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# Every Conflicts Decision is a Promise Broken

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## Every Conflicts Decision is a Promise Broken

Gene R. Shreve\*

How appropriate it is for the *Louisiana Law Review* to use this issue to recognize Symeon Symeonides for his distinguished contributions at the Paul M. Herbert Law Center. His record of scholarship, of leadership and of service in the conflicts community is quite remarkable. No one at the close of the last century had contributed more. And it is wonderful to know that we may expect those contributions to continue in the new millennium.

The papers in this symposium demonstrate the many ways in which Professor Symeonides has influenced the work of others. My own debt to him is great. I have found his periodic surveys of conflicts developments in American courts indispensable.<sup>1</sup> His public service and scholarship<sup>2</sup> on the codification of American conflicts law are unparalleled. His curiosity seems boundless, and I have profited greatly from his lucid and probing discussion on many topics.<sup>3</sup> Professor Symeonides has also been a generous colleague. He kindly permitted me to present excerpts from several of his works in my choice-of-law anthology,<sup>4</sup> and he provided a principal paper<sup>5</sup> for a symposium I organized on possibilities for a third restatement of conflicts.<sup>6</sup> The chance to offer this unabashed tribute is reason enough to write for the symposium. And I will return to the splendid work and example of Professor Symeonides after ruminating awhile about conflicts jurisprudence. I mean by "conflicts jurisprudence" to describe something more than the common law cases that make up the gist of our subject.<sup>7</sup> My interest is in the larger, epistemological side of conflicts law: the exertions necessary to reach "justified true belief"<sup>8</sup> about what conflicts law

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1. E.g., Symeon C. Symeonides, *Choice of Law in the American Courts in 1997*, 46 Am. J. Comp. L. 233 (1998).

2. E.g., Symeon C. Symeonides, *Problems and Dilemmas in Codifying Choice of Law for Torts: The Louisiana Experience in Comparative Perspective*, 38 Am. J. Comp. L. 431 (1990).

3. E.g., Symeon C. Symeonides, *Exception Clauses in American Conflicts Law*, 42 Am. J. Comp. L. 813 (Supp. 1994).

4. Gene R. Shreve, *A Conflict-of-Laws Anthology* (1997).

5. Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 Ind. L. J. 437 (2000).

6. Symposium, *Preparing for the Next Century—A Third Restatement of Conflicts?*, 75 Ind. L. J. 399 (2000) (contributions by Patrick J. Borchers, Perry Dane, Michael H. Gottesman, Alfred Hill, Friedrich K. Juenger, Andreas Lowenfeld, Harold G. Maier, Courtland H. Peterson, Bruce Posnak, Mathias Reimann, William A. Reppy, Jr., William L. Reynolds, William M. Richman, Symeon C. Symeonides, Robert A. Sedler, Linda Silberman, Gary J. Simson, Joseph William Singer, Aaron D. Twerski, Louise Weinberg, and Russell J. Weintraub).

7. In other words, I mean by jurisprudence "the study not of the actual laws of particular legal systems, but of the general concepts and principles that underlie a legal system or that are common to all such systems." Philip Soper, *Jurisprudence*, in *Cambridge Dictionary of Philosophy* 394 (Robert Audi, ed., 1995).

8. We return to this term eventually. See *infra* note 25 and accompanying text.

is or should be, and the consequences to our legal culture from the strain and difficulty of those exertions.

Soon after I began teaching and researching in conflict of laws twenty-five years ago, I noticed widespread negative attitudes about the subject held by lawyers, judges, law students and academics outside the field. These trouble me still. Conflicts law continues to be unpopular and difficult to understand. Conflicts theory continues to be in disarray. These sad conditions are easy to document<sup>9</sup> and barely open to dispute.<sup>10</sup> They trouble me in part because I like the subject very much. Conflict of laws is to me fascinating, important, and a delight to teach.<sup>11</sup> The larger point however is not that others ought to feel toward conflicts as I do, rather it is that a consensus that it is possible to achieve justice through conflicts law (current or revised) is necessary for our society.

