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On Reading Cramton, Currie & Kay -- Reflections and Prophecies for the Age of Interest Analysis

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BOOK REVIEW

Conflict of Laws: Cases-Comments-Questions (2d ed.). ROGER C. CRAMTON, DAVID P. CURRIE & HERMA H. KAY. St. Paul, Minnesota: West Publishing Co. 1975. Pp. lii, 1021. $18.50.

On Reading Cramton, Currie & Kay—Reflections and Prophecies for the Age of Interest Analysis

I shall not keep the reader in suspense. The second edition of Cramton, Currie and Kay[1] is a masterful piece of work. Even more important than its brilliance is the intellectual honesty displayed by the authors in confronting the difficult, if not impossible, questions presented by interest analysis. The authors were, and I believe remain, devotees of the mode of governmental interest analysis developed and refined by the late Professor Brainerd Currie.[2] From the first page to the last, the casebook bears the mark of his sharp and uncompromising questions, which penetrate and expose the fallacies not only of traditional doctrine, but also those of the more modern efforts to rescue the old doctrines by dressing them up in more fashionable clothing.[3]

The authors, however, do not reserve the tough questions for the enemy camp alone. With brutal honesty the authors have exposed the weaknesses and inconsistencies of their adopted doctrine of interest analysis. A few of these rigorous questions, taken out of context, are: "Is interest analysis merely a complicated way of saying that the law of the domicile governs?"[4] "Does the New York experience in automobile guest cases suggest that identifying the policies

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[1] R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS (2d ed. 1975) [hereinafter cited as CRAMTON]. The first edition, published in 1968, was the work of two of the three authors, Roger C. Cramton and David Currie.

[2] *See* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963) [hereinafter cited as SELECTED ESSAYS].

[3] Professor Brainerd Currie and a broad range of other academic critics have strongly criticized the RESTATEMENT (SECOND) OF CONFLICTS for its compromising approach to choice-of-law problems. *See, e.g.*, Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, reprinted in SELECTED ESSAYS, *supra* note 2, at 690; R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 275 (1971); Baade, *Marriage and Divorce In American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329 (1972); Ehrenzweig, *The "Most Significant Relationship" In the Conflicts Law of Torts—Law and Reason Versus the Restatement Second*, 28 LAW & CONTEMP. PROB. 700 (1963); and Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279 (1972).

[4] CRAMTON 245.

underlying the relevant law may not be feasible?"[5] "Is a more refined or exact definition of policy required for conflict than for domestic cases?"[6] "How do you determine *who* is entitled to the protections or burdens of a particular law?"[7] "Was Currie right in dismissing so lightly the forum shopping problem?"[8] "If interest analysis has no answer to true-conflict cases what good is it?"[9]

The authors constantly challenge the reader to rethink his position. After presenting several approaches to a conflicts problem, Cramton, Currie, and Kay frequently persuade the reader that none of the approaches is satisfactory. This is because a hypothetical case can always be invented in which application of the approach would defeat its avowed purposes. Consequently, one is moved by the futility of all these brilliant theories to say, "A plague on all your houses!" And yet the authors make clear that the clock cannot be turned back to the time when the purposes and consequences of choice-of-law rules went unexamined.[10]

Where does all this leave us? Except for a few zealots who have perceived "the truth" and thus view the slightest deviation from Brainerd Currie's thinking as heresy, the interest analysis camp (and despite my territorialist views, I number myself among them)[11] is in disarray. The tough questions posed by the casebook have pitted territorialist considerations against pure interest analysis.[12] There is no doubt in my mind that in the reconciliation of these two concepts lies the "tomorrow" of choice-of-law. The work will have to be accomplished in the world of scholarship posthaste. Failure to do so

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[5] *Id.* at 251.

[6] *Id.* at 253.

[7] *Id.* at 254.

[8] *Id.* at 271.

[9] *Id.* at 275.

[10] This does not mean that it may not be possible to formulate rules or principles of preference which give guidance to the resolution of a choice-of-law problem. *See* D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965). Such rules or principles will, however, proceed from an examination of the interests and policies behind the supposedly conflicting rules. Care will have to be taken that such rules are not overly broad and that the particular fact pattern fits within the intendment of the rules. *See* R. WEINTRAUB, *supra* note 3, at 30-32; A. TWERSKI, A SUMMARY ANALYSIS OF THE CONFLICT OF LAWS § II(F) (1976).

[11] As a matter of personal privilege, I disagree with the casebook's characterization of me as a rulist. CRAMTON 7. As will become clear in this review, I have strong territorialist leanings, but I also have rather strong objections to rules created for the sake of rules. *See* Twerski, *Neumeier v. Kuehner: Where Are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 105 (1973).

[12] "Pure" interest analysis looks solely to the state policies that underlie a particular law. Territorialists tend to emphasize the geographical and temporal contacts of the controversy with the jurisdiction whose law is to be applied.

will lead to decisions fashioned in the mold of *Neumeier v. Kuehner*,[13] or worse.

