Herma Hill Kay and Conflict of Laws: A Tribute

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Herma Hill Kay once wrote that "conflict of laws is a field, not of laws, but of men."[1] With one important revision to the language, that statement remains true.[2] The field continues to be dominated by the personalities, past and present, who have sought to bring clarity to this notoriously complex area of law, which former Boalt Hall Dean William Prosser famously described as a "dismal swamp."[3] If Prosser, who had the intelligence and foresight to hire Professor Kay to teach Conflict of Laws at Boalt Hall in 1960, had also had the benefit of reading Kay's decades' worth of illuminating scholarship, one wonders whether he would have ever been moved to write those words.[4] In any event, if Professor Kay is right, and I think she is, that the history of conflicts is very much a history of influential people and their ideas, she should know that her place in that history is both prominent and secure. It is an honor to celebrate her many contributions to the field.

Professor Kay first became interested in the field as a student in Brainerd Currie's course in Conflict of Laws at the University of Chicago Law School in 1958.[5] This was excellent timing. Currie was in the process of developing his theory of "governmental interest analysis," which would revolutionize thinking

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1. Herma Hill Kay, *Ehrenzweig's Proper Law and Proper Forum*, 18 OKLA. L. REV. 233, 233 (1965).

2. I will not commit the unforced error of naming names. The luminaries in the field know who they are, and they may assume that I do, too.

3. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

4. *Oral History of Herma Hill Kay*, 8 CAL. LEGAL HIST. 1, 11, 63 (2013) (describing Dean Prosser's hiring of Professor Kay).

5. *Id.* at 44–46; Herma Hill Kay, *Remembering Brainerd Currie*, 2015 U. ILL. L. REV. 1961, 1961.

about choice of law.[6] Currie's approach departed from traditional choice-of-law theory by focusing on states' policy-based interests in the application of their laws. Instead of blindly choosing law based on the territorial jurisdiction where particular events occurred, Currie reasoned, a court should analyze the content and purpose of the putatively conflicting laws to decide whether the application of a state's law to the case would advance the state's policy.[7]

Unsurprisingly, Currie was impressed with Kay as a student and hired her as a research assistant to study constitutional limitations on choice of law. Currie must have found Kay's research equally impressive because he immediately asked her to coauthor two major articles based on it.[8] In these articles,[9] Currie and Kay demonstrate that interest analysis is not only consistent with our constitutional system, but that, of all the available approaches to choice of law, it best accommodates both the protection of individuals mandated by the Equal Protection and Due Process Clauses, and the protection of federal and state interests mandated by the Full Faith and Credit Clause.[10]

Currie subsequently recommended to California Chief Justice Roger J. Traynor that he hire Kay as his law clerk, which he did.[11] Traynor was one of the leading judicial proponents of modernizing choice-of-law theory and a great enthusiast of Currie's ideas, making Kay an ideal match.[12] After her clerkship with Traynor, Dean Prosser hired Professor Kay at Boalt Hall, where she has taught and written on Conflict of Laws ever since.[13]

Currie's most important contribution to choice-of-law theory was his insight that in most cases only one of the supposedly clashing states has an interest in its law applying, and that the court should therefore apply that state's law, even if particular events in the case occurred in a different state. He

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6. *See, e.g.*, Mark P. Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893, 895–96 (1988) (describing the impact of Currie's theory); Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1637–38 (2005) (describing Currie's theory as "the shot heard round the world").

7. *See* Andrew D. Bradt, *Resolving Intrastate Conflicts of Laws: The Example of the Federal Arbitration Act*, 92 WASH. U. L. REV. 603, 611 (2015) (summarizing the basic framework of interest analysis).

8. *Oral History*, *supra* note 4, at 44.

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) [hereinafter Currie & Schreter, *Privileges and Immunities*].

10. Currie & Schreter, *Privileges and Immunities*, *supra* note 9, at 1390–91.

11. Herma Hill Kay, *Introduction* to THE JURISPRUDENCE OF JUSTICE ROGER TRAYNOR 7, 8 (Geoffrey Hazard ed., 2015) (describing her hiring as Traynor's clerk and describing the clerkship as "one of the greatest experiences of my life"); *Oral History*, *supra* note 4, at 44–48.

