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John Shaposka, a resident of Delaware, offered Michael Cipolla a ride to Michael's home in Pennsylvania after their classes in a Delaware school were ended for the day. Michael accepted and was injured when the automobile, driven by John and owned by John's father, was involved in a collision while still in Delaware. Delaware has a statute barring recovery against a host who was only ordinarily negligent, while Pennsylvania has no guest statute. Michael and his parents sued John in Pennsylvania, apparently urging only that John was guilty of ordinary negligence. Recovery could therefore be had only if the Pennsylvania court applied forum law rather than Delaware law. Defendant's motion for summary judgment was granted by the trial court and the Supreme Court of Pennsylvania affirmed.[1]

The majority opinion in *Cippolla v. Shaposka*, written by Justice Cohen for himself and four other justices, concluded that a true conflict was presented but that the interests of Delaware were both qualitatively and quantitatively superior to those of the forum.[2] In addition, relying on the work of Professor Cavers,[3] Justice Cohen suggested that ". . . it seems only fair to permit a defendant to rely on his home state law when he is acting within that state."[4] Chief Justice Bell concurred on the traditional grounds he had already urged in his dissent in *Griffith v. United Airlines*,[5] suggesting that the question ought to be resolved on the theory of lex loci delicti.[6] Justice Roberts dissented, drawing on Dean Pedrick's criticism of guest statutes,[7] and concluded that where truly conflicting interests of states are evenly balanced the conflict should be resolved by the 'better' (no-guest-statute) rule.[8]

Putting to one side Justice Roberts' reliance on the "better law" ap-

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1. Cipolla v. Shaposka, 439 Pa. 569, 267 A.2d 854 (1970).
2. *Id.*, 267 A.2d at 856, 857.
3. D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965).
4. 267 A.2d at 856.
5. 416 Pa. 1, 203 A.2d 796, 807 (1964).
6. 267 A.2d at 857.
7. Pedrick, *Taken for a Ride: The Automobile Guest and Assumption of Risk*, 22 LA. L. REV. 90 (1961).
8. 267 A.2d at 857, 862.

proach, it is difficult to find fault with the outcome of the case. Not only the orthodox place-of-harm choice rule but indeed much of modern conflicts theory can be argued in support of this result. Thus it seems clear that on this distribution of contacts the approach of the Second Restatement would indicate application of the Delaware guest statute.[9] Presumably Professor Ehrenzweig would agree, however unsympathetic he may be toward the Restatement, since Delaware was the place where the car was garaged and insured.[10] As already noted, Professor Cavers directly anticipated this kind of problem in his discussion of "Principles of Preference", and would advocate application of the Delaware rule.[11] An approach to the problem based on the "governmental interest analysis" of the late Professor Currie might well conclude, as the court did, that both states have an "interest".[12] Even so, it seems quite likely that Currie himself might have sought to avoid the conflict through a "restrained and enlightened interpretation" of the Pennsylvania law, thus deferring to the more clearly defined interest of Delaware.[13] The "functional analysis" of Professors von Mehren and Trautman could also reach the same result, either on the conclusion that Delaware was "predominantly concerned" or by construction of a Pennsylvania "regulating rule" coincident with the reference-to-forum-law rule which a Delaware court would almost certainly construct.[14] To round off this sampler of theories it should also be noted that an analysis of Dean Leflar's "choice-influencing considerations" may lend support to the *Cippolla* result, notwithstanding inclusion of the "better law" consideration which led Justice Roberts to dissent.[15] Indeed, in

9. *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 comment e; § 146 (Proposed Official Draft Pt. II, 1968).

10. A. EHRENZWEIG, CONFLICT OF LAWS 580 (1962).

11. D. CAVERS, *supra* note 3, at 146-47.

12. A perhaps too literal reading of Currie's earlier work seems to suggest that the forum acquired a ". . . definite and legitimate interest in the application of its policy" to a tort case, ". . . if both parties—or even the plaintiff alone—were residents of, or domiciled in . . . ." the forum. B. CURRIE, *Displacement of the Law of the Forum*, in COLLECTED ESSAYS ON THE CONFLICT OF LAWS 61 (1963) (hereinafter cited as COLLECTED ESSAYS).