Why is conflicts law so difficult? Even members of the legal academy who spend much of their careers trying to obtain and transmit a knowledge of the subject continue to find conflicts perplexing. Professor Arthur von Mehren observed:

Those who work in the field of choice of law are, at times, discouraged by the apparently intractable nature of the problems with which they must grapple. Intricate and subtle analyses are undertaken; ambiguities and uncertainties are painfully resolved. Ultimately, a result is reached, yet the solution is too frequently neither entirely satisfying nor fully convincing.<sup>12</sup>

Why is this so? For von Mehren, the answer lay in the multistate character of conflicts problems. "[E]ven where wholly domestic cases present a comparable order of difficulty, the solutions given in the multistate cases are more likely to trouble one's sense of justice."<sup>13</sup> He concluded that "one who expects to achieve

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9. For extensive evidence, see Gene R. Shreve, *Notes from the Eye of the Storm*, 48 Mercer L. Rev. 823 (1997) [hereinafter *Eye of the Storm*]; Shreve, *supra* note 4, at 309-10, 320-22; Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 Ind. L. J. 271, 279-81 (1996).

10. But see Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 Cornell Int'l L. J. 245 (1991) (questioning whether conflicts law is more difficult than other, ordinary questions of procedure).

11. Reasons supporting these views appear at some length in Gene R. Shreve, *Teaching Conflicts, Improving the Odds*, 90 Mich. L. Rev. 1672 (1992).

12. Arthur T. von Mehren, *Choice of Law and the Problem of Justice*, 41 Law & Contemp. Probs., Winter 1977, at 27.

13. *Id.* He explained his conclusion as follows:

Even in cases that do not present a true conflict, the fact that the parties will ordinarily be from different states tends to reduce significantly the decision's claim to legitimacy. A further source of doubt in some cases is that lay thinking is often strongly shaped by the territorial connections of the total situation although analytically these may be largely irrelevant for a jurist in deciding what law governs the issue before the court. The justice of a decision in a fully domestic case can never be challenged on such grounds and is greatly strengthened by the fact that the views of only one society need be taken into consideration. Finally, a court in a multistate case must undertake a process of analysis that is inherently more complex than that faced in a purely domestic case; to a greater or lesser degree, the court must take into account the rules and policies of foreign legal orders. Accordingly, the areas of possible doubt and ambiguity are larger.

*Id.* at 42. (footnote omitted).

results in multistate cases that are as satisfying in terms of standards of justice and of party acceptability as those reached in purely domestic cases is doomed to disappointment."<sup>14</sup>

Professor von Mehren's article is the best source to date on conflicts justice, and it bears careful reading. His focus on the multistate problem as a clash of two political systems<sup>15</sup> helps to answer the question why conflicts law is so perplexing. I will now attempt to add to that answer in a different way, by explaining how conflicts questions by their nature pose a crisis in legal reasoning. My suggestion will be that, as soon as it becomes plausible in the multistate setting for an American judge to select either of two conflicting rules of law (and I will accept von Mehren's political analysis as a means of demonstrating that plausibility), our legal process goes a little haywire.

Plato said in *The Republic* that a thing cannot be both what it is and what it is not.<sup>16</sup> This is one of the best-known expressions of the rule of logical contradiction,<sup>17</sup> a concept rooted in Western philosophy<sup>18</sup> and essential to legal reasoning.<sup>19</sup> In New York at any given time, the law cannot mean for a particular case that the defendant committed a tort and also that the defendant did not commit a tort. The law in Indiana for a given case cannot be that the defendant is in breach of a contract but at the same time not in breach of that contract. Clear as two conflicting

My apologies to any readers who may be put off by the length of this quotation and others that will appear in this paper. My reasons for quoting at length vary. In some cases readers may have a difficulty obtaining the original source. In others, it is my own writing and I cannot think of another way of making the point that would serve any better. In the case of Professor von Mehren's article, the material was simply too rich to leave out.

14. *Id.* at 42.

15. The detail of Professor von Mehren's argument appears *supra* note 13.

16. Socrates says to Glaucon:

It is clear that the same thing will never do or undergo opposite things in the same part of it and towards the same thing at the same time; so if we find this happening, we shall know it was not one thing but more than one.

The Republic, Book IV, from Great Dialogues of Plato 235, (W.H.D. Rouse trans., E. Warmington & P. Rouse, eds., 1956).

17. Plato may have been influenced here by Parmenides of Elea, who earlier explained that "reality must necessarily be, or must necessarily not be, or must both be and not be, which is impossible." Simon Blackburn, *Parmenides of Elea*, in *The Oxford Dictionary of Philosophy* 278 (1994).

18. It represents the first among three "laws of thought" that are "laws of logic that were traditionally treated as basic and fundamental to all thought . . . (1) (*the law of contradiction*), that nothing can be both *P* and not-*P*." Boruch A. Brody, *Glossary of Logical Terms*, in 5 *The Encyclopedia of Philosophy* 67 (Paul Edwards ed., 1967).