12. *See* Herma Hill Kay, *Chief Justice Traynor and Choice of Law Theory*, 35 HASTINGS L.J. 747, 748 (1984); *see also, e.g.*, Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959).

13. *Oral History*, *supra* note 4, at 45–47, 59–60; Kay, *supra* note 5.

famously referred to such cases as "false" conflicts.[14] Currie also believed that a court had a duty to apply its own state's law if the forum state had a legitimate policy-based interest in doing so. Thus, in a case of "true conflict" where both clashing states have a legitimate interest, the court should apply forum law.[15] Currie understood that there were problems with this approach, but he considered it the best available resolution until scholars or legislatures provided clearer direction.[16] Nevertheless, other scholars attacked his preference for forum law for being insufficiently attentive to interstate comity and too encouraging of forum shopping.[17]

By 1964, Currie had begun to refine his theory to address these concerns, influenced in part by Justice Traynor's jurisprudence.[18] But, sadly, Currie died in 1965.[19] As Professor Kay recently explained, Currie "died so soon after he first announced [the interest-analysis framework] that then he wasn't really able to adapt it and change it in response to criticisms."[20] Kay was the ideal person to push interest analysis forward. She recognized that Currie's ideas were not to be preserved in amber. Rather, Currie's work should be properly regarded as the groundbreaking effort it was, but one amenable to significant adjustment to meet new circumstances and scholarly challenges.

Kay's masterwork in this respect is her 1989 series of lectures at the Hague Academy of International Law, titled "A Defense of Currie's Governmental Interest Analysis."[21] The timing of her lectures was apt. Although interest analysis had dominated the field throughout the 1960s and 1970s, by the end of the 1980s, criticism of the theory had reached a fever pitch.[22] Although the lectures do accomplish Kay's stated purpose—taking on all of Currie's critics, foreign and domestic, with characteristic passion and

14. *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 726 (1963); Herma Hill Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 539 (1983).

15. CURRIE, *supra* note 14, at 119.

16. *Id.* at 119–22; Bradt, *supra* note 7, at 617 (noting that Currie was "notably unenthusiastic about this result").

17. Kay, *supra* note 12, at 762–63 ("Currie's initial statement drew criticism from academics, much of it directed at his failure to seek interstate solutions, which may differ from domestic outcomes, to the interstate problems presented in choice of law cases." (internal citations omitted)).

18. Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757–64 (1963).

19. Herma Hill Kay, Book Review, 21 J. LEGAL EDUC. 613, 614 (1969) (reviewing ROGER C. CRAMTON & DAVID O. CURRIE, CONFLICT OF LAWS—CASES—COMMENTS—QUESTIONS (1968)) (noting that Currie left "much work . . . to be done").

20. *Oral History*, *supra* note 4, at 46.

21. Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 11 (1989).

22. *Id.* at 104 (noting the "second wave of American criticism directed at Currie's work"); *see, e.g.*, Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); John Hart Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173 (1981); Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984).

rigor—with due respect to the lecturer, the title of the series is too modest for three reasons. First, the lectures are a *tour de force* of all choice-of-law theory, and explain its development in America from the early nineteenth century to the present.[23] Second, the lectures go far beyond merely "defending" Currie. In addressing his many critics, Kay does much more than that; as I describe below, she develops his theory in essential ways.[24] Third, and relatedly, to refer to governmental-interest analysis as "Currie's" was already outmoded. It would be more accurate to refer to the method as "Currie and Kay's governmental-interest analysis."

