conflict-of-laws cases which have been enumerated fall into two classes. The ten cases in the larger class present *no real conflicts problem*. The four cases in the smaller class present real problems, but they are problems which *cannot be solved* by any science or method of conflict-of-laws. Recognition of these blunt facts provides a basis—so far as I can see, the only basis—for progress toward a more satisfactory method of dealing with the cases.⁶

He explained why there is no available solution to the true conflicts case, again using the *Milliken* facts:

Paradoxically, the problem is insoluble with the resources of conflict-of-laws law precisely because it is a true problem of conflict of interests, . . . Maine is committed to a policy of security of transactions, and has a legitimate interest in enforcing that policy where Maine creditors are concerned. Massachusetts is committed to a policy of protecting married women, and has a legitimate interest in enforcing that policy where Massachusetts married women are concerned. The policies are here in direct conflict.⁷

What then is the court to do? Here is Currie’s much criticized answer:

The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state. . . .

5. *Id.* at 244–46.

6. *Id.* at 251.

7. *Id.* at 260.

[W]here the creditor is a resident of Maine and the married woman a resident of Massachusetts, we should adopt for each state the principle that its own law will be applied. . . . The result, unhappily for the quest for uniformity, will depend upon the forum.⁸

I was mesmerized—a condition that some of my Conflicts students and colleagues may suspect I continue to occupy—and said so to Currie at the time. I did well enough in his course that he invited me to be his research assistant. I eagerly accepted only to find myself charged with analyzing the question he had left open in the first article: whether his solution, which treated married women differently depending on their residence, was unconstitutional. Naturally, there was no precedent to guide me. The result of much effort was two articles that Currie and I co-authored, dealing with the Equal Protection Clause and the Privileges and Immunities Clause.⁹ Both concluded that his solution did not violate either clause.

Meanwhile, Currie's development of his governmental interest approach made him realize that one of his earlier articles was fundamentally inconsistent with his present thinking. He had published an article in 1955 called *Change of Venue and Conflict of Laws*,¹⁰ in which he argued that federal courts must be freed from the necessity to apply state conflict of laws rules, a necessity established in 1941 by the U.S. Supreme Court in *Klaxon Co. v. Stentor Electric Mfg. Co.*¹¹ He proposed instead that federal courts must independently develop their own rules for choice of law on a rational basis.¹²

When he came to doubt the validity of that solution, he published a subsequent article in the same journal in 1960 called *Change of Venue and Conflict of Laws: A Retraction*,¹³ in which he wrote, “[t]he conclusion reached was wrong—not just plain wrong, but fundamentally and impossibly wrong.”¹⁴ After illustrating the problems with his conclusion, he observed:

I hope it is evident from what has been said that I have abandoned all of the arguments that could possibly support the ultimate conclusion reached in the article, which visualized the gradual development by the federal courts of an independently reasoned body of conflict-of-laws principles destined ultimately to attain constitutional status, and so to bind the state courts as well. Lest there be any misunderstanding, however, I specifically retract that conclusion. . . . I can only say, in all humility, that what I learned imper-

8. *Id.* at 261–62.

9. Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960); Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960).

10. Brainerd Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405 (1955).

11. 313 U.S. 487, 496–97 (1941). Currie's proposal would have entailed the overruling of *Klaxon*.

12. Currie, *supra* note 10, at 501.

13. Brainerd Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960).

14. *Id.* at 341.

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fectly from wiser men I have learned better from my own mistakes.¹⁵

I had never seen any other law professor make such an open confession of error, and I was impressed with Currie's intellectual honesty. Over the years, I have also been impressed with his courage: he was not afraid to continue to modify even his central method of choosing the governing law. Currie did so expressly in 1964, by preparing a third iteration of his method to include a new step endorsing the use of a moderate and restrained interpretation, a refinement which he attributed to Justice Traynor.¹⁶

When I had completed my work on the two articles Currie and I collaborated in producing, I mentioned to him that I was interested in teaching law myself. He mused, "there are so few women law teachers." Then he brightened, and made me an extraordinary offer. "You know," he told me, "you ought to get a clerkship with the United States Supreme Court, but it's hard to do that unless you've had a clerkship with another judge. I can probably get Roger Traynor to take you." I was both overwhelmed and delighted. I had read all of Traynor's conflicts decisions, and others in different fields as well. Not surprisingly, his opinions were well represented in many law school casebooks.