19. Many more sophisticated points on the nature and reach of the rule of law are widely debated. The basic premise, however, is well-accepted. A successful judicial opinion must explain why the same result would occur in a category of like cases. *Viz.*, like cases must be decided according to the same rule. See, e.g., M.P. Golding, *Principled Decision-Making and the Supreme Court*, 63 *Colum. L. Rev.* 35 (1963); Edward H. Levi, *An Introduction to Legal Reasoning*, 15 *U. Chi. L. Rev.* 501, 501-02 (1948); James R. Murry, *The Role of Analogy in Legal Reasoning*, 29 *UCLA L. Rev.* 833 (1982); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 *Cal. L. Rev.* 1 (1974).

rules may be in and of themselves, for both to stand as the law of the same place renders that law incoherent.

However difficult it may be to determine the content of law in a purely domestic case, it will be only one thing—the law of that place. The law will not be what it is and also what it is not. The promise of legal reasoning is that the judge will be able to find and declare in each domestic case that one meaning (what the law is), rejecting thereby all meanings in opposition (what the law is not). Judges shore up the authority of their decisions by keeping this promise, for to select a given meaning for domestic law is to reject as false (not law) any conflicting meaning that has been urged upon the court.

Courts, however, cannot keep the same promise when resolving choice-of-law questions. The clear inference in domestic cases that meanings of the law opposed to the meanings given are not law disappears in the conflicts setting. Opposing law not chosen by the conflicts court is no less law for that. Necessary as it may be to decide the case, resolution of the choice-of-law issue usually does nothing to diminish either the validity of each law in the place from which it has been taken or the plausibility of applying that law to the case at hand. Law applicable to the conflicts case remains something that is and is not.

One can try to resist this idea by maintaining that even conflicts cases have but a single applicable rule of decision. It is certainly true that each court will use the tools of its own local conflicts law to direct and validate the final choice-of-law result. The winning rule of the two vying for acceptance is in that sense legitimated by application of the court's conflicts law that chose it.

Yet, the applicability of either of the conflicting rules cannot be as self-evident as the application of domestic law would be in the purely domestic case. Each of the rules vying for application in the conflicts setting enjoys a pedigree of validity in the place from which it is taken. The laws in that sense are equally correct in their (conflicting) applications. Either law can be chosen without destabilizing the meaning of the law not chosen. In this basic sense, then, the opposing laws are equally deserving of application. Conflicts law cannot break down this essential parity. It can only respond to the need to choose and rationalize an outcome. The unpopularity of conflicts law and the perennial tumult in conflicts theory therefore reflects in part this innate crisis in legal reasoning.

There is much truth in the statement that conflicts law is unpopular *because* it is difficult to understand. Many judges, lawyers, students and academic colleagues who are not close to the subject certainly dislike it for that reason. Because we who make up the American conflicts academy have failed either to make the subject clear or to explain satisfactorily why it cannot be made clear, we bear considerable responsibility for its unpopularity, and hence for the corrosive effect of that unpopularity on conflicts law.

We are less open to criticism for failing to clarify the subject. The aspects of the conflicts problem noted earlier—von Mehren's critique of the political instability of multistate cases and my description of the alienating effects of the conflicts questions on judicial reasoning—are impossible to eliminate from conflicts

law. This means that conflicts law can never be entirely clear; therefore, the conflicts academy can hardly be blamed for failing to make it so.

That is not to say, of course, that conflicts law could not be *clearer* (or in other respects better) than it is. But common law courts will continue to have difficulty improving conflicts law until they acquire a deeper understanding of the analytical and theoretical dimensions of the conflicts problem. Courts will need, for that understanding, help from the custodians of conflicts knowledge—the legal academy. To be of such assistance, American conflicts scholars must exhibit far more humility, cooperation, and real-world curiosity than they have so far.

Conflicts scholarship is in a sorry state. It “has . . . foundered in endless, self-perpetuating debate over the nature and value of multilateralism, unilateralism, substantivism, and the like.”<sup>20</sup> Conflicts theory has become increasingly unmanageable. “There is now in our conflicts literature such a disparate, often contradictory, accretion of policies, rules, systems, catch-phrases, diagnoses, and proposed cures” that it is “almost impossible for theorists now writing to demonstrate with complete success how their ideas are new, helpful, or even intelligible.”<sup>21</sup>

Is this judgment of the conflicts academy too harsh? Not if we assume that conflicts scholars are responsible for pursuing their part of the university ideal:<sup>22</sup> “the preservation, extension and communication of knowledge.”<sup>23</sup> They are most responsible for the epistemology of conflicts law. That is, they are most “concerned with the nature of [conflicts] knowledge, its possibility, scope, and general basis.”<sup>24</sup> As conservators of conflicts knowledge in this full and dynamic sense, conflicts scholars must offer up “justified true belief” about the subject.