By the time of her lectures, Kay had already advanced Currie's theory in important ways. At the end of Currie's life, he had begun to modify his approach to true conflicts, suggesting that states might avoid a conflict entirely through a "moderate and restrained interpretation" of their interests.[25] In an important article critiquing California's application of interest analysis, Kay gave life to this idea, explaining how courts should properly seek compromise in an effort to avert conflict if possible.[26] Moreover, in her Hague Lectures, Kay rebutted critiques of interest analysis's alleged parochialism by explaining how the preference for forum law should be understood and respected within the community of states.[27] This adaptation of principles of comity—which Kay called "toleration"—shows how states' mutual respect of a preference for forum law is an important component of a system allowing different states to pursue different policies:

> Toleration . . . denotes respect to the divergent laws of another sovereign. But toleration may be shown merely by one sovereign's acknowledgement that another sovereign acts appropriately when it enforces its own laws in its own courts in a multistate setting under circumstances where the first sovereign, had the case been before its courts, would also have enforced its own law. The practice of toleration in this sense requires no overt governmental action by the tolerating state. Nevertheless, its existence is vital to the smooth functioning of states bound together in a federation.[28]

Kay's provocative argument extends Currie's theory beyond one designed to animate a state's interests to one that accommodates states' interests while furthering unity within a community of states.

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23. *See* Kay, *supra* note 21, at 22–38.

24. *See id.* at 173–75 (developing the concept of "toleration").

25. Currie, *supra* note 18, at 757; *see also* Kay, *supra* note 21, at 75–76.

26. Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577, 613 (1980) (noting that "the need for courts following interest analysis to make explicit use of moderate and restrained interpretation when an apparent true conflict has been identified so that others may see the effort at compromise contained within that approach").

27. Kay, *supra* note 21, at 169–79.

28. *Id.* at 173–74.

As eminent a theorist as Professor Kay is, she has never been aloof to real-world problems. In all of her conflicts scholarship, she has required readers to pay attention to the way judges decide real cases. For instance, in her pathbreaking 1983 study of states' choice-of-law approaches, Professor Kay painstakingly analyzed all fifty states' jurisprudence, bringing order to the cacophony of American conflicts law. From the disarray, Kay demonstrated beyond dispute that most judges use the tools of interest analysis "even while expressly declaring that they choose to adopt other approaches."[29] This Herculean effort stands as a landmark success in helping us understand what the choice-of-law revolution of the 1960s hath wrought.[30]

Moreover, Professor Kay has gone beyond theory to propose practical solutions to several knotty problems in conflicts law. Kay's former employer and predecessor on the Boalt faculty, Chief Justice Traynor, once wrote that judges "cannot invariably rely on scholars, who are often better at demolition than at clearing the ground to open up roads, with appropriate traffic controls, for the heavy traffic of diverse laws."[31] This observation emphatically does not apply to Professor Kay, who has applied her theoretical expertise to develop workable approaches to numerous conflicts challenges, especially in the areas of family law and adoption.[32] Given her willingness to engage in current and complicated conflicts problems, it should also come as no surprise that Kay wrote one of the first and most influential articles tackling the issues arising from same-sex divorce.[33]

Professor Kay's influence on conflicts law goes beyond her scholarly articles. During her more than half-century at Boalt, she has taught the Conflict of Laws course to legions of students. And she is a legendary teacher, having been honored for her work in the classroom by both the law school and the Berkeley campus.[34] She has also reached many more students beyond Berkeley through her coauthorship of one of the field's leading casebooks, *Conflict of Laws: Cases—Comments—Questions*, to which she has contributed since the book's second edition.[35] In her otherwise glowing review of the casebook's

29. Kay, *supra* note 12, at 798.

30. Kay, *supra* note 14, at 585. One is tempted to say this task was Hermaculean, but I will refrain.

31. Roger J. Traynor, *War and Peace in the Conflict of Laws*, 25 INT'L & COMP. L.Q. 121, 122 (1976).

32. *See* Herma Hill Kay, *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer*, 84 CALIF. L. REV. 703 (1996); Herma Hill Schreter, *"Quasi-Community Property" in the Conflict of Laws*, 50 CALIF. L. REV. 206 (1962).