Thus, the second edition of Cramton, Currie, and Kay gives cause for both celebration and sombre reflection. Celebration—for it is always a time for rejoicing when sharp scholarly conflict is set forth with clarity and honesty. But sombre reflection in the recognition that unless there is a fundamental reconciliation of territorialist and interest analysis thinking, the lifetime work of some of the most innovative legal thinkers of our time will ultimately be disregarded. As priceless an item as this book is, I hazard the prophecy that the third and certainly the fourth editions will be very different. It will be an either-or proposition. Either the synthesis between territorialist thinking and interest analysis will be forthcoming, or else we will be presented with a new hodgepodge of narrow jurisdiction-selecting rules created for the sake of convenience and devoid of any consistent jurisprudential base. This vital and vibrant area of law could turn into a "dismal science."

I

TERRITORIALISM VERSUS INTEREST ANALYSIS

Rather than lead the reader through a bland chapter-by-chapter whodunit which will leave no one the wiser, I should like to take serious issue with the authors on one of the major problems facing interest analysts. The thrust of my remarks will be directed toward the position taken by the authors in chapter two of the casebook. This chapter was the major focus of revision and led to the publication of the second edition. It reflects the polarity that infects and affects the scholars and the uncertain reaction of the courts to interest analysis in the post-*Babcock* era.[14] It is clear that the authors are concerned with the role of interest analysis in those cases in which the governmental interests point toward the application of one state's law, while the entire territorial fact pattern points toward applying the law of the state where the facts developed.[15] The authors are, at times, on the verge of giving grudging recognition to territorial considerations but shrink from the challenge.[16] Even if party expectations are not a factor in determining conduct, should

[13] 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). The authors have presented a range of opinions on the troublesome results in *Neumeier*. CRAMTON 352-59.

[14] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 519 (1969).

[15] *See* CRAMTON 289-96, 334-52, 354.

[16] *Id.*

they not figure into the interest analysis calculus? The authors chastise the territorialists by asking whether we believe public opinion polls should be used to determine applicable law.[17] In a perceptive question directed toward my position that territorial considerations are often compelling,[18] the authors ask whether territorial considerations do anything more than lead us back to the contact counting that pervaded the *Auten*[19] and *Haag*[20] decisions.[21] Having been slapped with the white glove of two gentlemen and a gentlelady adversary,[22] I relish the opportunity for a duel.

In responding to these questions, I shall first pose several of my own. I believe it can be demonstrated that even the most ardent advocate of interest analysis must ultimately come to terms with the territorial dilemma. Indeed, if my questioning is successful we may even find a rather substantial dose of territorialism in Brainerd Currie's work.[23]

A. *Territorial dimensions of the fact pattern before the court*

Let us turn then to *Haag v. Barnes.*[24] *Haag* was a support action on behalf of an illegitimate child. The child was conceived in New York as a result of sexual relations between defendant Barnes, an Illinois lawyer, and plaintiff Haag, a New York legal secretary who worked for the defendant during his frequent business trips to New York. After learning of the pregnancy, Ms. Haag went to California to live with her sister and await the birth of the child. Haag then became apprehensive that Barnes was losing interest in her, so she travelled to Chicago. Upon arriving in Chicago, she was instructed by Barnes's attorney to choose a Chicago hospital for the child's birth; she was also told that Barnes would pay the expenses. Shortly after the child was born, the parties executed a support agreement in Chicago which provided that Barnes would pay $275 a month until the child was sixteen years old, in exchange for a release from all future obligations. Haag also agreed to remain in Illinois with the child for two years. The instrument stipulated that Illinois law governed the agreement. Under Illinois law, such support agreements

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[17] *Id.* at 295.

[18] Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method,* 9 DUQUESNE L. REV. 373 (1971).

[19] Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

[20] Haag v. Barnes, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961).

[21] CRAMTON 342.

[22] *Id.* at 282, 342.

[23] *See* text accompanying notes 37-39 *infra.*

[24] 9 N.Y.2d 554, 174 N.E.2d 441, 216 N.Y.S.2d 65 (1961).

releasing a parent from future support were valid if made for at least $800. In New York, agreements by parents of an illegitimate child were not binding unless approved by a court upon determination that adequate provision for the child had been made.

Ms. Haag returned to California with the consent of Barnes, who released her from the contract provision requiring her to remain in Illinois. She lived there with her sister for two years and then returned to New York. A year after returning to New York, she attempted to upset the Illinois support proceeding. In a much criticized decision by Judge Fuld, the New York Court of Appeals held that Illinois law should govern because Illinois had the most "significant contacts" with the case.[25] In support of Illinois law the following contacts were enumerated: (*1*) the intention of the parties as expressed in the contract was that Illinois law governed; (*2*) the contract was executed in Illinois; (*3*) both parties were designated in the agreement as being of Chicago, Illinois; (*4*) the defendant's place of business was Illinois; (*5*) the child was born in Illinois; (*6*) the persons designated to act as agents for the principals were Illinois residents; and (*7*) all contributions for support had been made from Illinois.[26] The following New York contacts were held to be of less significance: (*1*) the child and mother lived in New York at the time of the action; and (*2*) part of the "liaison" took place in New York.[27]

Professor Currie's analysis of *Haag* is one of the most logically compelling arguments that I have ever read. He demonstrated not only that the "most significant contact" approach is foreign to interest analysis, but also that it is destined to lead to irrational and nonsensical results.[28] Why, Currie asks, should contacts such as the defendant's place of business, the place where the child was born, and the intention of the parties or their physical locus when they signed the support agreement, be determinative of whether Ms. Haag should recover additional support for her illegitimate child?[29] New York, the forum in this case, has a clear and well-established policy: agreements lacking judicial approval that attempt to establish the support rights of the child are prohibited because the state seeks "to secure the welfare of the child and ultimately to protect the community against the contingency of the child's becoming a public

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[25] *Id.* at 560, 175 N.E.2d at 444, 216 N.Y.S.2d at 69.

