The Odds Against Teaching Conflicts

Gene R. Shreve
Indiana University Maurer School of Law, shreve@indiana.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub
Part of the Conflict of Laws Commons, and the Legal Education Commons

Recommended Citation
http://www.repository.law.indiana.edu/facpub/623
THE KIND INVITATION OF PROFESSOR WILLIAM RICHMAN AND THE EDITORS OF THE UNIVERSITY OF TOLEDO LAW REVIEW TO PARTICIPATE IN THIS SYMPOSIUM ENABLES ME TO CONTINUE SPECULATIONS ON CONFLICTS TEACHING THAT I BEGAN A FEW YEARS AGO.

In an essay celebrating the publication of Professor Richman's fine casebook, I noted some of the pleasures and frustrations of conflicts teaching. Among the latter, I discussed how conflicts professors must compete with a variety of distractions in the lives of second- and third-year students, and how these students frequently exhibit cynical or even hostile attitudes toward conflicts law.

The conclusions of that essay rested on the sanguine assumption that, insofar as special problems arose in conflicts teaching, professors could resolve them through humanistic rededication, pedagogical retrenchment, and the selection of good

---

* Richard S. Melvin Professor of Law, Indiana University-Bloomington. This comment is a revised version of an address given by the author at the Conflict of Laws session of the Association of American Law Schools Conflicts Panel in January, 1996.


2. A conflicts course may treat a variety of topics including personal jurisdiction, the Erie doctrine, and the intersystem recognition and enforcement of judgments. However, I mean by conflicts law the choice-of-law process:

The purpose of conflicts law is to provide an intelligible and principled basis for choosing a substantive rule (perhaps tort or contract) over the competing rule of another place. Rules compete when their application would lead to conflicting results and when the relation of each place to the controversy is such that it is plausible for the rule of either place to govern. Conflicts law must legitimate the choice. It must explain why rejection of one law in favor of another is right.


3. My impressions about these problems come from twenty years of conflicts teaching, from informal discussions with my students, and from discussions with other conflicts teachers. This information is anecdotal. Assumptions about conflicts teaching and, particularly, about student attitudes toward the conflict of laws could be tested through empirical research, but I am unaware of any such study.
teaching materials. This, I suggested, would enable more students to learn and be stimulated by conflicts law.

Among the explanations why some students come to judge conflicts law harshly, there was one that I did not really examine in the first essay. That was the possibility that those students are right. Is a dim view of conflicts law warranted? Those of us who have developed a fondness for the subject would probably like to answer “no.” Yet we are aware of the sentiments of lawyers, judges, or commentators toward conflicts law that prevent us from giving that answer with great confidence. My article treats this rather disturbing side of our subject and how it affects us as conflicts teachers.

I exclude from this study the delightful conflicts students who seem to like the subject from beginning to end. I also exclude students who never seem to give


5. I wrote that conflicts law is:

One of the few common law courses in the upper curriculum, it invites more attention to themes of judicial lawmaking and process than courses after the first year usually do. Moreover, the topics addressed in conflicts are as challenging intellectually as a law teacher could want. They continually provide opportunities to question the “what” and “why” of law. Finally, professors have a hook to use in teaching conflicts that is not always available in highly conceptual courses. Conflicts problems inescapable in practice are really no different from those in the classroom. In perhaps no other law school course do spheres of intellectualism (dear to the legal academy) and practical understanding (dear to lawyers and judges) so overlap.

Shreve, supra note 1, at 1672.


7. I have often found judges, whether speaking publicly or in informal conversation, to be either wary of conflict of laws or downright disapproving. This shows through in judicial opinions occasionally See, e.g., In re Paris Air Crash of Mar. 3, 1974, 399 F Supp. 732, 739 (C.D. Cal. 1975) (describing conflicts law as a “veritable jungle, which, if law can be found out, leads not to a ‘rule of action but a reign of chaos’); Paul v National Life, 352 S.E.2d 550, 553 (W Va. 1986) (describing conflicts law as “cumbersome and unwieldy [creating] confusion, uncertainty and inconsistency, as well as complication of the judicial task”).

conflict of laws a chance. My focus is on a third, swing group. These students start the course with an open mind, and they invest a reasonable amount of energy in preparing for class and trying to learn the subject. However, they eventually seem to lose faith in the capacity of courts, commentators, or their professors to make sense out of conflicts—to explain it as logical, principled, or coherent law.