Currie was as good as his word, and he got in touch with Traynor who offered me a clerkship sight unseen. Meanwhile, I had gone to New York to interview on Wall Street for a permanent job. I was unable to arouse any interest among the hiring partners until I thought to mention that I might get a clerkship with Traynor. My value in their eyes as a potential young lawyer rose immediately. Still, there was some question whether any firm would be willing to make me an offer and hold it open while I went to California. Currie was not enthralled when I discussed this situation with him. He said sternly, "well, you probably ought to do some practice, but we can't play footsie with Traynor. You have to let him know whether you're going to do this or not." His implication was clear: A clerkship with Traynor was more important than practicing law right away if what I wanted to do was to become a law professor. I accepted Traynor's offer without further delay. Since he had planned to leave San Francisco to go abroad shortly after the school term ended, and wanted to meet me before he left, I skipped graduation and immediately drove from Chicago to San Francisco.

As the clerkship drew to a close, Traynor took it upon himself to ask Chief Justice Earl Warren to take me, but Warren did not at that point want women clerks. In the end, it all sorted itself out. Professor Barbara Nachtrieb Armstrong had retired from the Boalt Hall faculty, and one of the places the law school looked for entry level professors was among Traynor's clerks. I learned later that Professor Rex Collings, Jr.,

15. *Id.* at 349, 352.

16. Herma Hill Kay, *Chief Justice Traynor and Choice of Law Theory*, 35 HASTINGS L.J. 747, 772–73 (1984).

had called Traynor and asked, “Justice Traynor, do you have any good men clerking for you who want to go into teaching this year?” According to Collings, Traynor replied, “no, but I have a woman who is as good as any man I ever had. Would you like to interview her?” And, of course, Collings knew better than to turn Traynor down, so I went along to interview at Berkeley and—amazingly—was hired. Barbara’s courses, which I was expected to take over, were California Marital Property and Family Law. Dean Prosser asked whether there was a third course I would like to teach, and without any hesitation I proposed Conflict of Laws. I began teaching those courses in 1960, and have spent more than fifty years on the Berkeley faculty doing just that.¹⁷

Currie continued to mentor me as I began teaching and working on my first article, which combined California Marital Property and Conflict of Laws.¹⁸ Toward the close of the article, with some hesitation, I wrote in a footnote that I did not agree with Currie’s response to one of his critics, Professor Alfred Hill, which seemed to me to be inconsistent with his own governmental interests approach.¹⁹ Currie was unruffled. He wrote a note congratulating me on the article, and said about my footnote merely that, “when I wrote that response, I must have been wearing my light fall suit!”

My Berkeley colleague, Andrew Bradt, who is in the audience today and who has already begun to build his own expertise in Conflict of Laws, was kind enough to give me an insightful summary of the article I have just presented.²⁰ I have his permission to share some of it with you:

What comes through in your remarks is Currie’s great openness to ideas—from offering up his early draft to the course, to working with you as a coauthor, to helping you with Traynor, to his willingness to change his mind about his ideas. There’s a great generosity of spirit there that comes through from his writing, and that was obviously true beyond the printed page as well. I think that also has something to do with why he was able to throw off all the old dogma in developing his theory, and also why so many people continue to love his writing.

17. I subsequently added a course on Sex-Based Discrimination. See Herma Hill Kay, *Claiming a Space in the Law School Curriculum: A Casebook on Sex-Based Discrimination*, 25 COLUM. J. GENDER & L. 54 (2013). The first edition of that casebook was co-authored by Kenneth Davidson, Ruth Bader Ginsburg, and Herma Hill Kay.

18. Herma Hill Schreter, “*Quasi-Community Property*” in the *Conflict of Laws*, 50 CALIF. L. REV. 206 (1962).

19. *Id.* at 233 n.172 (citing Alfred Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 478 (1960) and Brainerd Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258, 278 (1961)).

20. Email from Andrew Bradt to Herma Hill Kay (Dec. 15, 2014, 18:04 PST) (on file with author).

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I have continued to teach and write about Currie's governmental interest approach, most comprehensively in my Hague Lectures in 1989, *A Defense of Currie's Governmental Interest Analysis*.²¹ I greatly regret that Currie, who died in 1965, never saw my lectures. I like to think he would have appreciated them.

21. Hemra Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 9, 149 (1989-III).

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