[26] *Id.* at 559-60, 175 N.E.2d at 443-44, 216 N.Y.S.2d at 69.

[27] 9 N.Y.2d at 560, 175 N.E.2d at 444, 216 N.Y.S.2d at 69.

[28] SELECTED ESSAYS, *supra* note 2, at 727-39. *See also* Ehrenzweig, *The "Bastard" In the Conflict of Laws—A National Disgrace,* 29 U. CHI. L. REV. 498 (1962).

[29] SELECTED ESSAYS, *supra* note 2, at 732-33.

charge."[30] The New York interest, Currie argues, remains unaffected by such irrelevancies as the locus of the signing, the child's place of birth, and the defendant's place of business. Even the intention of the parties should not be considered by the New York court, because the litigated issue is whether a mother may sell out the child's statutory birthright to adequate support and simultaneously place the state in the position of bearing the burden of supporting the child.[31] If New York does not concern itself with the mother's intent, it should not permit her to affect the welfare of both the child and the community merely because there are Illinois contacts in a conflicts case.[32]

Professor Currie concludes that there was indeed a conflict between the policies of the two states. New York, by requiring prior judicial approval of such settlement agreements, seeks to protect the child at the expense of the father's ability to end his paternal obligation. Illinois, by permitting such agreements without any form of judicial approval, fosters the rights of fathers to freely contract away paternal obligations, thereby severing his responsibilities to the child forever. These policies are in irreconcilable conflict in this case and there the matter must end. If the interests are as Currie has identified them, then no conflict of laws methodology which involves the balancing of state interests can conclusively resolve the policy conflict between the two states.[33] There is accordingly no reason why New York should not apply its own law.

Up to this point the analysis is vintage Currie, but then Currie does a turnabout and exposes a raw nerve:

> We have established, I think, that only two relationships [residence of the mother and father] between the respective states and the parties, the events, and the litigation need be taken into account in order to formulate a definition of governmental interests that each state *might reasonably* make. It does not follow, of course, that no other facts or relationships can be relevant in the court's actual definition of those interests. A court inclined to define local interests with moderation and restraint might with justification take other circumstances into account. *For example, it would not be unreasonable to distinguish between the* Haag *case and one in which the New York mother-to-be travels to Illinois and there seduces the man.*

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[30] *Id.* at 731.

[31] *Id.* at 732-33.

[32] *Id.*

[33] *See id.* at 184. Currie states: "If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest."

> Possibilities need not be multiplied. The point is that in defining the scope of New York's interest in the parties and the events the circumstances given weight must derive their significance from limitations that can reasonably be placed on the reach of New York's policy.[34]

It is not my intention to point to the inconsistency between the Currie position that interests are not to be weighed or balanced, and his position that courts can indulge in a moderate and restrained interpretation of their own forum's statute by taking into account the policies of other states. The authors of the casebook have attacked this contradiction with vigor and have indicated their belief that the Currie position on this point is hardly defensible.[35] I am instead fascinated by a different aspect of his discussion. Having identified the interests of the two competing states, Currie raises a most difficult question—What if a *femme fatale* decides to leave New York and go to Chicago and there seduce the Chicago lawyer? Would New York then read its support statute to reach this situation? Currie suggests that it need not.[36]

Here I believe Currie has posed the irreconcilable problem for true advocates of interest analysis. The interest of New York, as defined by Currie, is to protect the welfare of the child and the community against the abandonment of the father and inadequate support. As long as the interest remains intact (and it does so remain as long as the mother's connections with New York are strong enough that she intends to return there), there seems to be no rational reason for New York to disclaim an interest in the outcome of the support arrangement. Yet, here Currie suggests that New York, by a "restrained and moderate interpretation" of its own law, could find that it need not seek to have its own law apply to a New York seductress who has temporarily established her base of operations in Illinois.[37] Why not? What interest of New York in the welfare of the child has been diminished? Is New York any less likely to have to shoulder the burden of support? Is it even plausible to argue that Barnes permitted himself to be seduced on the reliance that if any child should be born of the union he would be able to free

[34] *Id.* at 734-35 (second emphasis added).

[35] CRAMTON 289-90.

[36] Although Currie suggests that in this hypothetical case a New York court might construe its statute so that it does not reach this fact pattern, (*see* text accompanying note 39 *infra*), at an earlier point in this discussion of *Haag*, Currie chastises Judge Fuld for listing as a contact that "part of the 'liaison' " took place in New York. SELECTED ESSAYS, *supra* note 2, at 734.

[37] *See* Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1959), reprinted in SELECTED ESSAYS, *supra* note 2, at 361.

himself of his obligations to it? Now, I ask the question: If Illinois law is to be considered applicable in this case, is it because a public opinion poll conducted on State and Madison Streets has revealed that most Illinois residents expect Illinois law to govern because so many of the events took place in Illinois? Indeed, was Professor Currie a closet territorialist?

