

Adrift on the Sea of Indeterminacy

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I should apologize, right here at the start. I'm out of place in this gathering of conflicts scholars. I'm not sure why I was invited. I don't "walk the walk," or "talk the talk." I spent thirty years in the trenches, *practicing* law. My views about choice of law were shaped, irrevocably, by observing the impact of conflict scholars' proposals *on the real world*. It was not a pretty sight.

Today's conflicts scholars no doubt consider themselves a diverse bunch, with widely differing views about how law should be chosen in multistate disputes. But from the trenches, most of them look alike.¹ Each waxes eloquent about the search for the perfect solution—the most intellectually and morally satisfying choice of law for each dispute—and each ends the theorizing by embracing some proposition that will prove wholly indeterminate in practice.

In the *Second Restatement*, modern-day conflicts scholars buried the hatchet temporarily, coming together to endorse an approach incorporating all their conflicting proposals: a cacophonous formula of formulae, a blend of indeterminate indeterminacy.² A total disaster in practice, as all of them now acknowledge.³

Now, they're at it again. They propose to clean up their last mess by concocting another. The mistake last time, they think, was that they compromised with each other. Now it's time to adopt one single-minded indeterminate formula, and each proclaims that it should be "mine!"

The prospect of a third restatement fashioned by the architects of the *Second* (or their intellectual offspring, the modern-day conflicts scholars), is enough to send practicing lawyers scurrying for shelter. We are adrift on a sea of indeterminacy, and we won't find our way to shore in the hands of those whose errant navigation got us here. Yes, the *Second Restatement* should be junked. But the new vehicle should be built by a different crowd. Let judges, lawyers and/or legislators—those who live in the real world and have to suffer the consequences of the choices made—have a hand at formulating a new solution, one that would contain determinate choice-of-law formulae that work in practice.

A decade ago, I sneaked into academia. To vent my unhappiness, born of my experiences as a lawyer, I fired off what I expected would be my first and last

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1. A handful of scholars who advocate bright-line choice of law rules are exempt from the critique in this paper. *See, e.g.*, LEA BRILMAYER, *CONFLICT OF LAWS* (2d ed. 1995); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

2. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) [hereinafter SECOND RESTATEMENT].

3. *See* Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 404-05 (2000); William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 419-24 (2000); Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 441-46 (2000); Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475, 477 (2000); *see also* Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 11 & n.42 (1991).

conflicts article.⁴ The article decried, in equal measure, the hash that conflicts had become and the chefs who had brought this unappetizing dish into being. My proposal was that Congress enact determinate choice-of-law rules—blunt instruments, not exquisite philosophizing—and be done with it. A resurrection, if you will, of the *Restatement of the Law of Conflict of Laws* (“*First Restatement*”),⁵ or perhaps a gussied-up equivalent that made equally determinate but perhaps more sensible choices. (Dean Symeonides’s core proposal in this Symposium,⁶ if stripped of its authorization for courts to “escape,” would fill the bill, but so might any number of other determinate formulae.) My article recognized that an inevitable by-product, were its proposal adopted, would be rendering conflicts extinct as a field for scholarship.⁷ This was a price I was prepared to pay.

Whether because of that article’s substantive deficiencies, or its impolitic mocking of its likeliest audience, it has been one of the least-cited articles in the field. Imagine my surprise, then, when the invitation came to participate in this Symposium. There being no other link between me and the field except that article, the invitation signified two things: (1) somebody had actually read the article (hooray!), and (2) that reader wanted an encore. Given my documented *dyspepsia*, the invitation could only signify a desire that I vent my spleen again. So, having apologized in advance, here goes.

I. THE CHARMS OF DETERMINACY

Determinate choice-of-law rules would confer three benefits that are missing in the present state of chaos.

