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CONFLICTS EMPIRICISM

GENE R. SHREVE*

The topic of this symposium, “American Conflicts of Law at the Dawn of the 21st Century,” is an important one, and I am grateful to Dean Symeonides and to the staff of the Willamette Law Review for the invitation to participate. Not long ago, I coordinated another symposium that addressed American conflicts law at the turn of the century.¹ My position as editor required me to maintain a distance from any particular topic raised in that symposium. One topic—empirical research in conflict of laws—especially intrigued me, and I am delighted to have an opportunity now to weigh in on that topic with some thoughts of my own.

In one of the main papers in that earlier symposium, Professors William Richman and William Reynolds argued for an empirical turn in conflicts scholarship.² The authors described two existing forms of conflicts empiricism: a new genre of statistical studies³ and more traditional, jurisdiction-by-jurisdiction surveys

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1. See Symposium, *Preparing for the Next Century—A New 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, Matias 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).

2. See William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417 (2000). Dean Patrick Borchers registered basic agreement with their position in a brief comment. Patrick J. Borchers, *Empiricism and Theory in Conflicts Law*, 75 IND. L.J. 509 (2000).

3. 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). Richman and Reynolds are particularly enthusiastic about this work. Richman & Reynolds, *supra* note 2, at 428-30.

of case developments.⁴ Conflicts empiricism, said the authors, “reasons from multiple results in actual cases toward choice-of-law rules of thumb that courts actually follow. This style of reasoning is not unknown in the law. It is essentially the program of the Realists, who were concerned with what courts do, rather than what they say.”⁵

To Richman and Reynolds, developments in conflicts empiricism were “reminiscent of progress in the history of science. At first scientists speculated about the phenomena, then conducted limited observations of the relatively few instances, then multiplied and systemized their observations, and finally began to test hypotheses statistically.”⁶ The authors maintained that recent statistical studies help to resolve longstanding debate on matters including eclecticism and methodology in choice of law.⁷

Later in the symposium, however, Professor Courtland Peterson expressed reservations. “There may indeed be a consensus that . . . a sorry state of affairs exists in the general run of conflicts cases,” he wrote. “I am much inclined to accept that unhappy conclusion, but less sanguine than others about the potential of empirical studies as a remedy for the situation.”⁸ Considering whether empiricism could facilitate the development of a new restatement of conflicts, Peterson wrote:

There are truly formidable difficulties. First, if restatement is supposed to reflect actual practice, and if we *really* want to get it right, we need to look not only at the behavior of judges but also at the behavior of lawyers and their clients. It is a virtual certainty that the latter often settle controversies involving conflicts questions precisely because the outcome of the litigation would be unpredictable. . . . And even as to settlements which occur because the resolution of the conflicts issues was thought to be predictable, how does one accumulate the data to make such a study?⁹

In short, Peterson found useful the limited sort of conflicts

4. Over the years, Dean Symeonides has perfected this model. See, e.g., Symeon C. Symeonides, *Choice of Law in the American Courts in 1998: Twelfth Annual Survey*, 47 AM. J. COMP. L. 327 (1999).

5. Richman & Reynolds, *supra* note 2, at 427.

6. *Id.* at 428.

7. *Id.* at 428-33.

8. Courtland H. Peterson, *Restating Conflicts Again: A Cure for Schizophrenia?*, 75 IND. L.J. 549, 551 (2000).

9. *Id.*

empiricism undertaken so far but noted that “this is probably about the best that we can hope for from empirical studies in this area.”¹⁰

Before continuing this dialog on conflicts empiricism, it might be useful to consider at greater depth the concepts underlying the discussion.

Empiricism and theory are coordinate features of human belief. “[A]n empirical belief is one capable of being confirmed or disconfirmed by sense experience.”¹¹ “[A]n empirical quality of things is one that can be represented in sense experience, as opposed to an inferred or postulated theoretical property.”¹² Theory is “the sense of the principles or methods of a science or art rather than its practice.”¹³ It is “the sense of an explanation based on observation and reasoning.” Theory is something we create; “it sets rules and thus functions like fundamentalism.”¹⁴

The acquisition of human knowledge requires incessant travel between the realms of empiricism¹⁵ and theory. For example, we have a succession of experiences as children where touching something hot causes pain. Our recollection of these experiences (a simple form of empiricism) eventually stirs something in us, providing the incentive and inspiration to develop a theory about hot things: (1) touching them causes pain; (2) pain makes us unhappy;¹⁶ (3) therefore, we will avoid touching hot things whenever we can.

Even the most commonplace exercises of empiricism are important because they enable us to add things up, to make

10. *Id.* at 552.

11. SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* 118-19 (1994). “A statement, proposition, or judgment is empirical if we can only know its truth or falsity by appealing to experience.” Alan R. Lacey, *Empirical*, in *THE OXFORD COMPANION TO PHILOSOPHY* 226 (Ted Honderich ed. 1995).

12. BLACKBURN, *supra* note 11, at 119.

13. *THE BARNHART DICTIONARY OF ETYMOLOGY* 1132 (Robert K. Barnhart ed. 1988).

14. Mieke Bal, *Scared to Death*, in *THE POINT OF THEORY* 33 (Mieke Bal & Inge E. Boer eds., 1994).

15. I intend for “empiricism” its most generic meaning: “The use of empirical methods in any art or science.” *THE OXFORD ENGLISH DICTIONARY* 129 (1971). That is to say, I do not intend for the term the meaning it carries in philosophical movements of empiricism: “that experience has primacy in human knowledge and justified belief.” Nicolas O. Wolterstorff, *Empiricism*, in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 224 (Robert Audi ed., 1995).

16. Here we also draw on experiences with pain not caused by hot things.

sense of our existence. But it is scientific empiricism—the disciplined, systematic empiricism of the natural and social sciences—that best informs academic theory. Academic theory is both altruistic and self-seeking, the latter because it secures for academics a privileged place within their formal subcultures of expertise.¹⁷ They are responsible for the epistemologies of their fields: the communication of justified true belief.¹⁸ Scientifically empirical “data”¹⁹ most convincingly justify true belief (academic theory), enhancing the academic’s communication of knowledge and claim to expertise.²⁰

Data in this sense represent the results of controlled, repeated factual investigations. The scientific empiricist creates a research “model”²¹ for the inquiry, seeking in the same way the same facts from a category of like sources.²² This may take the form of data from experimentation;²³ collection of data from inert, passive sources;²⁴ or collection of data from active (perhaps interactive) sources.²⁵ Unscientific empiricism occurs without

17. CHERYL GEISLER, *ACADEMIC LITERACY AND THE NATURE OF EXPERTISE* 70-75 (1994).

18. On the character of knowledge as justified true belief and the features of such knowledge in conflict-of-laws analysis, see Gene R. Shreve, *Every Conflicts Decision is a Promise Broken*, 60 *LA. L. REV.* (forthcoming 2000).

19. Or, perhaps more accurately, the causal inferences from such data. See HUBERT M. BLALOCK, JR., *CAUSAL INFERENCE IN NONEXPERIMENTAL RESEARCH* 62 (1964).

20. For academics, “the professional privileges of autonomy and high social status, constrained by a normative commitment to service, were all built upon a foundation of cognitive expertise.” GEISLER, *supra* note 17, at 73.

21. See RUSSELL L. ACKOFF, *THE DESIGN OF SOCIAL RESEARCH* 5 (1953); JOHAN GALTUNG, *THEORY AND METHODS OF SOCIAL RESEARCH* 29-36 (1969).

22. The shape of the model must be explained and justified as the research methodology. ACKOFF, *supra* note 21, at 6.

23. See generally HERBERT BUTTERFIELD, *THE ORIGINS OF MODERN SCIENCE* 60-61 (1962); Harold Kincaid, *Defending Laws in the Social Sciences*, in *READINGS IN THE PHILOSOPHY OF SOCIAL SCIENCE* 127-28 (Michael Martin & Lee C. McIntyre eds., 1994).

24. The work of Borchers and Solimine would fall here. See *supra* note 3. Another interesting example is JOHN D. BESSLER, *DEATH IN THE DARK—MIDNIGHT EXECUTIONS IN AMERICA* 213-20 (1997) (compiling the times of day (or night) when all executions occurred in the United States from 1977-1995).

25. See generally A.R. LOUCH, *EXPLANATION AND HUMAN ACTION* (1966); *ISSUES IN PARTICIPANT OBSERVATION* (George J. McCall & J.L. Simmons eds., 1969). For an interesting example, see AUSTIN SARAT & WILLIAM L.F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* (1995).

the discipline of a research model. Investigations are casual, episodic, and largely unexplained. They rest to a large degree on "a priori" or "common sense" assumptions.²⁶ The results are, in a word, anecdotal.

In the natural sciences it is usually enough for theory to state and support a causal rule—that is, to explain why a particular phenomenon occurs and will repeat itself.²⁷ But often for law (and social sciences generally), theory also must be an instrument for good. That is to say, it is not enough for theory to explain a causal rule (touching hot things causes pain). It also must set a direction for behavior in light of the causal rule (avoid touching hot things).