33. Herma Hill Kay, *Same-Sex Divorce in the Conflict of Laws*, 15 KING'S COLLEGE L.J. 63 (2004).

34. *Awards and Honors*, BERKELEY LAW, https://www.law.berkeley.edu/our-faculty/awards-and-honors [perma.cc/N9M5-KNP6] (last visited Dec. 29, 2015).

35. Richard A. Epstein, Gerhard Casper, David Gossett & Herma Hill Kay, *In Memoriam: David P. Currie (1936–2007)*, 75 U. CHI. L. REV. 1, 11–12 (2008) (describing Kay's addition to the casebook).

first edition, Professor Kay noted that the book "lost some of its charm" in its chapter on family law, which seemed oversimplified and included no materials on interstate child custody.[36] The book's original coauthors, Professors Roger Cramton and David Currie, obviously understood that the best way to solve this problem was to invite Kay to bring her expertise to bear as a colleague, which she did in the chapters on choice-of-law theory and family law.[37] The book, which Kay now coauthors with Larry Kramer and Kermit Roosevelt, continues to thrive, its ninth edition having been published in 2013.[38] In a field full of scholarly and incisive casebooks, it is in my view the very best—and its chapter on family law of course remains unrivaled.[39]

Finally, I would be remiss if I did not mention Professor Kay's remarkable generosity toward me as a colleague during my time on the Berkeley Law faculty. Before arriving at Boalt, I knew Professor Kay only by her scholarly reputation. Since I arrived at Berkeley in 2012, she has become a mentor, role model, and friend. I am only one in a long line of faculty members who have benefitted from her guidance and support.[40] But she has spent countless hours helping me to better understand conflicts law and develop my own voice as a teacher and scholar of the subject. In an appreciation of her own mentor, Brainerd Currie, Professor Kay recounted the heady experience of discussing conflicts law with him and Chief Justice Traynor.[41] During my many conversations with Herma about conflicts law—and life—I imagine that I felt much like she did then.

The greatest tribute to Professor Kay's contributions to conflicts law is the endurance of her ideas. As she noted in 2001, despite still-vigorous criticism, interest analysis has "won the war of replacing a jurisdiction-selecting formula with an approach that focuses on the policies and interests underlying the conflicting laws."[42] This continues to be true.[43] Professor Kay's teaching and scholarship have played an indispensable role in building the sturdy foundation on which interest analysis now stands. And the American Law Institute will

36. *See* Kay, *supra* note 19, at 615–16.

37. ROGER C. CRAMTON, DAVID P. CURRIE & HERMA HILL KAY, CONFLICT OF LAWS—CASES—COMMENTS—QUESTIONS (2d ed. 1975); Epstein, Casper, Gossett & Kay, *supra* note 35, at 12.

38. *See* HERMA HILL KAY, LARRY KRAMER & KERMIT ROOSEVELT, CONFLICT OF LAWS—CASES—COMMENTS—QUESTIONS (LEG, Inc., 9th ed. 2013).

39. *Id.* at 619–778.

40. Eleanor Swift, *Introduction* to *Oral History*, *supra* note 4, at 5 (describing Kay's "special generosity" in mentoring young faculty).

41. Herma Hill Kay, *Brainerd Currie—Teacher*, 28 MERCER L. REV. 436, 438–39 (1977).

42. Herma Hill Kay, *Currie's Interest Analysis in the 21st Century: Losing the Battle, but Winning the War*, 37 WILLAMETTE L. REV. 123, 126 (2001) (noting that "[a]ll the modern United States choice-of-law theories use policy analysis").

43. SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 63 (2d ed. 2006) ("By the beginning of the twenty-first century, there is little doubt that the old order has collapsed. In this sense, the revolution that began in the 1960s has prevailed.").

continue to benefit from her invaluable guidance as an adviser as it embarks on a Third Restatement of Conflict of Laws. So, although Professor Kay's work is far from finished, Chief Justice Traynor's words about Brainerd Currie ring equally true with respect to her, with one additional important revision to his language: "Every court in the land is in [her] debt."[44]

44. Roger J. Traynor, Book Review, 1965 DUKE L.J. 426, 436 (reviewing BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963)).