A. Predictability

At the time they engage in primary activity, parties would like to know what the law requires of them. When the activity has interstate dimensions, this requires knowing *which* state’s law will govern their behavior. Determinate choice-of-law rules, applied uniformly in all states, would provide that certainty. This is no small accomplishment, and not just for the actors’ peace of mind. It also serves instrumental ends. Legal rules are supposed to influence behavior. But if the criteria for choosing law are so amorphous that parties can’t tell which state’s law will apply, or if that choice will vary depending on the plaintiff’s post hoc forum selection, then the defendant-actor cannot know what law to obey.

B. Administrative Efficiency

Parties pay dearly for the administrative chaos that accompanies the present array of indeterminate choice-of-law criteria. When litigation begins, the parties must bear

4. See Gottesman, *supra* note 3.

5. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT].

6. See Symeonides, *supra* note 3.

7. See Gottesman, *supra* note 3, at 50-51.

the costs of litigating choice of law. The grab-bag of criteria proffered by section 6 of the *Second Restatement* makes this litigation battle an intellectually enjoyable one for the lawyers, but surely not for the clients who must pay their fees. And the costs do not stop with that initial skirmish. Because choice of law is a question of law, the party disappointed by the trial court's choice has the opportunity to secure de novo reconsideration on appeal, and the possibility of reversal is high precisely because the choice-of-law criteria are so indeterminate. If appellate reversal comes after the case has been tried, it may render wasted all of the time and expense devoted to litigating the case below. If, to avoid this, interlocutory appeal of the trial judge's choice-of-law ruling is sought and obtained, the parties will suffer substantial delay in the resolution of the suit. The indeterminacy of choice of law also impedes early settlement of disputes, as the parties cannot confidently estimate the likely outcome of the case.⁸

C. Uniformity and a Level Playing Field

To achieve the first goal, predictability, the choice-of-law rules must be the same no matter where the plaintiff files suit. But uniformity-regardless-of-forum-choice serves another goal as well: even-handed justice. It is simply not fair that one party gets to choose, after the fact, what legal regime will govern the parties' dispute.

There is more to the law, of course, than predictability, administrative efficiency, and uniformity. These are the benefits of bright-line rules in any area of the law, but they have to be weighed against the costs in imperfect justice. When the latter emerge as more important, these values may have to yield to multifaceted criteria designed to "get it right." In most areas of the law, scholars recognize that there are trade-offs, and weigh the competing values before formulating solutions. Conflicts scholarship is unique in its utter disregard for the values of determinacy.

Of the four main articles in this Symposium, only one mentions predictability as a relevant consideration,⁹ but that one blends it into a "golden medium" in which courts enjoy the flexibility to "escape" determinate choice-of-law rules when dissatisfied with the result.¹⁰ This is akin to the "medium" between swimming on the surface of the ocean and standing on the ocean floor: it would not be thought "golden" by those wanting to breathe. Allowing courts an indeterminate "escape" card vitiates all prospect of predictability.

Administrative convenience is mentioned in none of the major papers. Uniformity is *condemned* in the only paper that addresses it (with forum preference for its own law urged as the superior nostrum).¹¹

Because these values are ignored in the main papers (as they are in most conflicts scholarship), the authors are spared the burden of demonstrating that their proposals are worth the price. They proceed as though it were a "given" that the proper office

8. There are public costs as well, such as the judicial time devoted to resolving the vexatious conundrums of modern choice of law.

9. See Symeonides, *supra* note 3.

10. See *id.*

11. See Weinberg, *supra* note 3, at 485.

of the law is to devise the theoretically “best” choice of law, regardless of the incidental costs inflicted by that quest.¹² In succeeding parts of this Comment, I suggest that the benefits of the quest do not justify its costs.

II. THE “BENEFITS” OF CHOOSING THE “BEST” LAW HAVE BEEN GREATLY EXAGGERATED

Conflicts scholars work *so hard* to find the “best” choice of law because they assume that something really important turns on the enterprise. That assumption is unwarranted. Of course, after the fact, choice of law is important *to the parties*, for it may be outcome determinative. But somebody is going to win, and somebody lose, no matter what law is chosen. The right question is whether it is important *to society* which state’s law is chosen.