The dilemma is real. The state interests, once defined under classic interest analysis, remain constant. Even major shifts in the geographical nexus of the fact patterns rarely upset those interests.[38] You and I know why the New York court would be reluctant to impose on an Illinois father who never left Illinois, the rule subjecting all support agreements to the scrutiny of a New York court. It seems patently unfair to tell a party who has acted only within his home state that he is to have visited upon him the law of another state with which he has had no contact whatsoever. Whether one terms this consideration "unfair surprise" or "expectations" it amounts to the same thing. The fact pattern is so heavily dominated by one state that our sense of justice says that it is fair for that state's law to govern. Another state's governmental interest may have to take a back seat to territorialism.

Once territorialism is taken into account, perhaps Judge Fuld's decision in *Haag* is tolerable, if not sensible. Certainly, the father of the child had substantial contacts with New York. While in New York, he became involved in an illicit sexual relationship. This may be significant according to the Currie analysis set forth above. However, from that point the scenario shifted significantly away from New York. Ms. Haag, though technically remaining a domiciliary of New York, undertook a series of actions that gave the case a heavy Illinois orientation. Her pursuit of Barnes to Chicago, the agreement to keep the child in Illinois for two years, and the sojourn to California undertaken only with the permission of the father, evidence a major shift of events to Illinois. Using territorialism I would

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[38] *Compare* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1973), *with* Tooker v. Lopez, 24 N.Y.2d. 394, 301 N.Y.S.2d 519 (1969). Each case involved a suit between an automobile passenger and driver who were New York domiciliaries. *Babcock* arose from an accident which occurred during a weekend sojourn into Ontario. In *Tooker*, the parties had resided in Michigan as students for several months before the accident, which occurred in Michigan. The Court defined New York's policy in both cases as permitting New York plaintiffs to recover against New York insurance companies, and refused to apply the Ontario and Michigan host-guest immunity statutes. These cases demonstrate that although the territorial nexus of a fact pattern may shift significantly from one case to another, devotees of interest analysis might continue to resolve the case in a self-same manner, while territorialists would recognize such a change as justifying application of the law of the other jurisdiction.

not, on these facts, have held that Illinois law should apply, but I do not find such a result to be irrational.

The failure to consider the territorial dimensions of a conflicts case can also lead to constitutional problems of inordinate complexity.[39] Under classic interest analysis, the state interest that is to be furthered by a particular statute might be defined in a discriminatory manner. For example, the policy underlying the statute of frauds might be characterized by a court as being for the protection of domiciliaries who contract within the state.[40] Yet it would be clearly unconstitutional for a state to treat non-domiciliaries differently from citizens of that state, by denying non-domiciliaries the opportunity to plead the statute of frauds as a defense to suits arising from contracts allegedly made within the state.[41] If a ter-

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[39] Constitutional problems were directly confronted in Brainerd Currie's landmark article, Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities,* 69 YALE L.J. 1323 (1960), reprinted in SELECTED ESSAYS, *supra* note 2, at 445.

[40] In Lams v. F. H. Smith Co., 36 Del. 477, 178 A. 651 (1935), a Delaware plaintiff sought to enforce an option contract against a New York defendant. The contract was enforceable under New York law, but unenforceable under Delaware law—that State's statute of frauds required an agent's authority to be in writing. The Delaware court considered whether it should label its statute of frauds "substantive" or "procedural" for choice-of-law purposes, and found it "substantive" in order to afford "the greatest measure of protection . . . to its citizens . . . ." *Id.* at 487, 178 A. at 655. The court apparently concluded that Delaware residents would more often be sued in out-of-state courts on commercial contracts made in Delaware, than they would be sued in Delaware on contracts made in other states.

By applying interest analysis techniques, Currie demonstrates that using place of making rules to accomplish the policy of protecting Delaware domiciliaries will lead to anomalous results. Delaware defendants will not be protected when they contract out of state, although out-of-state defendants could plead the Delaware statute of frauds so long as the contract was made in Delaware. If the defendant hails from a state that does not have a statute of frauds, invalidation of the contract would foster the interest of neither state. SELECTED ESSAYS, *supra* note 2, at 450-55.

[41] Currie considers whether the constitutional problem could be met by giving the out-of-state defendant the benefit of his domiciliary law or the Delaware law, whichever affords the lesser protection. Under such a scheme, the out-of-state defendant would be getting no greater protection than Delaware affords its residents (thus assuring that the Delaware interest is met) and no lesser protection than granted by his own domiciliary law (thus preventing unconstitutional discrimination). The defendant would not be discriminated against merely because he is an out-of-state resident. If he is not protected it is because the law of his domicile did not see fit to grant him protection equal to that of Delaware citizens. Although Currie flirts with this idea, he ultimately rejects it:

> An argument can be made . . . that the dominant policy of Delaware is to vindicate the expectations of promisees, and that the protective policy is a limited exception for local defendants. But the argument does not carry, in this context, the conviction that it carries when the protective policy is directed toward special categories of persons who are thought to be unable to protect themselves; *here the protected category is residents of the state in general.*

