Empiricism and Theory in Conflicts Law

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I am grateful to the editors of the *Indiana Law Journal* for the opportunity to comment on the papers presented this year at the Association of American Law Schools Conflict of Laws section meeting. As one would expect given the distinguished panel assembled, the papers are provocative and important.

I wish to devote my attention to William Richman and William Reynolds's article entitled *Prologomenon to an Empirical Restatement of Conflicts.*[1] As one of several writers who has been interested in empirical assessment of conflicts decisions, I am fundamentally in agreement with Richman that there is a great deal of work yet to be done. The two most extensive studies in this area[2] largely confirm the belief held by most observers that (in multistate tort cases) there is a significant difference in the results reached as between states that follow the *Restatement of the Law of Conflict of Laws*[3] and those that have gone modern. The studies also largely confirm the widely held view that the choice *as between* the modern theories makes relatively little difference; all the modern theories produce result patterns that are more favorable, in particular, to the application of forum law and plaintiff-friendly rules. As Dean Symeonides put it in one of his annual surveys:

> [T]hese cases simply confirm an impression at which this author has arrived after having read several thousand conflicts cases over the last decade: that, *of all the factors that may affect the outcome of a conflicts case, the factor that is the most inconsequential is the choice-of-law methodology followed by the court.*[4]

There may, of course, be ways in which theoretical choices matter. For instance, the extreme flexibility of the modern approaches probably brings increased litigation costs, in particular through the need to prosecute appeals. Because cases settle (at least for economically rational litigants) when the parties' assessments of the value of the case converge to within the expected cost of pursuing the case to judgment, the ever-present wild card of choice of law may discourage settlement. To date, the empirical work (including my own) has been limited to binary evaluation of fairly easily observed phenomena, such as whether reported decisions apply forum law. Other modes of analysis may yield more nuanced results.

Empiricism must, however, be seen as part of a theoretical project. In fact, to engage an empirical project is to advance a theory that is, in my view, rightly gaining currency. That theory is that conflicts law needs to be evaluated in the same way as legal principles, rules, standards, and doctrine in other areas of the law.[5] The conflicts

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1. William M. Richman & William L. Reynolds, *Prolegomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417 (2000).

2. *See* Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989).

3. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934).

4. Symeon C. Symeonides, *Choice of Law in the American Courts in 1994: A View "From the Trenches"*, 43 AM. J. COMP. L. 1, 2 (1995) (emphasis in original).

5. *See, e.g.*, Russell J. Weintraub, *An Approach to Choice of Law That Focuses on*

academy has pretty well exhausted itself worrying about nonproblems. We have debated and still debate such unknowable and irrelevant points as whether a hypothetical embodiment of the Massachusetts government would have wanted its (now many decades repealed) rule of contractual disability for married women applied to a Maine woman[6] and whether automobile guest statutes (of which exactly one remains in force in the United States) represent any discernable policy.[7] It is difficult to imagine a writer on tort law interested in, for example, the utility of punitive damages approaching the matter through the wholly fictional device of an anthropomorphized state sovereign, yet such "analysis" continues to exert a considerable influence in conflicts law.

Conflicts rules, principles, and theories deserve the same scrutiny as other legal rules, principles, and theories. Real people, after all, are litigants in multistate cases. We ought to take account of what we (i.e., the conflicts academy) are doing to these real people. Are we helping contribute to a system that needlessly exhausts resources in litigation because of its inherent instability? Are conflicts cases needlessly harder to settle and thus needlessly more expensive? Are we putting civil defendants at the mercy of plaintiffs by encouraging courts to nearly always apply forum law? Before we set on a course of drafting yet another restatement and offering it for judicial acceptance we need answers to (real) questions like these.

Consequences, 56 ALB. L. REV. 701, 705 (1993).

6. *See* BRAINERD CURRIE, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 77, 85 (1963) (discussing hypothetical variants of Milliken v. Pratt, 125 Mass. 374 (1878)).

7. *See, e.g.*, Symposium, *Choice of Law: How It Ought To Be*, 48 MERCER L. REV. 639, 667-72 (1997) (symposium transcript); *see also* Patrick J. Borchers, *Back to the Past: Anti-Pragmatism in American Conflicts Law*, 48 MERCER L. REV. 721, 726 (1997) (noting disappearance of guest statutes).