The conflicts scholars’ unstated but implicit affirmative answer to this question reflects an unwarranted assumption that the values of choice of law in the *international* setting adhere as well in the *interstate* setting. Conflicts originated as a field devoted to choosing law when disputes had international implications.¹³ In that context, the stakes can be really important. There are vast cultural differences between nations, and no mechanism for harmonizing (or keeping within manageable bounds) the widely divergent legal principles that emerge from those differences. In some nations, persons are whipped for spray-painting cars;¹⁴ in others, their hands are chopped off for stealing.¹⁵ These—and their civil law equivalents—often are shocking to citizens of other lands. Understandably, monitoring the application of such controversial norms to multinational disputes is deemed important. American courts would find it intolerable to impose and enforce some foreign norms, and choice of law is the medium by which they are able to escape doing so.

Conflicts scholars have proceeded as though the stakes are just as high when a dispute has connections with two or more American states. It’s just not so. While substantive legal rules often differ from state to state, the swing is not so wide as between nations. The choice between contributory negligence and comparative negligence does not implicate the fundamental ethos of a nation as does the choice between imprisonment and cutting off hands. In part, that is because we are a nation whose fundamental values are shared nationwide. But perhaps more important, it is because we have an overarching constitution that assures that excesses will be reined in. Concerns about Nazism, slavery, etc.,¹⁶ are irrelevant to choice of law within the United States. The Constitution will strike down state laws that have toxic characteristics.¹⁷

12. See Juenger, *supra* note 3; Richman & Reynolds, *supra* note 3; Symeonides, *supra* note 3; Weinberg, *supra* note 3.

13. See BRILMAYER, *supra* note 1, at 12.

14. See Andrea Stone, *Whipping Penalty Judged Too Harsh*, USA TODAY, Mar. 10, 1994, at A3.

15. See MATTHEW LIPPMAN ET AL., ISLAMIC CRIMINAL LAW AND PROCEDURE 43, 106-10 (1988).

16. See Weinberg, *supra* note 10, at 492.

17. Professor Weinberg cites the legal treatment of homosexuality as an area in which wide swings currently exist in America. See *id.* at 493. But it may well be that the Constitution will

The Constitution itself recognizes the diminished significance of choice of law in interstate disputes. The Full Faith and Credit Clause¹⁸ requires the courts of each state to enforce against its own citizens the judgments of courts of sister states, no matter how offensive the results to the forum court, and no matter how contrary to the forum's chosen policies.¹⁹ This is a departure from the traditional rule of international law—that a nation's courts may withhold enforcement to foreign judgments that offend the public policy of the forum.²⁰ It reflects constitutional confidence that we can live with the diversities in our states' laws.

That the interests advanced for indeterminate rules are unimportant is further evidenced by the wide dichotomy among conflicts scholars as to what *is* important. While each identifies *something* to hang his/her theory upon, in doing so each implicitly discredits as *unimportant* the interests that *other* scholars are trying to serve.

One group of conflicts scholars thinks that the interests to be served are those of the states. They think the prize should go to the state with the greatest interest in applying its own substantive law.²¹ But the states themselves seem oblivious to this need that scholars attribute to them. Can anyone cite a case in which a state appeared as *amicus curiae* arguing the importance that its own law be applied? (States often appear as *amicus curiae* asserting interests they *do* hold dear.) Has any state legislature declared it important that its substantive law be chosen in some defined category of cases having multistate contacts? My point is not that states are indifferent to having their own law applied in some cases. Obviously, states have a strong interest in seeing conduct with injury-causing potential in their borders adjudged by their own substantive law. But that interest was fully served by Beale's initial choice, in the *First Restatement*, that the law where the injury was sustained should apply.²² That interest, therefore, does not require an indeterminate choice-of-law rule. Moreover, while states care about their substantive law, and obviously want it applied in the

strike down all discrimination against gays and lesbians. *Bowers v. Hardwick*, 478 U.S. 186 (1986), which declined to do so under the Due Process Clause while leaving open the question under the Equal Protection Clause, was decided by a 5-4 vote, and one of the Justices in the majority later publicly recanted. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 596 ed. note (13th ed. 1997). More recent decisions of the Court, while not definitive, reflect an emerging consensus supporting the use of the Constitution and federal statutory law to ban discrimination based on homosexuality. See *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Romer v. Evans*, 517 U.S. 620 (1996). What is perhaps most telling is that Professor Weinberg has had to go to the periphery of what is constitutionally permissible to conjure up a sufficiently troublesome example in order to justify the enterprise.