[K]nowledge is standardly defined as [*justified true belief*], because at the very least it seems that to know something one must believe it, one’s belief must be true, and one’s reason for believing it must be satisfactory in light of some standard, because one could not be said to know something if one

20. Shreve, *Eye of the Storm*, *supra* note 9, at 829.

21. *Id.* at 828. See Perry Dane, *Conflict of Laws*, in *A Companion to Philosophy of Law and Legal Theory* 209 (D. Patterson ed., 1996) (“More recently, choice of law has sometimes resembled the law’s psychiatric ward. It is a place of odd fixations and schizophrenic visions.”).

22. This role for law professors is argued forcefully in Francis A. Allen, *Law, Intellect and Education* (1979).

23. Dallas Willard, *The Unhinging of the American Mind: Derrida as Pretext*, in *European Philosophy and the American Academy* 5 (Barry Smith ed., 1994). In both teaching and in scholarship, there is a delicate balance between preserving and questioning knowledge.

The justification for a university is that it preserves the connection between knowledge and the zest of life, by uniting the young and the old in the imaginative consideration of learning. . . . This atmosphere of excitement, arising from imaginative consideration, transforms knowledge. A fact is no longer a bare fact: it is invested with all its possibilities. It is no longer a burden on the memory: it is energizing as the poet of our dreams, and as the architect of our purposes.

Alfred North Whitehead, *The Aims of Education and Other Essays* 93.

24. D. W. Hamlyn, *History of Epistemology*, in *The Oxford Companion to Philosophy* 242 (Ted Honderich ed., 1995).

had, say, arbitrarily or haphazardly decided to believe it. So each of the three parts of the definition appears to express a necessary condition for knowledge. The claim is that taken together they are sufficient for knowledge.<sup>25</sup>

Conflicts scholars always have appeared to satisfy the first of these requirements, sincerity of belief. Problems come with the combined difficulties generated by the second and third requirements. What can truly be said about what conflicts law was, is, could, or should be? What in conflicts law is real, or possible, or best? An empirical turn in conflicts scholarship appears imminent.<sup>26</sup> Yet, notwithstanding the dominance of empiricism in the physical sciences and its considerable importance for the social sciences and law, it will never answer some of the most important questions raised in the pursuit of conflicts knowledge.<sup>27</sup> For example, it is doubtful that empirical research will offer much help concerning two important aspects of the conflicts problem noted earlier, Professor von Mehren's critique of the political instability of multistate cases and my description of the alienating effects of conflicts questions on judicial reasoning. It is not that the statements of these problems are unrelated to the real world. On the contrary, our views rest on representations about how the world is—as they must.<sup>28</sup> It is simply that there are no mysteries in the facts supporting either of our perspectives to be resolved through empirical inquiry.

Professor von Mehren and I have raised intractable conflicts problems. Many more probably exist in the conflicts field, which Benjamin Cardozo called "one of the most baffling subjects of legal science."<sup>29</sup> As these conflicts imponderables are identified, knowledge about them continues through the development of theories for coping with them. In any field, the pursuit of theory is innately difficult and controversial.

Theory wields a double intimidation; on the one hand it suggests the pertinence of a vast range of things you don't know, but if you attempt to catch up, put a lot of work into reading and the things people tell you you

25. A.C. Grayling, *Introduction to Chapter One, in Philosophy—A Guide Through the Subject* 9 (A.C. Grayling ed., 1995).

26. See, e.g., 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.* 549 (2000).

27. Courtland H. Peterson, *Restating Conflicts Again: A Cure for Schizophrenia?*, 75 *Ind. L. J.* 549 (2000).

28. "Whether what is said about the world is true surely must depend on how the world is." Bede Rundle, *Correspondence Theory of Truth*, in *The Oxford Companion to Philosophy* 166 (Ted Honderich ed., 1995).