Students often enter conflicts class with an initial assumption about conflicts law. They probably share it with the community at large. The assumption is that courts simply apply their own law. To those untrained in conflicts law and analysis, the stark unilateralism of this assumption is a straightforward, intelligible, and perfectly sensible. It in fact describes the conflicts law of ages past. Yet conflicts professors quickly and easily demolish this assumption. We demonstrate the injustice of forum shopping, the substantive chaos, and the pernicious acts of judicial localism that would result from such law.

Once we have destroyed their first assumption, students shift quickly and intuitively to a second: that every jurisdiction does (or at least should) administer the same conflicts law to reach the same choice-of-law result in a given case. For those without significant exposure to conflicts law, the pure multilateralism of this assumption can seem a simple, straightforward, and attractive idea. It comes fairly close to describing what conflicts law in this country used to be.

It takes a bit longer in the course for the second assumption to collapse. The multilateralist sympathies of some professors may in fact lead them to leave part of the edifice of this assumption standing. However, at least by the time in the course when the students consider choice of law and the Constitution, it is quite

9. See Shreve, supra note 1, at 907 (explaining these necessary attributes of conflicts law).
10. In a unilateral approach, the sovereign jurisdiction entertaining the particular case may sacrifice the transjurisdictional goals of comity, reciprocity, and uniformity in order to recognize local interests and advance them by the decision. The rule stated in the text accompanying this note represents an extreme, unalloyed form of unilateralism probably unknown in this country. For further discussion of the unilateral approach to choice of law and a brief history of unilateralism in the United States, see Gene R. Shreve, Choice of Law and the Forging Constitution, 71 IND. L.J. 271, 284-86 (1996).
12. Multilateralism stands in opposition to unilateralism. Multilateralism venerates uniformity of choice-of-law result for a given case wherever (within a community of sovereign jurisdictions) the case happens to be entertained. Uniformity of result secures multilateralist goals of stability, reciprocity and comity.
14. The rule stated in the text roughly conforms to conflicts law in this country until about the middle of this century. See Shreve, supra note 10, at 282-84 (discussing the multilateral approach to choice of law and a brief history of multilateralism in the United States).
15. I have written that:

The Full Faith and Credit, Due Process, Equal Protection, Privileges and Immunities, and Commerce Clauses all can easily be read to protect nonforum state interests, or the interest of
clear that pure or even substantial multilateralism in American choice of law is an illusion.

At about this time in the course, I think many students start seriously to doubt the possibility of principled, coherent conflicts law. They cannot find a third successive assumption. They find instead contradiction and dissonance within courts and the scholarly community about what conflicts law is or ought to be. It is difficult to overstate how little stout building material is available for the construction of a third assumption. Significantly, Professor Friedrich K. Juenger opened his path-breaking history and critique of conflicts law with the observation: "The outstanding characteristic of the conflict of laws is the astonishing lack of consensus on the discipline's goals and methods."[16]

A glance at the two choice-of-law approaches in extensive use that are considered most up-to-date—the American Law Institute's *Restatement (Second) of Conflict of Laws*[17] and Professor Robert A. Leflar's *Choice Influencing Considerations*[18]—gives some indication of the disarray and stasis of conflicts law and the disapproval it inspires among commentators.

Published in 1971, the *Restatement (Second)* was a forced marriage of old-guard multilateralism with new-wave unilateralism. The resulting attempt to meld a rule-based, jurisdiction-selecting approach with a method-based, policy-sensitive approach,[19] was probably doomed to failure. The *Restatement (Second)* often seems as a consequence to be schizoid in application,[20] particularly in the difficult and important areas of torts and contracts. Moreover, while sections throughout the *Restatement (Second)* require chosen law to be from a place bearing a "significant

nonforum litigants, that are disrupted by parochial state conflicts decisions. Yet the Supreme Court rarely intervenes under the Constitution to protect these interests.