13. *Cf.* Kay, Book Review, 18 J. LEG. ED. 341, 346-47 (1966), suggesting that Currie might well have preferred the dissent in *Lilienthal* v. *Kaufman*, 239 Ore. 1, 395 P.2d 543 (1964). Professor Kay relies, quite properly I think, on Currie's candid admiration for Justice Traynor's enlightened interpretation of forum interest in *Bernkrant* v. *Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961). See B. CURRIE, *Justice Traynor and the Conflict of Laws*, in COLLECTED ESSAYS 688-89 n.236; Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 757-58 (1963).

14. See A. VON MEHREN AND D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 76-77 (1965).

15. Compare the analysis of *Balts* v. *Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966), in R. LEFLAR, AMERICAN CONFLICTS LAW § 136 (1968), concluding that predictability with respect to intrafamily immunity had minimal bearing, interstate orderliness and ease of administra-

view of his doubt that mere domicile of a party gives rise to a governmental interest, Leflar might well deny that Pennsylvania had any interest to protect.[16]

Even if the result of *Cipolla* is thus not likely to be sharply disputed, some interest in the decision may be engendered by its rationale. As with many modern cases, no specific theory or doctrine is expressly adopted by the majority opinion, although it is clear that Justice Cohen purports to use a policy-oriented approach as opposed to purely mechanical, jurisdiction-selective rules. His terminology reflects the work of several conflicts scholars in addition to Cavers: thus "interest" (Currie), "contacts" (Restatement Second), and "concerned jurisdiction" (von Mehren and Trautman). This catholic caution is balanced by some candor, however, in the admission that the rule permitting a defendant to rely on his home state law when acting within that state ". . . is . . . a highly territorial approach . . . ."[17] Justice Cohen concludes that "The very use of the term true conflict implies that there is no one correct answer, but as a general approach a territorial view seems preferable [sic] to a personal view."[18]

This recognition of an underlying territorial theory raises the aspect of the *Cipolla* decision on which the following brief comment is offered. Stated somewhat differently, what is posed is the apparent dilemma of a policy-oriented choice process which must operate within a federal system organized on a territorial basis. Currie saw this dilemma as essentially a political problem, in which resolution of conflict through the establishment of a unitary legal system, quite apart from its immediate impracticality, would devaluate the good we attribute to local self-determination.[19] Moreover, Currie was faithful to the logic which this perception of federalism implies, namely by defining "true conflict" between the interests of several states as precisely

tion were not problems, and thus the common family domicile in the forum was of prime importance as a genuine governmental interest, bolstered by the "better" (no immunity) rule of the forum. But even if a no-guest-statute rule is "better law," the forum in *Cipolla* could easily find predictability with respect to insurance a more potent factor, the guest rule as easy to administer, and "deference to the primarily concerned state" a proper choice objective in the search for interstate order. *Cf. id.*, § 107 at 248-49. Moreover, Leflar suggests weighing the 'better rule' consideration with considerable caution. *Id.*, § 110 at 259.

16. R. LEFLAR, *supra* note 15, § 109 at 253. *But cf.* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 249 at ftnt. 88a (1971) (suggests that Pennsylvania might have an interest as domicile *and* intended destination).

17. 267 A.2d at 857.

18. *Id.*

19. B. CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, in COLLECTED ESSAYS 177, 179.

that situation which will not yield to rational resolution by a state court through a choice process based on the evaluation of underlying policy.[20] Currie's solution, of course, was a resort to forum law if the forum were an interested state.

In these terms Justice Cohen, having found a "true conflict," would be obligated to ignore the Delaware rule, or at least to concede that resort to Delaware law was arbitrary if not irrational. It seems improbable that his comment about the absence of any 'one correct answer'[21] was intended to go so far. Instead, particularly in light of his reference to a qualitative superiority of Delaware's contacts, it appears that Justice Cohen and the majority of his brethren accept Currie's invaluable contribution to false problem analysis, but also accept the "weighing" of contacts which was anathema to Currie.[22]

In doing so the Pennsylvania Court is in good company,[23] and in this sense the *Cipolla* decision seems fairly representative of the shape of an open-ended but still reasonably cohesive American conflicts theory now beginning to emerge. Currie was surely right in regarding the territorialist division of legal systems as political, producing a problem of the separation of powers. But in his insistence that interstate policy-weighing is a governmental function of a non-judicial order[24] he seems to have mistaken the nature of the pressures upon American judges to engage in just such political decision-making. Justice Cohen does not articulate these pressures, nor does he fully articulate the weighing process by which the superiority of the Delaware interest was deter-

20. *E.g.*, B. CURRIE, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in COLLECTED ESSAYS 77, 106-10, 117.