18. U.S. CONST. art. IV, § 1.

19. See *Union Nat'l Bank v. Lamb*, 337 U.S. 38, 41-42 (1940); *Roche v. McDonald*, 275 U.S. 449, 452, 455 (1928); *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908).

20. See BRILMAYER, *supra* note 1, at 47-68 (describing interest analysis).

21. See HENRY J. STEINER ET AL., TRANSNATIONAL LEGAL PROBLEMS 713 (4th ed. 1994) (explaining that comment (g) to section 98 of the *Second Restatement* "indicates that some defences not available against sister-state judgments can be interposed to those from foreign countries," including, *inter alia*, "that its enforcement would violate public policy").

22. See BRILMAYER, *supra* note 1, at 20-23 (describing the jurisprudential roots of the FIRST RESTATEMENT).

general run of cases, there is no evidence that they think it important that their law be applied in the small subset of cases where choice of law might produce a departure.

Another group of conflicts scholars thinks that the interests to be served are those of the parties—they are entitled to have the most logical law applied to their transactions.²³ Again, this interest can be served in most instances simply by choosing sensible determinate rules. Symeonides's presumptive rules would work reasonably well in this regard if the opportunity for escape were removed.²⁴ To be sure, any set of determinate rules for choosing law will produce less-than-optimal "fits" with the parties' sense of logic in some cases, but it is not worth the surrender of certainty and predictability to secure perfection in these outlying cases. Moreover, in many contexts the parties can agree in advance on the law that will govern their transaction if they care enough.

A third group of conflicts scholars acknowledges that the agenda that drives their approach has nothing to do with conflicts per se, but rather with the underlying substantive law. This group wants the "better" law chosen in every case.²⁵ These scholars recognize that each forum is likely to think its own law better, and their prescriptions give heavy weight to the forum applying its own law.²⁶ They expect that the "better" law will emerge because the plaintiff will choose the forum with the better substantive law.²⁷

Plaintiffs, of course, are not altruistic. If choice of forum determines choice of law, they will pick the forum that will yield them a win. So the "better law" crowd has an agenda: the better law is the law that enables the plaintiff to win. As Professor Weinberg, a leading exponent of this view, has candidly acknowledged (indeed, proudly proclaimed), the tort law that enables the plaintiff to win is the better tort law, and the contract law that enforces the contract is the better contract law.²⁸ If torts or contracts scholars articulated such simplistic formulae for fleshing out the substantive law in their fields, they would be thought to be operating with an incomplete palette. The proposals do not become more sensible because camouflaged under the banner "choice of law."²⁹ Happily, they are unlikely to generate a consensus that makes them operative.

23. See FIRST RESTATEMENT, *supra* note 5.

24. See BRILMAYER, *supra* note 1, at 70-73; SECOND RESTATEMENT, *supra* note 2, § 6 (paying limited deference to this camp by the inclusion of "the protection of justified expectations" and "certainty, predictability, and uniformity of result" as factors to be considered *along with* the conflicting interests championed by other camps in determining which state's law to apply).

25. See Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991).

26. See Weinberg, *supra* note 24, at 65-67.

27. See *id.*

28. See Weinberg, *supra* note 3, at 485. Professor Juenger exhibits a similar rooting interest in his article in this Symposium. See Juenger, *supra* note 3, at 413.

29. What is more, as I have elsewhere shown, there is no reason to assume that the "good guys" will forever have control over where suits are filed. See Gottesman, *supra* note 3, at 14-15.