Currie, SELECTED ESSAYS, *supra* note 2, at 507 (emphasis added). Currie concludes that since the Delaware statute of frauds is not written for a select group of Delaware defendants, no

ritorialist rather than interest analysis approach is employed, these constitutional problems disappear. For a territorialist, the answer is that a statute of frauds may govern situations that are so closely connected with a given territory that it becomes correct for the state to seek to impose its law to govern the situation. I prefer to call this close type of nexus an "interest" which deserves recognition on par with those suggested by the interest analysts. The right of a state to apply its own law (here the statute of frauds) to a situation which is so heavily centered within the state seems to make fundamental good sense.[42]

B. *The Impact of Territorialism upon the Concept of "State Interest"*

We now must come to grips with the underlying question—Are the territorial considerations, that even Currie admits may have an impact on choice-of-law resolution,[43] to be dealt with only as a check on pure interest analysis, or are these considerations fundamental to a rational evaluation of state interests? Professor von Mehren, in a recent article scrutinizing the various choice-of-law methodologies,[44]

harm is done if the out-of-state defendant from a state that does not have a statute of frauds is given greater protection than that afforded him by his home state.

> It is true that no policy of [his home state] is thereby advanced; but on the other hand it would be difficult to spell out a legal policy on the part of Delaware of protecting the resident plaintiff when the domestic statute has not been satisfied. At all events, here again we resolve doubts in favor of the constitutional policy against discrimination; the [out-of-state] defendant in this situation should be given the same "privileges and immunities" that are enjoyed by residents of Delaware under the Statute of Frauds, and this whether the rejected classification be conceived in terms of citizenship or of residence.

Id. at 508.

This convoluted argument indicates the price to be paid when territorial considerations are totally pushed aside when undertaking interest analysis. The upshot of Currie's argument, that the privileges and immunities clause demands that a contract be invalidated even though there is no state that has a positive policy of invalidating the contract, strains credulity.

There is a rational explanation for this dilemma, which Currie did not pursue. The implications would have been devastating for his brand of interest analysis. It should be noted that Currie suggests that the Delaware statute of frauds is not merely protective of a special category of persons, but it is rather for "residents of the state in general." *Id.* at 507. If the Delaware statute of frauds is not merely for the protection of Delaware defendants, and if it cannot be a plaintiff-protecting rule (because if the statute of frauds is a defense to be pleaded and proved by the defendant), then how can it be for "residents of the state in general"? I do not believe that Currie's analytical framework provides a satisfactory answer to this question.

[42] For a similar analysis, see Intercontinental Planning Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969); and Twerski, *Choice-of-Law In Contracts—Some Thoughts on the Weintraub Approach*, 57 IOWA L. REV. 1239, 1242 (1972). *See also* Cavers, *Oral Contracts To Provide By Will and the Choice-of-Law Process: Some Notes on Bernkrant*, in PERSPECTIVES OF LAW—ESSAYS FOR AUSTIN WAKEMAN SCOTT 38, 60 (1964).

[43] SELECTED ESSAYS, *supra* note 2, at 690.

[44] von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927 (1975).

appears to argue that the territorial considerations that he describes as the "comprehensibility" factor in a choice-of-law case, stand in direct opposition to the kind of domestic interest analysis advocated by Currie.[45] Perhaps the question is merely one of semantics, but I believe the problem is fundamental. With all the vaunted sophistication of interest analysis, inadequate attention has been paid to the identification and definition of states's interests. In another forum, I attempted to demonstrate that the "time-space" dimensions of a conflicts case are important in helping to determine the scope of a state's interest in having its law applied.[46] This has not, however, been the approach adopted by the courts.[47]

In the rush to adopt interest analysis, the courts were faced with identifying a methodology for determining interests. The most obvious methodology came to the fore: looking to the original legislative or judicial policy behind a particular law. Thus, automobile host-guest statutes were designed to prevent collusion between friendly parties against insurance companies,[48] state laws against loss of consortium were designed to protect defendants from ephemeral claims,[49] and rules establishing the incapacity of parties to contract were to protect the helpless or hapless from their own incompetence.[50]

These attempts to equate a statutory or common-law rule with the policy that brought the rule into existence make for shallow jurisprudence.[51] Let me illustrate. The case for discussion,

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[45] *See id.* at 945.

[46] Twerski, *supra* note 18.

[47] *But see* Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970), where the court asserted that

> [i]nhabitants of a state should not be put in jeopardy of liahility exceeding that created by their state's law just because a visitor from a state offering higher protection decides to visit there. This is, of course, a highly territorial approach . . . .

Id. at 567, 267 A.2d at 856-57.

[48] *See* Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[49] Erwin v. Thomas, 264 Ore. 454, 506 P.2d 494 (1973).

[50] Currie, *Married Women's Contracts: A Study in Conflict of Law Method,* 25 U. CHI. L. REV. 227 (1958), reprinted in SELECTED ESSAYS, *supra* note 2, at 77.

[51] For a more inclusive definition of state interests see Ratner, *Choice of Law: Interest Analysis and Cost-Contribution,* 47 S. CAL. L. REV. 817 (1974), in which the following mode of analysis is suggested:

> Identification of such underlying policies focuses not on the motives or intentions of legislators who enacted the statute or of judges who developed the common law rule but on community purposes or goals as disclosed by the problems that evoked the rule, its function in the network of existing community arrangements, *and the beneficial consequences to the community of its implementation.* A community has an interest in the application of its rule to achieve the community benefits that flow from such application.

