Introduction

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Our subject—variously termed choice of law, conflict of laws, or conflicts law—is the body of legal doctrine that seeks to provide a basis for choosing a substantive rule (e.g., in tort or contract) over the conflicting rule of another place. Rules conflict when their applications would produce opposing results in the same case, and when the relation of each place to the controversy makes it plausible for the rule of either place to goveru. Conflicts law is usually state common law, applied either by state courts or by federal courts in exercise of the latter's diversity jurisdiction.

Choice of law has for more than half a century pursued multiple, perhaps competing objectives in theory. It has often appeared uncertain in application. This has prompted extensive debate over what conflicts law is or should be. Should it be multilateral in character (a body of rules to be administered throughout a community of jurisdictions)? Or unilateral (keyed to the reach or purpose of laws vying for acceptance)? When or how should conflicts law promote particular substantive results (e.g., pro-recovery law in product liability cases)? When should it defer to expectations of the parties? How many of these or other policies can be consolidated in a single choice-of-law approach (conflicts eclecticism)?

Our Symposium contributors examine many of the contemporary problems associated with choice of law and, specifically, consider whether or how a third restatement of conflicts of law might improve the quality of conflicts law. Many questions arise. Is it right to assume (as a new restatement probably would) that conflicts law in the United States will remain largely state common law? If so, is a new conflicts restatement desirable to overcome shortcomings in the *Restatement (Second) of Conflict of Laws* ("*Second Restatement*")? For example, should a new conflicts restatement exhibit a clearer preference between rules and method in choice of law? A clearer preference among contending conflicts values (for example, multilateralism, unilateralism, substantivism, party expectations)? Should a new conflicts restatement take greater account of choice of law by statute or treaty? Of recent developments here and abroad in choice of law, adjudicatory jurisdiction, and the enforcement of judgments?

The American Law Institute ("ALI" or "Institute") took a strongly multilateralist position in its original *Restatement of the Law of Conflict of Laws* in 1934, and replaced it with an eclectic approach in the *Second Restatement* in 1971. The *Second Restatement* has attracted many judges (if fewer commentators), but it has not prevented the subject of choice of law from reaching what many believe is a state of crisis. The restatements of the ALI are entering their third generation, yet the ALI has not initiated work on a third restatement of conflicts.

Conflicts continues to be perhaps the most confused, controversial, and unpopular branch of American law. Yet I doubt that the absence to date of a new conflicts initiative is because the ALI would find the project too daunting. The mandate of the Institute is after all "to improve law and its administration."[1] The features of conflicts

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1. AMERICAN LAW INSTITUTE, THIS IS THE AMERICAN LAW INSTITUTE 2. The Institute's charter stated its purpose to be "to promote the clarification and simplification of the law and its better adaptation to social needs, to seeure the better administration of justice, and to

law that make the subject especially problematic should if anything increase the likelihood of a third restatement project by the Institute before too long.

Yet the following argument can be made against taking the possibility of a third conflicts restatement seriously. The depths of dissatisfaction with conflicts law are sobering.[2] They are also longstanding.[3] Perhaps then a third conflicts restatement is a mistake simply because it supports the idea that it is desirable to *have* conflicts law. The argument could take a couple of forms. First, can we not focus our energies instead on making substantive law uniform—eliminating conflicts, hence the need for conflicts law? Second, even in the absence of substantive law uniformity, can we not simply refuse to take conflicts law seriously, somehow willing it out of existence?[4]

Neither of these options is realistic. Concerning the first, opportunities abound within our federal structure of government for each state within the Union to exercise an independence in substantive law making. This is due to the frequent absence of national law, and due to the lack of any requirement that sister states agree. Uniform substantive law therefore is unlikely ever to appear on a scale rendering American conflicts law obsolete.[5] Concerning the second option, discussions appearing throughout this Symposium demonstrate the reality of conflicts problems and the continuing need for conflicts law.

That is not to say that our Symposium participants necessarily agree on the desirability or shape of a third conflicts restatement. Some contributors reject a restatement approach for conflicts,[6] or question whether the time is right for a new

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encourage and carry on scholarly and scientific legal work." *Id.*

2. *See, e.g.*, GENE R. SHREVE, A CONFLICT-OF-LAWS ANTHOLOGY 320-22 (1997) (reporting negative judgments about conflicts law by law students, the bar, the bench, and the legal academy).

3. Negative attitudes of lawyers toward conflicts law imperiled publication of the original conflicts restatement. An ALI insider wrote:

> The law book people with whom the Institute was associated in publishing the Restatement shook their heads dolefully at the mention of a volume in the conflict of laws. They predicted that any book bearing that title would be a financial failure because of the unpopularity of the subject. Only when marketed as part of a set of books, they said, would the Restatement volume in conflict of laws reach the shelves of lawyers and law libraries.

