Losing the Battle, Winning the War: Juenger's Critique of Interest Analysis

Patrick J. Borchers

A decade has now passed since the publication in book form of Fritz Juenger's Hague Academy General Course. Published under the title *Choice of Law and Multistate Justice*, I believe it to be one of the most distinctive and influential treatments of our common discipline.

I say "distinctive" because Juenger's theories ran counter to both of the major orthodoxies in American conflicts law. One is the old orthodoxy embodied in the First Conflicts Restatement and the writings of Joseph Beale. In that sense Juenger's approach was not distinctive, because a vast majority of courts and the conflicts academy join him in rejecting the unyielding application of territorial connecting factors demanded by that approach.

The distinctive part of Juenger's theory, however, was his penetrating challenge to the new orthodoxy of interest analysis. In my view, one of the most persuasive aspects of *Multistate Justice* is Juenger's critique of the American conflicts revolution and, in particular, classical interest analysis. Interest analysis was articulated in its original form with that name by Professor Brainerd Currie. Most of Currie's important writings are collected in his 1963 work *Selected Essays on the Conflict of Laws* and it is to that formulation of interest analysis to which Juenger addressed himself.

In his attack on Currie's methodology, Juenger made several interrelated points. First, he pointed out that Currie's notion of states having "interests" in the outcome of cases akin to a human emotion of "selfishness" was every bit as fictional as Beale's notion of rights "vesting" in the place of the last event necessary to create liability. Thus, Juenger doubted Currie's claim that his theory was simply an offshoot of the ordinary processes of construing and interpreting legal rules. Currie's system still depended upon some connecting factor, though he was vague as to the precise nature of the connection required to create an interest. In the end, however, Currie simply replaced territorial connecting factors — such as the place of the injury for

torts — with personal connecting factors such as the home states of the parties.

Second, Juenger pointed out that Currie's methodology shared much with unilateralist schools that dated back centuries. Indeed, Juenger convincingly argued that Currie's approach had much in common with that of the German writer Wächter. He also compared Currie's efforts to those of the statutists and pointed out that in some ways Currie's efforts were less sophisticated than those of his intellectual predecessors. Juenger expressed particular skepticism regarding Currie's foundational contention that one could find a policy underlying every state rule, particularly one that might state no defensible policy, such as automobile guest statutes. By assigning essentially equal weight to all interests, Juenger contended that this methodology was hardly deserving of the label "analysis."

Third, Juenger criticized the parochialism of Currie's approach. In so-called "true" conflicts, where the forum and another state are interested, Currie advocated cutting the Gordian knot by applying forum law. In so-called false conflicts, where only one state is interested, Currie advocated applying the law of the interested state. In "unprovided-for," or "no interest," cases Currie again advocated application of forum law. As Juenger pointed out, the net result of Currie's approach was to apply forum law in all cases except those in which the forum is entirely disinterested and another state is interested. Given that it is the rare case in which the forum has jurisdiction, yet is disinterested as Currie defined that term, Juenger pointed out that interest analysis thus formulated amounted to little more than a naked forum law preference.

In essence, Juenger's underlying complaint regarding interest analysis rested with its assumption that lawsuits between private parties are really contests between sovereigns. It is not the case, as some assume, that Juenger did not believe in interests. Interest, in the sense of having a stake in the outcome, is a common legal expression. He, however, doubted that states have interests in the resolution of garden variety tort and contract disputes between private parties, or at least that they have interests strong enough to overcome the obvious stake or interest that the litigants have in a predictable and fair resolution of their dispute. The core of his critique has always seemed to me best expressed on page 135 of *Multistate Justice*: "[Currie] believed that governments have a deep-seated concern in the implementation of their legal rules, and that realization of that concern is an important attribute of sovereignty. Neither he nor his followers bothered to adduce empirical evidence for this hypothesis. . . ." In other words, Juenger

was making the observation that absent empirical proof as to their existence, there was little sense in exalting the interests of sovereigns over those of the litigants.