Id. at 819 (emphasis in original).

Reque v. Milwaukee & Suburban Transport Corp.,[52] is a standard first semester torts case illustrating the limitations of the negligence per se principle.[53] The fundamental issue is: under what circumstances does violation of a prohibitory statute give rise to a cause of action in favor of parties injured as a result of that violation? Plaintiff was injured when she stepped off a bus and fell to the ground. The claim of negligence was bottomed on a statute requiring all buses to stop within one foot of the curb. Because the bus was illegally stopped, the plaintiff claimed that the negligence of the defendant bus company caused her injury; had the bus stopped closer to the curb she would not have fallen. The Wisconsin Supreme Court denied the claim, following the well-established rule that in order to make out a case of negligence per se the plaintiff must be within the class of persons protected by the statute, and the harm must be the kind against which the statute was intended to protect.[54] In this instance, the intent of the legislature was to require buses to stop within one foot of the curb to avoid obstructing traffic; the statute was not passed for the convenience of alighting passengers. Thus, the plaintiff was denied recovery because the statutory standard did not cover the particular harm sustained.

My guess is that a good interest analyst would say that Wisconsin had an interest in buses stopping close to the curb to accommodate traffic but had no interest in protecting passengers getting off too far from the curb. I believe that this kind of interest analysis is myopic. The error is fundamental. It may well be that were it not for the problem of buses blocking traffic, the legislature would never have passed the statute for the convenience of passengers. But once the statute is in effect, passengers may expect to alight from a bus onto the curb. If this is so, then it may be a harm that the statute has come to protect even though it was not the original focus of the statute. Or better yet, it may be a cause of action the statute has brought into existence.

Another example of this phenomenon arises from my favorite energy crisis hypothetical. As we all know, speed limits on superhighways were reduced to 55 m.p.h. to conserve energy. In my hypothetical, defendant, while driving at 65 m.p.h. on the Pennsylvania Turnpike, has a blowout and loses control of his car, which then careens over the median strip and collides with a car

[52] 7 Wis. 2d 111, 97 N.W.2d 182 (1959).

[53] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36 (4th ed. 1971).

[54] 7 Wis. 2d at 114b, 97 N.W.2d at 183.

coming in the opposite direction. I have been careful to exclude from this hypothetical any reliance by drivers in the defendant's lane on the 55 m.p.h. limit. Does the 55 m.p.h. speed limit set a standard for safety? There can be little question that the reduction in speed limit would not have occurred but for the energy crisis. Should the reduced speed limit be dispositive of the case if it is determined that a car traveling at the 55 m.p.h. limit could have been brought under control thereby avoiding the accident? I think that an affirmative answer is in order. For the first month or two the statute was clearly viewed as energy-oriented, but, as the reduced fatality statistics were revealed, subtle changes began taking place in our thought patterns. People began thinking: What is the rush? Is it really that important that another thousand people be killed each year to get us to our destination ten minutes faster?

Perhaps I have chosen some obvious examples, but I believe the message is clear. If we are to understand the policies behind common-law rules and statutes, we must look to effect as well as causes. Law is a developing, pulsating reality which teaches and molds societal values, and is in turn acted upon by society. It is *not* a static, dead presence frozen into the policies and political pressures that brought it into existence. Given this perspective, it is not at all clear to me that our present approach to interest analysis is adequate.

Erwin v. Thomas[55] illustrates this problem in a conflict-of-laws setting. Erwin was a Washington resident. He was injured in Washington by the negligent operation of a truck driven by Thomas in the course of his employment. Thomas was an Oregon resident and his employer was an Oregon corporation. The plaintiff, Erwin's wife, sought to recover damages for loss of consortium. Oregon, but not Washington, allows a wife to recover damages for loss of consortium. The Oregon court made the following analysis:

> Let us examine the interests involved in the present case. Washington has decided that the rights of a married woman whose husband is injured are not sufficiently important to cause the negligent defendant who is responsible for the injury to pay the wife for her loss. It has weighed the matter in favor of protection of defendants. No Washington defendant is going to have to respond for damages in the present case, since the defendant is an Oregonian. Washington has little concern whether other states require non-Washingtonians to respond to such

[55] 264 Ore. 454, 506 P.2d 494 (1973).