21. See text at note 18, *supra*.

22. B. CURRIE, *supra* note 19, at 182; B. CURRIE, *The Constitution and the "Transitory" Cause of Action*, in COLLECTED ESSAYS 281, 357; B. CURRIE, *The Verdict of Quiescent Years*, in COLLECTED ESSAYS 584, 603-05.

23. *Cf.* R. Weintraub, COMMENTARY ON THE CONFLICT OF LAWS 203 (1971), rejecting the term "weighing" as the "loosest of metaphors" but suggesting that "In the true conflict situation . . . viewing the entire matter at issue with circumspection and common sense will very often suggest a resolution of the conflict that is fair and impartial—the preferred national solution to an interestate conflict problem." See generally R. LEFLAR, AMERICAN CONFLICTS LAW (1968). It is clear that many reputable courts have begun to use the 'weighing' process during the last decade. The decisions in New York and Wisconsin are especially illustrative, and are too well known to require citation.

24. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 758 (1963). In the same context, commenting on his own view of the separation of powers, Currie said:

> This has been an unpopular suggestion . . . . At one time it loomed as the most controversial aspect of governmental-interest analysis. So far as I am concerned, it lost most of its controversial character and most of its interest some time back.

Id. at 758-59.

One can only remark that Currie's early perception of the importance of this concept to the rest of his theory was probably correct, and it is thus a pity that his interest in it waned.

mined. But even in this laconism *Cipolla* is representative of many modern opinions, and it therefore may be fair to use this case as the occasion for a brief re-examination of Currie's concern about the propriety of conflicts policy evaluation in the state courts.

Currie's own statement is worth repeating, to put the matter in perspective:

> It is no part of the duty of a court to subordinate domestic interests to those of a foreign state. The conflict must remain unresolved, unless it can be resolved by political action. Resolution of a conflict between the interests of co-ordinate states is a function of a high political order, which courts are not equipped to perform.[25]

His further comments on this theme may, I hope fairly, be summarized as follows. Notwithstanding a pervasive distrust of the legislative process, apparent throughout the literature on conflict of laws, this is our system and we must take its faults (including unresolved conflict) in the bargain with its virtues.[26] Legislative intervention in conflicts matters ought to be *ad hoc* rather than systematic, but this does not mean ". . . that courts rather than state legislatures should predominantly determine the reach of state policy and interest . . . ."[27]

On this theory a court is and should remain a mere handmaiden to the legislature, implementing as best it can the legislative will. It is to have some latitude, indeed a considerable latitude, in this process of implementation. Not only is the role to be creative, and not only is the interpretation of the legislative will to be teleological rather than mechanical, but a court may even moderate the impact of local legislative purpose through restrained and enlightened interpretation of forum interests to avoid conflicts with foreign interests.[28]

Central to this approach is what I have called, for want of any more descriptive name, the Handmaiden Axiom. It is important to recognize that this Axiom, as Currie used it, is not simply another name for the theory which subordinates the judicial to the legislative function within the framework of the separation powers. The Axiom is, rather, a very special application of that theory, even more restrictive than the category of conflicts cases. Certainly the broad proposition that judges are usually subordinate to legislatures in our legal system is much too

25. *Id.* at 758.
26. *Cf.* B. CURRIE, *The Verdict of Quiescent Years*, in COLLECTED ESSAYS 584, 602-03.
27. B. CURRIE, *supra* note 24, at 761.
28. *Id.* at 757, 762.

imprecise to be of much help in determining when a court must apply forum law or when it may ignore it. It is in the possible gradations of meaning within the generalization about judicial subordination that real controversy lies.

One way to identify the meaning of the Axiom is to conceive the concept of judicial subordination as a principle to be defended, with various lines of defense around it. Taken in this light the inner bastion can be seen as one about which there is no controversy: If a legislature lays down a statutory choice rule the courts of that state are bound to implement it, whether the judges think it wise or not, subject only to constitutional limits.[29] There is simply no argument about this aspect of the concept, although it does pose some interesting possibilities if the case to which such a statute is clearly applicable would otherwise be regarded as a false conflict.

A second (middle) line of defense is built on the site where the legislature has made a clear policy determination which, although not couched in choice-of-law terms, is clearly expressed as a policy so strong as to overshadow competing policies. Again subject to constitutional limits, this line is clearly defensible so long as the case in question presents a true conflict.