Shreve, *supra* note 10, at 271. The absence of constitutional control in this area makes possible a good deal of conflicts localism:

[S]tate and federal diversity cases favoring local substantive law when the forum state's relation to the controversy is clearly less than that of the place providing conflicting law. [C]onflicts localism unfairly damages nonforum litigants, exhibits disrespect to nonforum governments, and undermines principles of order and uniformity in choice of law.

*Id.*

16. FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 1 (1993) ("Uncertainty about the proper approach to multistate problems reigns supreme and the conceptual apparatus of the approaches that have been proposed is as complex as it is unconvincing.").


20. *See*, e.g., JUENGER, *supra* note 16, at 105-06 ("The Second Restatement became a mixture of discordant approaches."); Laycock, *supra* note 8, at 253 ("Trying to be all things to all people, it produced mush.").
relationship" to the case, the Restatement never makes very clear how the significance of relationships is to be determined in particular cases.

In number of adoptions, Leflar's Choice-Influencing Considerations trail the Restatement (Second) by a margin of about four to one. Professor Leflar developed his approach at the time work on the Restatement (Second) was in progress. A judicial realist and conflicts modernist, he developed an approach free of the ponderous length and quixotic rule paraphernalia of the Restatement (Second). At the same time, the conflicts approach of Choice-Influencing Considerations is so cursory and loose-textured that it is particularly open to haphazard or result-oriented applications. And critics have found the greatest flaw in Leflar's approach to be that it authorizes choice based in part on the substantive-law preferences of the judge. To many commentators, the authority of courts to

21. Restatement (Second) of Conflict of Laws § 6 cmt. c (1971) ("All that can presently be done in these areas is to state a general principle, such as application of the local law of the state of most significant relationship, which provides some clue to the correct approach but does not furnish precise answers.").


24. The methodology was presented and elaborated in two articles. Leflar, Choice-Influencing Considerations, supra note 18, at 279-304; Leflar, Conflicts Law, supra note 18, at 1386-88.

25. Cf. Juenger, supra note 16, at 119-20 ("The conflicts practice in the minority of states that follow Leflar's teachings has been even more consistently result-oriented than those states following the Restatement (Second).Since tort victims are likely to sue in a state whose substantive law provides recovery, result-selectivity and forum preference tend to point in the same direction. Seldom will a plaintiff sue in a jurisdiction whose rules of decision are unfavorable; and it is only in these rare cases that courts must either sacrifice teleology to government interests or opt for result-selectivity at the expense of local policies.").

26. This is Professor Leflar's consideration entitled, "Application of the Better Rule of Law," explained and defended at length in Leflar, Choice-Influencing Considerations, supra note 18, at 295-304.
choose law on this basis is very doubtful, and use of a "better rule" criterion skews the conflicts decision. 27

Such is the Janus-faced picture of conflicts law that complicates conflicts teaching. The subject-matter makes it both a wonderful and exasperating course to teach. 28 How do we cope with the second in order to maximize the first? How bad are the odds against teaching conflicts? Regrettably this essay does more to frame the question than to answer it.

One thing, however, does seem clear. We should try to avoid dealing with student rejections of conflicts law in unproductive ways. First, we should not teach the course in a way to conceal or marginalize the deep fissures that exist in contemporary conflicts law and commentary. Second, we should think twice before suggesting to students that the problems afflicting conflicts law will disappear when our pet theories (whatever they may be) are universally accepted. Third, we should try not to give up on our students or the subject.

The largest single reason why conflicts law is in disarray may be that it is and always will be an exceedingly difficult branch of law. One commentator has noted that:

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. 29

The frustration some of our students may feel when they cannot construct a third and lasting assumption about the content of conflicts law foretells the frustrations of lawyers and judges who must live with the subject in practice. Perhaps we succeed as conflicts teachers, I think, when we introduce students for the first time, and in a thorough, balanced way to both to the richness and to the real difficulties of the subject.


28. On the positive side, see Shreve, supra note 1, at 1672.