> claims. Washington policy cannot be offended if the court of another state affords rights to a Washington woman which Washington does not afford, so long as a Washington defendant is not required to respond. The state of Washington appears to have no material or urgent policy or interest which would be offended by applying Oregon law.[56]

Having decided that Washington had no interest, the Oregon court determined that Oregon had precious little interest whether non-resident married women injured outside Oregon recovered for loss of consortium. Since neither state had any interest, the Oregon court felt that it should do "what comes naturally" and apply Oregon law. Conflicts *cogniscenti* will recognize this case as the "unprovided for" case or the "no policy" case that places a court in a special kind of dilemma because no state law has a claim to application.[57] I have indicated my disbelief in the proposition that in a common, interstate automobile accident a court cannot find any law to apply.[58] Anyone, other than a law professor who teaches conflicts, would find such a statement ludicrous. Indeed, in such cases it would seem that a public opinion poll might be invaluable in bringing wild theoreticians down to earth. I should like, however, to focus on the question raised by the Oregon court,[59] and emphasized by Cramton, Currie, and Kay when they asked, "[w]as the policy of Washington affronted in *Erwin v. Thomas* . . . by Oregon's permitting a Washington wife to recover damages for loss of consortium arising out of her husband's injury in Washington caused by Oregon tortfeasors?"[60]

There is some difficulty in tracing the rationale of the Washington policy in denying recovery to wives for loss of consortium. Its origin most probably stems from the common-law rule that a wife had no right to the services of her husband. Dean Prosser asserts that:

> As the social and legal inferior, she could not require him to work for her, and she had at least no common law remedy for deprivation of his society, intercourse and affections. He was legally bound to provide for her and she was entitled to his support; but any injury to him did not terminate that obligation, and the tortfeasor was liable to the husband himself for any loss of earning power.[61]

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[56] *Id.* at 458-59, 506 P.2d at 496 (footnote omitted).

[57] For extensive discussion of the "unprovided for" case, see *Symposium: Neumeier v. Kuehner: A Conflict's Conflict,* 1 HOFSTRA L. REV. 94 (1973).

[58] *See* Twerski, *supra* note 11, at 106-12.

[59] 264 Ore. at 458-59, 506 P.2d at 496.

[60] CRAMTON 357.

[61] W. PROSSER, *supra* note 53, § 125 at 894 (footnote omitted).

It is questionable whether the policy expressed by this rule protects defendants. But, even if that is conceded, the continued acceptance of the wife's disability to sue for loss of consortium was based upon a belief that the consortium action would lead to double recovery and that it would encourage a multiplicity of actions by other persons such as children, parents, and other relatives.[62] Indeed, its viability in Washington, in the face of a strong equal protection argument against it, may be indicative of Washington's conservatism on the issue of women's liberation.

To put all this in the term "defendant protecting" is simply dishonest. Whatever the policy of Washington, it is not only a policy that protects defendants but also one which denies plaintiffs' recoveries—that is the inevitable effect of a defendant protecting policy. Sometimes it may be possible to clearly identify the policy that supports the rule denying the plaintiff recovery, and express that policy in what interest analysts would call an "anti-plaintiff" interest. But it appears to be sheer nonsense to say that a state has no interest in denying recovery to a plaintiff injured in her own home state when that state's law denies recovery. As the state's "contact" with the event in question becomes more substantial, the state's policy for governing that kind of event takes on increasing importance. We cannot look merely to the policy that brought the rule into being as the sole determinant of state policy; we must look to the effect of law on the society's expectations. In part, what I am advocating can hardly be opposed by the interest analysts, since they could not argue against a more sophisticated form of interest analysis. And they would agree, I believe, that if they have been looking superficially at state interests in certain kinds of cases, then the process can only benefit from a sharpening of analytical techniques.

I believe, however, that there are definite limits to the analytical process of interest analysis. In the dogma of interest analysis, there is a belief that if we look hard enough we can determine the scope of a state's interest in cases with extraterritorial facts. The commentators cry with anguish at the refusal of courts to spell out the scope of their interests in these cases,[63] arguing that as the final arbiters of state policy, the courts can and should tell us what their policy is.

If a decade of interest analysis has taught us anything,

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[62] Annot., 36 A.L.R.3d 900 (1971).

[63] *See, e.g.*, Baade, *The Case of the Disinterested Two States: Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 150, 163 (1973).

it is that courts are not being ornery or unkind when they refuse or are unable to articulate their policies. The New York Court of Appeals had no pat answer for the scope of the forum's interest in *Neumeier*.[64] If the court were to be altruistic and give the benefit of New York law to an Ontario citizen injured in Ontario, it would have needed a guide for its altruism. Looking as hard as it could, it found no such guide in New York jurisprudence. What the court did find was a fact pattern so heavily dominated by Ontario that the judges could not wrench themselves from the conclusion that Ontario law should apply. There was a deep belief that whatever the policy behind Ontario law at the outset, it would be sheer arrogance to say that Ontario law would not apply to an Ontario plaintiff injured in his own backyard.

I would thus conclude that "territorialism" or "comprehensibility" are not merely checks on interest analysis. The effects of law on society are so complex that when a given event is tied in "time-space" dimensions to a given jurisdiction, it becomes almost certain that the interests of that society are called into play in a very significant way. Sometimes we can make out reliance interests that affect conduct. However, as the example drawn from the tort cases demonstrate, even where conduct is not affected by reliance on the state's law, this law often has a compelling effect on thought patterns of society. What was yesterday's false conflict may become tomorrow's real conflict. For those who wish to indulge in that kind of analytical game of identifying the original policy behind a law in order to decide cases, there is only the admonishment that a theory so ephemeral is bound to result in decisions lacking staying power. I prefer to recognize from the outset the very real limitations that encompass the interest analysis process itself.