III. THERE IS NO *BEST* APPROACH TO CHOOSING LAW

As Professor Juenger recognizes, sixty years of philosophizing about what mix of criteria will produce the *best* choice of law have not generated a consensus, or anything approximating one, among either scholars or courts.³⁰ Indeed, little new seems to have emerged from academics in the past several decades, and the field has stumbled along, the warriors in its competing camps reduced to scholarship that examines one new judicial decision after another for its faithfulness to the particular camp's favorite recipe. Small wonder that the bar and the students have stopped paying attention.³¹

It seems a fair deduction that there is no *right* answer to the question of what is the *best* choice-of-law, but simply a competition of tastes. Indeed, even if one were to entertain the notion that there is, somewhere, a *best* solution, it seems clear that we will never achieve a consensus that recognizes it. It makes no sense to sacrifice the benefits of determinacy for a will-o'-the-wisp.

IV. THE QUEST FOR THE *BEST* IMPERILS ACHIEVING
MULTISTATE UNIFORMITY

If one cherishes the hope that all states would adopt the same choice-of-law rules, so that justice is not determined by the forum choice of the party who gets to court first, the quest for the *best* has got to stop. The modern era teaches that quest will generate different choice of law rules in different states. That is virtually inevitable if, as I believe, there is no *best*: it would be a remarkable coincidence if all states landed on the same solution to a question that has no right answer.

Only a determinate set of choice-of-law rules, which acknowledges its imperfections and proclaims as its agenda serving the interests of predictability, administrative efficiency, and uniformity—interests that courts understand and apply in other contexts—has any hope of attracting the necessary consensus. Some will respond, no doubt, that the experience of states that have stuck to the *First Restatement* refutes this hope. Professor Juenger, for example, notes that West Virginia, which purports to adhere to the *First Restatement*, has found it irresistible to depart when the interests of its citizens seem shabbily served.³² But West Virginia is trapped in a prisoner's dilemma. Most of its sister states are employing one or another modern device to disadvantage West Virginia citizens appearing in *their* courts. It would take heroic patience and altruism to adhere faithfully to determinate

30. See Juenger, *supra* note 5, at 403-04. I have no quarrel with Professor Juenger's suggestion that an "interstate" substantive law be developed to resolve multistate disputes, except that achieving that seems even less likely than achieving consensus on a uniform set of choice-of-law rules.

31. See Weinberg, *supra* note 3, at 478 n.16.

32. See Juenger, *supra* note 3, at 410-11 & nn. 70, 72 (discussing *Mills v. Quality Supplier Trucking, Inc.*, 510 S.E.2d 280 (W. Va. 1998), where the court uses forum's comparative negligence standard because contributory negligence standard of non-forum state would contravene public policy).

rules when the other players are not.³³ One might reasonably hope that all states would desist if there emerged a set of determinate rules that corrected for the “mistakes” that led to the unraveling of the *First Restatement*.

V. IT WILL TAKE A NEW CREW TO LEAD US OUT
OF THE SEA OF INDETERMINACY

I am not opposed to the adoption of a third restatement. Or, more accurately, I am not opposed to the adoption of a third restatement. (The capitals connote entrusting the enterprise to a body dominated by conflicts scholars, and to that I am opposed.) Some centralized undertaking is necessary if the current mess is to be cleaned up. I am on record as favoring a congressional solution, but as yet Congress has remained idle. Failing that, I would propose entrusting this task to a forum of judges and lawyers, who would better appreciate the practical implications of the choices made: something analogous to the judicial conferences that generate federal rules. Yes, there’s usually one academic, entitled the “reporter,” who participates in these conferences. With appropriate care, an academic could be found who would not subvert the process and cast us all adrift once more.³⁴

33. Professor Brilmayer explains this elegantly. See BRILMAYER, *supra* note 1, at 181-93.

34. See BRILMAYER, *supra* note 1; Laycock, *supra* note 1.