There is nothing revolutionary about empirical legal scholarship.²⁸ Indeed, the conflicts academy is probably the last subgroup in the general field of procedure to test empirical waters.²⁹ That does not make the recent work of Professors Symeonides, Borchers, Richman, Reynolds, and Solimine any less praiseworthy. Moreover, it is encouraging that these individuals, who are at the front rank of traditional scholarship, are those who are turning our attention to conflicts empiricism. This insures that their call to action will be taken seriously within the conflicts community, and that their empirical work and their critiques of the investigations of others will be grounded in the best under-

26. Keith Smith, *Distribution-free Statistical Methods and the Concept of Power Efficiency*, in RESEARCH METHODS IN THE BEHAVIORAL SCIENCES 536 (Leon Festinger & Daniel Katz eds., 1953).

27. Numerous examples appear in THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996).

28. Empiricism has enjoyed a considerable history in legal scholarship. See Lloyd L. Ohlin, *Partnership with the Social Sciences*, 23 J. LEGAL EDUC. 204 (1970); Laurens Walker, *Developments in Law and Social Science Research*, 52 N.C. L. REV. 969 (1974).

29. For examples from other procedural fields, see Symposium, *Empirical Studies of Civil Procedure, Part I*, 51 L. & CONTEMP. PROBS., Summer 1988, at 1; Symposium, *Empirical Studies of Civil Procedure, Part II*, 51 L. & CONTEMP. PROBS., Autumn 1988, at 1; WALLACE D. LOH, *SOCIAL RESEARCH IN THE JUDICIAL PROCESS* 544-47, 600-04 (1984) (evidence and trial process); J. Alexander Tanford, *Psychology in Judicial Policy Decisions*, in 4 RESEARCH IN LAW AND POLICY STUDIES 253 (1995) (trial process); DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991) (remedies); AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR (Shelden Goldman & Austin Sarat eds., 1989); C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* (1996).

standing of conflicts law.

It remains in this Article only to address some of the points that have arisen in the empiricism dialog so far, and add some comments about the future.

Professors Richman and Reynolds see perhaps too strong a parallel between empiricism in the natural sciences and prospects for conflicts.³⁰ The two pose fundamental differences in both method and purpose of investigation.³¹ To illustrate, Thomas Kuhn observed that, as the natural sciences mature, dominant paradigms begin to appear.³² They are dominant in the sense that they drive divergent paradigms largely out of existence. Kuhn suggested that the capacity of a paradigm to achieve this vanquishing effect is limited to the natural sciences.³³ The flux and controversy in law (and particularly in conflicts law) attest to the absence of a dominant paradigm. Our stalled position is comparable to the history of a field of natural science before the emergence of its first dominant paradigm when "all of the facts that could possibly pertain to the development of a given science are likely to seem equally relevant."³⁴

I am not sure that Richman and Reynolds make the best case for conflicts empiricism by holding up the example of the legal realists. With the quixotic exception of Underhill Moore,³⁵ most realists gave "little more than lip service to the methods of the social sciences"³⁶ before their movement died out in the late

30. See *supra* text accompanying note 6.

31. "We must . . . make allowances for the fact that the conditions in which legal science develops are quite different from those involved in the development of the natural sciences and we cannot expect, in our discipline, discoveries of the kind made in the natural sciences." Viktor Knapp, *Legal Science, in 2 MAIN TRENDS OF RESEARCH IN THE SOCIAL AND HUMAN SCIENCES*, pt. 2, at 930 (1978).

32. For example, "transformations of the paradigms of physical optics are scientific revolutions, and the successive transition from one paradigm to another via revolution is the usual developmental pattern of mature science." KUHN, *supra* note 27, at 12.

33. See *id.* at 17.

34. *Id.* at 15.

35. Moore was "probably the most committed legal empiricist America has ever seen." NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 91 (1995). His study of New Haven traffic and parking ordinances lasted from 1933 to 1937, when he lost his funding. The project remains something of a puzzle. See John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 *BUFF. L. REV.* 195 (1979).

36. DUXBURY, *supra* note 35, at 93.

1940s. They were more inclined to attack the positions of their opponents as empirically ungrounded than to engage in significant empiricism of their own. The forays of realist Walter Wheeler Cook against the choice-of-law territorialism of Story, Beal, and the original Restatement of Conflicts are examples.³⁷ Neorealist Robert Leflar was more positive-minded and influential than Cook;³⁸ however, he never laid claim to being much of an empiricist. Like most of us in the conflicts academy, Leflar picked cases to write about that he found useful and interesting. His research was therefore anecdotal. And, as our social science colleagues are fond of reminding us, the plural of "anecdote" is not "data."