A third (outer) line may be drawn where the legislature has expressed a clear policy determination but has not provided any clue as to whether the policy is to be regarded as applicable to multi-state cases. This position, if I understand the theory correctly, is one which the governmental interest analysts must defend to the last man if they are to be True Believers.[30] That is to say, if there is a substantial domestic policy which would be sacrificed by the non-application of forum law, then forum law must be applied even if the legislative expression of this interest does not reflect an intention to make it an overriding consideration. Whether or not this position is defensible as a principle is, I believe, the crux of the controversy, and it is this point of the judicial subordination concept that is referred to here as the Handmaiden Axiom.[31]

29. *Cf.* Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEX. L. REV. 141, 150-51 (1967); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (Proposed Official Draft Pt. I, 1967).

30. The term is that of Baade, *supra* note 29, at 151, whose whole article makes it amusingly clear that governmental-interest analysis is not a theory but a religion. Old conflicts dogma has often been excoriated in ecclesiastical terms, and perhaps continuation of the practice should be encouraged: If Currie was the Luther of the Reformation, then surely Cavers must be its Wesley. And who can doubt the ecumenicalism of the Second Restatement?

31. It should be apparent that governmental-interest analysis, as Currie and Baade have

Probably the most elusive aspect of Currie's theory is that which permits flexibility through "restrained and enlightened interpretation" of forum interests. A judge so inclined could clearly use this notion to escape application of domestic rules simply by refusing to recognize that a substantial forum interest exists, but it seems clear that Currie and his disciples have not intended any such weasel-worded understanding of this device. If I read them correctly what they mean instead is that there is still another defense of the judicial subordination idea—not a line of defense as such, but rather outposts which would be manned if no enemy were in sight. There are, in other words, cases where an applicable policy discoverable in the domestic law would be given effect if the case were purely domestic, but the forum interest in question is not so compelling as to demand application in multistate cases. In such situations the judge may sacrifice the (insubstantial) forum interest in favor of a strong foreign interest.[32]

To concede that the judge may abandon the outpost with honor is not, however, to suggest that he may retreat beyond the outer line of defense. In short, the Currie view of "restrained and enlightened interpretation" permits the judge to consider the advisability of sacrificing insubstantial forum interests under the pressure of clearly substantial foreign interests. But the judge who has backed up to the point where a substantial forum interest is at stake can retreat no further, regardless of the substantiality of competing foreign interests.

In earlier writings Currie divided the cases into only two categories, false problems and true conflicts. In his later work he distinguished three classes of cases: (1) false problems, (2) cases where reasonable minds might differ as to whether a conflicting interest should be asserted, and (3) intractable problems which can be solved only by political action.[33] He recognized the second class as presenting real problems, but seems to have avoided calling these cases "true conflicts'."[34] The name "true conflict" for all cases where interests can be identified as squarely opposing seems clearer to me, whether the inter-

used the term, does not distinguish between these second and third lines of defense. For them these are by definition indistinguishable, because they view any substantial interest of the forum as an over-riding interest. *Cf.* text *infra*, at note 33. The realities of judicial opinion-writing also blur the distinction, since the draftsman is likely to emphasize the dominance of the policy if he really finds it to be over-riding, and he is sorely tempted to strengthen his conclusion by hyperbole even if he does not.

32. See the Currie articles cited *supra* at notes 12, 13, 19, 20, 22, 24 *passim*.

33. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 763-64 (1963).

34. *But cf.* Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROB. 732, 733 n.4 (1963).

ests involved are "substantial" or not, but the terminology is not too important. What seems to me to be crucial, however, is the distinction between a domestic interest which is overriding because the legislature has made it so, as opposed to an interest deemed by the governmental-interest analysts to be overriding simply because it is a forum interest and a substantial one. Cavers foresaw the possibility that ". . . only a little oversimplification . . . [would cast Currie as an advocate] of applying forum law simply because it is forum law."[35] I hope I make no such mistake. But it seems not unwarranted to regard governmental-interest analysis as requiring application of forum law for its own sake when the interest thus implemented is substantial.