To turn my second descriptor: Has Juenger's critique of interest analysis proved to be influential? Superficially, a negative answer might seem to be correct. It is true, of course, that only a few states — New York, California and New Jersey being the best examples — expressly purport to follow interest analysis, and New York's approach has been distilled to a set of three rules that diverge considerably from Currie's teachings. The largest block of states purport to follow the Second Conflicts Restatement, but that document is replete with references to "interests." For example, section 6 of the Second Restatement makes "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue" one of its principal criteria for deciding conflicts cases. Even Leflar, whose choice-influencing considerations are employed by a few states, and whom Juenger much admired for his forthright advocacy application of "the better rule of law," made one of his co-equal choice-influencing considerations "advancement of the forum's governmental interests." There can be little question, therefore, that Currie succeeded in radically transforming the American conflicts vocabulary.

To be sure, not all judges and scholars are keen on interest analysis. Justice Scalia, dissenting in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 602 (1996), worried that the majority in that case had decided to infect the law of punitive damages with "the sort of 'interest analysis' that has laid waste the formerly comprehensible field of conflict of laws." Judge Posner, in his book *The Problems of Jurisprudence,* described interest analysis at page 429 as being a "legal reform [that] miscarried. . . ." Some scholars, particularly those whose work has an economic or empirical bent, have criticized interest analysis for promoting inefficiency because of its forum bias and indeterminacy in application. But, all in all, those willing to expressly disavow Currie's vocabulary are in the minority.

Nevertheless, one cannot help but notice that the adoption of Currie's interest vocabulary by courts has not prevented the injection of many of Juenger's decisional principles into actual cases. For instance, courts applying the New York and California conflicts approaches have cited Juenger's works. And in many cases, perhaps without saying so, those courts have taken his side with regard to his critique of the theory they purport to apply.

Consider, for example, the New York Court of Appeals' decision in *Cooney v. Osgood Machinery, Inc.*, 612 N.E.2d 277 (1993), decided the

same year that *Multistate Justice* was published. In that case, despite characterizing the case as being a "true conflict" in which the New York and Missouri interests in the application of their workers' compensation laws conflicted and could not be reconciled, the New York Court of Appeals decided to apply Missouri law, thus ignoring Currie's counsel to apply forum law in such cases. Moreover, one of the reasons that the Court of Appeals gave for refusing to elevate its home state's law over that of the Show-Me State was that the New York rule "is clearly a minority view. . . ." 612 N.E.2d at 283, n. 2. Thus, while New York's high court still expressed itself in Currie's vocabulary, its result and rationale reflected the sort of pragmatic, non-parochial analysis that Juenger had always advocated.

Consider as well the New Jersey Supreme Court's opinion in *Fu v. Fu*, 733 A.2d 1133 (1999), another purported application of interest analysis. That case was yet another of the one-car accident cases that populate conflicts casebooks. In this instance, the conflict was between a New York statute that makes owners of vehicles vicariously liable for the torts of permissive drivers and the New Jersey common-law rule that would not make the owner liable. The car was rented in New Jersey and all of the parties were New Jerseyites, but the accident occurred in New York. In a result that would have pleased Juenger greatly, the New Jersey court applied the New York rule and, along the way, observed that "discerning the underlying purpose of a liability-denying rule often is difficult." *Id.* at 1141.

Or consider a slightly older California Supreme Court case that Juenger cited frequently: *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721 (1978). *Offshore Rental* was yet another case characterized as a true conflict. This time the conflict was between a Louisiana rule that did not allow corporate recovery for injury to a key employee and a California rule that did. Again ignoring Currie's counsel to apply forum law, the California high court applied Louisiana law, which it described as "'prevalent and progressive'" and thus more deserving of application than California's "unusual and outmoded" statute.

Thus, three state high courts, each applying interest analysis to a true conflict, chose foreign over forum law and justified their selection with observations about the substantive qualities of the laws involved. Despite the fact that each opinion employs Currie's vocabulary, the results and rationales are quite consistent with Juenger's teachings. Ultimately, I think it unlikely that Currie's interest vocabulary will disappear from the American conflicts lexicon in the near future. In that sense, *Multistate Justice* may lose the battle. But its underlying message of non-parochialism

and pragmatism has wormed its way into the methodologies of even those courts most beholden to Currie's approach and in that way the war may be won.