II

PROCESS VALUES AND THE SUBSTANTIVE-PROCEDURAL DICHOTOMY

For those who maintain steadfast belief in the analytical purity of interest analysis, I should like to suggest some reading that is bound to shake up some rather firmly held conceptions. With great care, the authors develop the thesis that the substantive-procedural dichotomy in choice of law is fraught with great dangers.[65] If State X is to apply State Y's law to a given event, and if

[64] Neumeier v. Kuehner, 31 N.Y. 2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). *See* Twerski, *supra* note 11, at 112-115.

[65] CRAMTON 99-124.

a procedural rule of State Y will effectuate the deliverance of the State Y result, then unless there is a strong administrative policy demanding the application of State X's law, State X should defer to State Y, even for what might otherwise be denoted a "procedural" rule of State X. The argument is that "procedural" and "substantive" are terms that should be viewed functionally.[66] In a functional analysis we must concern ourselves with the impact of the "procedural" rule on the result of the case. If the procedure can affect the outcome and not seriously inconvenience the forum, there is no reason to treat the procedural rule any differently than other "substantive" choice-of-law problems. The forum state has little interest in applying its law, and the state whose law would otherwise apply has a significant interest in the application of its law. Indeed, this would appear to yield a false conflict under interest analysis. If one reflects on this argument, it is clear that when "procedure" is viewed in a functional setting it ceases to be a distinct category. Each procedural rule must be evaluated in terms of its impact on the ultimate outcome of the lawsuit. If the impact is significant and the application of a foreign procedural rule can be accomplished without overburdening the administrative mechanism of the forum court, then forum law should give way.

In a recent article, Professor Summers has taken a fresh look at legal process (procedure) not as a functional tool for obtaining good results but as process *qua* process.[67] He argues that "a legal process can be good, *as a process,* in two possible ways, not just one: It can be good not only as a means to good results, but also as a means of implementing or serving process values such as participatory governance, procedural rationality, and humaneness."[68]

Professor Summers contends that we have placed inordinate emphasis on process as a means for obtaining good results, while very little emphasis has been placed on the intrinsic values to be achieved by the legal process itself. Nothing short of a full recitation of Professor Summer's engaging thesis will do it justice. He has, however, clearly identified a blind spot in our jurisprudential thinking. Its implications for the procedural-substantive dichotomy should be obvious. If we begin thinking of procedure

[66] *See generally* R. WEINTRAUB, *supra* note 3; Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure In the Conflict of Laws,* 37 N.Y.U.L. REV. 813 (1963); and A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS 615-18 (1965).

[67] Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974).

[68] *Id.* at 4.

qua procedure as implementing a broad range of social values, then we may have to reexamine the outcome-oriented approach that now dominates our thinking.

I have not raised the question of process values as an isolated point with which to needle the authors. Rather, I believe this issue is indicative of the primitiveness of the jurisprudential thinking that pervades interest analysis. Its simplistic approach to governmental interests is serious business, because if our identification of the interests is shallow the entire structure will fall.

III

JURISDICTION AND FULL FAITH AND CREDIT

The engaging choice-of-law chapters are followed by chapters on jurisdiction and full faith and credit.[69] These chapters force the student to rethink traditional approaches in the light of the cataclysmic changes in choice of law.[70] Here again we are not spared the difficult questions.[71] It becomes painfully clear to the student that interest analysis and jurisdictional thinking are still not integrated. And when the student finds some sense of relief in the cold rationalism of recognition practice under the full faith and credit clause, that too is disturbed by the splendid chapter demonstrating the sheer idiocy which controls recognition practice in the area of domestic relations.[72]

CONCLUSION

The ultimate strength of this superb casebook is that it does not permit the student to escape the tough questions. The authors

[69] CRAMTON 499-751.

[70] *Id.* at 144-402.

[71] *See, e.g., id.* at 526-27, where the authors examine the complex interface between jurisdiction and choice of law through an analysis of Hanson v. Denckla, 357 U.S. 235 (1958). They ask, "Why doesn't it violate constitutional limits on choice of law to apply Florida law to invalidate in the 1950's a trust arrangement established in 1935 by a person who had no connection with that state when the arrangement was made? . . . Is there any reason to impose a higher threshold of expectation upon the jurisdictional issue than upon choice of law? Isn't choice of law likely to be the more significant of the two issues?" *Id.* at 527.

In the chapter on recognition of judgments, Yarborough v. Yarborough, 290 U.S. 202 (1933), is used to illustrate vexing problems in full faith and credit. They ask, for example, "Why should Georgia's interest in terminating the father's obligation override South Carolina's interest in providing for his child?" *Id.* at 677.

The authors also tackle the "land taboo" issue from several perspectives. At one point they ask the reader, "If a foreign land decree is not entitled to full faith and credit, does its recognition on a comity basis deprive the losing party of property without due process of law?" *Id.* at 712.

[72] *Id.* at 752-848.

whipsaw the reader and demand that he face them. They brilliantly utilize both extensive scholarly material and case materials to accomplish this goal. They have a unique ability to capture the essence of a lengthy scholarly work through appropriate excerpts and pithy comments. The net result is that the student develops a sense of sophistication that could not otherwise be so easily obtained. For any law professor facing the decision as to whether to introduce students to conflict of laws through the Cramton, Currie, and Kay method, I can only suggest that you try it—you'll like it. No—you'll love it.

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