29. Benjamin Cardozo, *The Paradoxes of Legal Science* 67 (1928). In addition, see Max Rheinstein, *How to Review a Festschrift*, 11 *Am. J. Comp. L.* 632, 655 (1962) (calling conflicts law the "most difficult and most confused of all branches of the law"); Friedrich K. Juenger, *Choice of Law and Multistate Justice* 1 (1993) ("Alas, in spite of all the valiant intellectual efforts lavished on it, and the voluminous literature that has built up over the ages, the law of conflicts remains mired in mystery and confusion.").

should know, you discover that theory is not settled knowledge that you can comfortably apply. Theory is not a field you could ever master, though it simultaneously presents mastery as a goal (you hope that theoretical reading will give you the concepts, the metalanguage, to order and understand the phenomena that concern you) and makes mastery impossible, not just because there is always more to know, but more specifically and more painfully because theory is itself the questioning of presumed results and the assumptions on which they are based. The nature of theory, by this account, is to undo, through a contesting of premises and postulates, what you thought you knew, so that there may appear to be no real accumulation of knowledge or expertise.<sup>30</sup>

All of the numerous running arguments within the conflicts academy are laden with theory.<sup>31</sup> Given the innate difficulty of conflicts law and given the need to pursue so much conflicts knowledge through the daunting path of theoretical discourse, one can wonder why the conflicts academy has not demonstrated (1) more humility about the task of understanding their subject, (2) more empathy, cooperation, and support toward their equally hard-pressed colleagues, and (3) more curiosity and concern about how lawyers and judges are faring as they grapple with the subject.

The performance of the conflicts academy overall has been dismal in each of these respects. Conflicts scholars are often too easy on themselves and like-minded colleagues and too hard on others. They are prone to "impenetrable analysis, harsh dismissal of opposing views, and hollow claims of victory."<sup>32</sup> In their work, "the difficulty of a legal question is demonstrated less by agreement on that score. . . than by the rising decibel level of arguments over who is obviously right and obviously wrong."<sup>33</sup> Many appear indifferent to the work day problems that lawyers and judges have with conflicts law. Correspondingly, the latter have become less interested in the work of conflicts scholars.<sup>34</sup>

There may be many reasons why these conditions have afflicted conflicts scholarship. Academic lawyers often present their observations, conclusions and beliefs in a manner somewhat like a courtroom lawyer's brief to a judge. Legal scholars usually argue "a solution, one single answer that recommends itself above all others."<sup>35</sup> When, however, academic lawyers start to debate in a field (like

30. Jonathan Culler, *Introduction: What's the Point?*, in *The Point of Theory—Practices of Cultural Analysis*, 14 - 15 (Mieke Bal & Inge E. Boer, eds., 1994).

31. See *supra* text accompanying notes 20 and 21.

32. Shreve, *Eye of the Storm*, *supra* note 9, at 824.

33. Gene R. Shreve, *Conflicts Law—State or Federal?*, 68 *Ind. L. J.* 907, 911-12 (1993).

34. "[T]he role of conflicts scholarship in judicial opinions seems to be diminishing and . . . most new discussion about conflicts theory seems confined to a small . . . academic circle." Shreve, *Eye of the Storm*, *supra* note 9, at 828.

35. Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 *Va. L. Rev.* 1545, 1567 (1990). The "legal scholar adopts a voice that is objective, neutral, impersonal, authoritative, judgmental and certain." *Id.* at 1568 (footnotes omitted).

It is tempting to speculate that academic lawyers are more combative than other scholars. Yet



conflicts) that involves a great deal of theory, their adversary attitude and the intellectual abstractions attending theory may form a combination toxic to productive discourse: "so often we think the problem 'solved' when our abstraction has so overcome our opponent's that, for the moment, he can think of no other abstraction with which to counter-attack."<sup>36</sup>

For the conflicts academy to shed its difficulties, it will need exemplars. One such person is certainly Professor Symeonides. He has continuously demonstrated that exercise of a sharp, critical mind does not require antagonism; that one can present important and original work without condemning the work of others; that theory and critique can be both intelligible and profound; and that conflicts colleagues, the bench and the bar can be supported in their struggles with conflicts law and are worth caring about.

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dissonance appears to be on the rise throughout the university—"where good work and 'the best minds' are understood in terms of novelty and antagonism" Willard, *supra* note 23, at 5.

What marks "good work" at present is fruitful antagonisms with the discourse group. Not stability, but instability, is valued, where the best players in the game of "knowledge" are always requesting that *new* rules be introduced to govern the use of descriptive (denotative) language games. . .

*Id.* at 4.

36. George Raymond Geiger, *Dewey's Social and Political Philosophy*, in *The Philosophy of John Dewey* 345-46 (Paul A. Schlipp & Lewis E. Hahn eds., 3d ed. 1989).