HERBERT F. GOODRICH, YIELDING PLACE TO NEW: REST VERSUS MOTION IN THE CONFLICT OF LAWS 9 (1950).

4. For an example of this argument, see Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949 (1994).

5. The same persistence of conflicts issues occurs in other countries employing a federal system of government. *See, e.g.*, Peter Nygh, *Choice-of-Law Rules and Forum Shopping in Australia*, 46 S.C. L. REV. 899, 912-13 (1995); John Swan, *Federalism and the Conflict of Laws: The Curious Position of the Supreme Court of Canada*, 46 S.C. L. REV. 923, 931 (1995). In contrast, the common source of substantive law for countries under a unitary form of government obviates most intranational conflicts. Conflict of laws is therefore a much less significant category in the unitary countries of Germany, Italy, and France. *See, e.g.*, Peter E. Herzog, *Constitutional Limits on Choice of Law*, 234 RECUEIL DES COURS 239, 311-25 (1992).

6. *See* Michael H. Gottesman, *Adrift on the Sea of Indeterminancy*, 75 IND. L.J. 527 (2000); Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403 (2000).

conflicts restatement.[7] Others more receptive to the prospect of a third restatement differ over what they would like to see: rules as opposed to method,[8] method as opposed to rules,[9] governmental interest analysis,[10] avoidance of governmental interest analysis,[11] substantivism,[12] or avoidance of substantivism.[13] Contributors variously urge that our conception of a new conflicts restatement must be informed by more extensive empirical research,[14] a better understanding of international legal developments,[15] experience gained from the preparation of the earlier conflicts restatements[16] or from the preparation of recent restatements in other fields,[17] and a broad appreciation of opportunities to reform American conflicts law possible from a new restatement.[18]

This is one of the richest and most important collections of writings ever assembled on a conflicts topic. I am deeply grateful to our scholars for contributions and to the editors of the *Indiana Law Journal* for their tireless efforts to bring this Issue together. I hope that readers find in this Symposium both enlightenment and a sense of direction for the future.

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7. *See* Gary J. Simson, *Leave Bad Enough Alone*, 75 IND. L.J. 649 (2000); Russell J. Weintraub, *The Restatement Third of Conflict of Laws: An Idea Whose Time Has Not Come*, 75 IND. L.J. 679 (2000).

8. *See* Alfred Hill, *For a Third Conflicts Restatement—But Stop Trying To Reinvent the Wheel*, 75 IND. L.J. 535 (2000).

9. *See* Robert A. Sedler, *Choice of Law in Conflicts Torts Cases: A Third Restatement or Rules of Choice of Law?*, 75 IND. L.J. 615 (2000).

10. *See, e.g.*, Bruce Posnak, *The Restatement (Second): Some Not So Fine Tuning for a Restatement (Third): A Very Well-Curried Leflar over Reese with Korn on the Side (Or Is It Cob?)*, 75 IND. L.J. 561 (2000); William A. Reppy, Jr., *Codifying Interest Analysis in the Torts Chapter of a New Conflicts Restatement*, 75 IND. L.J. 591 (2000).

11. *See* Hill, *supra* note 8.

12. *See, e.g.*, Joseph William Singer, *Pay No Attention to That Man Behind the Curtain: The Place of Better Law in a Third Restatement of Conflicts*, 75 IND. L.J. 659 (2000).

13. *See* Perry Dane, *Whereof One Cannot Speak: Legal Diversity and the Limits of Restatement*, 75 IND. L.J. 511 (2000).

14. *See* Patrick J. Borchers, *Empiricism and Theory in Conflicts Law*, 75 IND. L.J. 509 (2000); William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417 (2000). *But see* Courtland H. Peterson, *Restating Conflicts Again: A Cure for Schizophrenia?*, 75 IND. L.J. 549 (2000) (questioning the possible contributions of empiricism).

15. *See* Mathias Reimann, *A New Restatement—For the International Age*, 75 IND. L.J. 575 (2000); Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635 (2000).

16. *See* Harold G. Maier, *The Utilitarian Role of a Restatement of Conflicts in a Common Law System: How Much Judicial Deference is Due to the Restaters or "Who are these guys, anyway?"*, 75 IND. L.J. 541 (2000).

17. *See* Aaron D. Twerski, *One Size Does Not Fit All: The Third Multi-Track Restatement of Conflicts of Laws*, 75 IND. L.J. 667 (2000).

18. *See* Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437 (2000); Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475 (2000).