If realists have not contributed to conflicts empiricism by example, they have aided the project enormously through their advocacy of interdisciplinary research. For, "while the realists themselves might not have been particularly adept social scientists, they . . . demonstrated, in principle, that interdisciplinary legal study was a virtue beyond doubt."³⁹ It would be foolish to press further with conflicts empiricism without enlisting the vast experience and investigatory sophistication of our social science colleagues. This applies no less to conflicts thinking than to other fields of law.

Recall Professor Peterson's skepticism about whether conflicts empiricism could ever advance beyond the screening of conflicts decisions, to look "not only at the behavior of judges but also at the behavior of lawyers and their clients" to determine whether settlement is affected by the perceived predictability or unpredictability of conflicts issues.⁴⁰ He concluded: "how does one accumulate the data to make such a study?"⁴¹ The answer that legal scholars in other fields have found for such a question is (1) free the substantial time necessary for the project; (2) acquire funding for the considerable expense (planning, computer time, investigator field work, etc.) of empirical research; and (3) get a competent collaborator if you are not a so-

37. See WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 38-39 (1973).

38. See GENE R. SHREVE, *A CONFLICT-OF-LAWS ANTHOLOGY* 191-214 (1997).

39. DUXBURY, *supra* note 35, at 93. "Realism made the interdisciplinary study of law respectable, even among its opponents." *Id.* at 92.

40. Peterson, *supra* note 8, at 551.

41. *Id.*

cial scientist (perhaps a university colleague from the social sciences). This is how projects as challenging as the one envisioned by Peterson have come into being.⁴²

Professor Peterson nonetheless makes a valuable point. Serious empirical research is daunting, at times tedious, and certainly not to everyone's taste. Furthermore, the usefulness of a particular project is likely to be limited. For example, the surveys of Borchers and Solimine represent an important early step in conflicts empiricism. Yet they are tentative by the standards of empirical science,⁴³ and (contrary, perhaps, to the suggestions of Richman and Reynolds), they have not settled any of the big issues debated within the conflicts academy.

As a more basic matter, we would deny conflicts empiricism much of its potential value if we saw it chiefly as a means for settling old arguments. It stands to reason that if the old arguments all proceed a priori, *none* of them may comport with the real-world discoveries of empirical inquiry. While the empiricist cannot be oblivious to discourse in her field,⁴⁴ it is necessary that she begin her research in a "basic posture of humility and willingness to learn what was never imagined to be learnable when the researcher started."⁴⁵

Traditional conflicts scholarship certainly is in disarray. It seems to have hardened into "endless, self-perpetuating debate over the nature and value of multilateralism, unilateralism, substantivism, and the like."⁴⁶ Conflicts empiricism may in time and in its own way prove to be a solvent. But supporters of the movement must be among the first to understand its nature and limits. Experience elsewhere suggests that to exaggerate the po-

42. See, e.g., Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 LAW & CONTEMP. PROBS., Autumn 1988, at 13 (Rowe is a law professor, and Vidmar is a professor of political science).

43. For a discussion of the greater use of surveys and survey analysis, see FRANK HARARY ET AL., *STRUCTURAL MODELS: AN INTRODUCTION TO THE THEORY OF DIRECTED GRAPHS* (1965); MORRIS ROSENBERG, *THE LOGIC OF SURVEY ANALYSIS* (1968).

44. See THOMAS FLEMING, *THE POLITICS OF HUMAN NATURE* 11 (1988).

45. DAVID A. ERLANDSON ET AL., *DOING NATURALISTIC INQUIRY—A GUIDE TO METHODS* 20 (1993).

46. Gene R. Shreve, *Notes from the Eye of the Storm*, 48 MERCER L. REV. 823, 829 (1997). "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 has become "impossible for theorists now writing to demonstrate with complete success how their ideas are new, helpful, or even intelligible." *Id.* at 828.

tential of conflicts empiricism or to misuse the results of its inquiries will only provoke hostility.⁴⁷ We must all remember that it is not necessary for members of the conflicts academy to undertake empirical projects in order to profit from them. Empiricism enriches rather than replaces theory. With this distinction in mind, it is possible to understand that empiricism poses no threat to traditionalists. Conflicts empiricism will not displace traditional, theory-based conflicts scholarship. It will only make it better.

47. See, e.g., Dallas Willard, *The Unhinging of the American Mind: Derrida as Pretext*, in *EUROPEAN PHILOSOPHY AND THE AMERICAN ACADEMY* 11 (Barry Smith ed., 1994) (attacking empiricism as “the tendency to limit reality, knowledge, and value to the sense-perceptible”); P.A. SOROKIN, *THE CRISIS OF OUR AGE* 125 (1941) (“[B]ecause of its enormous and complicated assortment of fact—poorly integrated, often irreverent, and despite their alleged precision, frequently contradictory—empirical science has distinctly impaired our understanding of reality.”) (emphasis omitted).