I do not mean to suggest that the problem reduces itself to anything so simple as a characterization of interests as "substantial" or "insubstantial"; obviously the question is much more complex than that. What I do suggest, returning to *Cipolla* and laconic cases like it, is that for precedential purposes the articulation of the process of determining substantiality is no easier than that of "weighing" interests. Moreover, as Professor Cavers remarked long ago,[36] Currie's own approach invites judicial interest-weighing by permitting the forum court to take into account the policy of another state in the determination of whether or not there is a true conflict. I find Currie's response to that comment singularly unpersuasive:

> . . . [T]hough the function is essentially the same, there is an important difference between a state's construing domestic law with moderation in order to avoid conflict with a foreign interest and its holding that the foreign interest is paramount. When a court avowedly uses the tools of construction and interpretation it invites legislative correction of error—or at least criticism from the law reviews. When it weighs state interests and finds a foreign interest weightier it inhibits legislative intervention and confounds criticism.[37]

As a defense or even a partial defense of the Handmaiden Axiom it seems clear that this argument simply will not wash. What most probably inhibits criticism is not the process itself, whether it be the process of interpreting domestic interests or that of weighing these against foreign interests, but rather the difficulty of articulating either in a way which permits them to be subjected to close analysis. As to the question

35. D. Cavers, The Choice-of-Law Process 86 (1965).
36. Cavers, *supra* note 34.
37. Currie, *supra* note 33, at 759.

of legislative correction it should first of all be observed that those few statutes enacted for the purpose of overruling cases are often, if not usually, addressed to the result of a case rather than to its specific rationale. How is the reuslt of a publicly unacceptable "weighing" any more obscure than that of a publicly unacceptable interpretation? Indeed, the argument at this point arrives at self-contradiction. A legislature disturbed because a judicial decision of its own courts sacrifices local to foreign interests can move directly to remedy the situation. A decision preferring a local (even though substantial) interest to an obviously stronger foreign interest, on the other hand, is likely to cause a public outcry in the foreign state and thus to generate pressure for legislative reform only in a legislature to which the court of decision is not responsible. Statutory "correction" in that event would probably take the form of retaliatory legislation against the offending forum, and lead to that very parochialism which "restrained and enlightened interpretation" understandably seeks to avoid.[38]

At bottom the relative rarity of legislative intervention in conflict resolution is more realistically attributable to either both of two quite different causes. First, the evaluation of interests in particular cases, whether domestic or multistate, seldom adversely affects enough people to produce sufficient pressure for legislative change. Secondly, more optimistically, legislative abstention from the field may reflect a wise recognition that statutory choice determinations often produce mechanical and irrational results, as well as infringements on the legitimate interests of sister states which are at best parochial and at worst invite retaliation.[39] Whichever of these causes is dominant, the fact of the matter is that American legislatures have effectively conceded the power of flexible policy determinations in most conflicts problems to the courts. Judges, in the exercise of that power, have a responsibility not only for the implementation of local state policy but also for the healthy functioning of that federalism to which their own states are committed. The problems of multistate policies inherent in federalism must lead them inevitably to the weighing of co-ordinate state interests, and the question is no longer whether, but how shall they do so.

I recognize all too well that such a conclusion is not an exit, but a threshold. How are interests to be identified, measured, and the process

38. *Cf.* R. LEFLAR, AMERICAN CONFLICTS LAW § 107 (1968).

39. In fact some of the more significant statutory rules, however imperfectly they may be drafted, seem designed precisely with a view toward preserving flexible judicial determination. *E.g.*, UNIFORM COMMERCIAL CODE § 1-105.

of doing so articulated? As our preoccupation once shifted from particular contacts to the quantity of contacts, so also has it now moved on to the more rational objective of qualitative evaluation. The enormous task which this objective opens before us will occupy both courts and scholars for many years to come. This ending is scarcely the place to further explore the beginning of that task, but I cannot refrain from mentioning one fascinating problem raised by the wry comment of Justice Roberts, dissenting in *Cipolla*. "Naturally," he said, "it is always difficult to read the legislative mind, and courts have discovered a host of reasons for guest statutes."[40] Has our venture into qualitative evaluation, coupled with the poor quality of legislative history materials in most states, already led us to judicial fabrication of policies to justify the assertion of forum interests? Should the practice of pouring new policy wine into old statutory bottles, so often employed in domestic law interpretation, be carried with equal vigor to the determination and measurement of state interests? Perhaps somewhat greater restraint should be exercised in the area of conflict resolution,[41] especially when the task before the court involves the determination and evaluation of a foreign state's interest. To pursue the thought of Justice Roberts, perhaps an initial step in multistate cases should be to inquire whether a newly articulated policy has been the unwitting guest of a host statute, uninvited and never entertained by the legislative mind.

40. 267 A.2d at 857.
41. *But cf.* Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 761-62 (1963).