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BOOK REVIEW

WHAT DO WE REALLY KNOW ABOUT THE AMERICAN CHOICE-OF-LAW REVOLUTION?

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THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE. By Symeon C. Symeonides. Martinus Nijhoff Publishers, 2006. 478 pp. $182.00

INTRODUCTION

Virtually everyone who has engaged in choice-of-law scholarship has had unflattering things said about him or her, and every scholar's favorite methodology has come under attack. Given the reputation of the First Restatement of Conflicts of Laws,[1] it should come as little surprise that Joseph Beale, its drafter, "has been the target of ridicule by practically every conflicts

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1. RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934). Conflicts of Law is a broad field that encompasses choice of law and other areas. However, choice-of-law scholars often use "conflicts" and "choice of law" interchangeably, and I do so as well in this Book Review.

writer in the last four decades,"[2] or that the First Restatement itself "has been the favorite punching bag of every conflicts teacher."[3] But the scholars who succeeded Beale and pioneered the modern approaches have fared no better, and neither have their theories. William Prosser memorably referred to conflicts scholars as "learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon."[4] Prosser's assessment is charitable compared to that of Lea Brillmayer, who has described them as "a wild-eyed community of intellectual zealots."[5] Meanwhile, the modern doctrinal approaches have yielded "gibberish"[6] and "confused and misguided thinking."[7] In short, modern conflicts theory and doctrine is a mess—a "debacle," according to one scholar[8]—and there is no real consensus on how to clean it up.

It is time for a new treatment of conflicts, one that does not approach it either through high-minded theory or as a set of convoluted law school exam fact patterns. What the field really needs is empirical inquiry: what has the revolution in choice of law wrought, and what can we learn from that?[9]

Intrepid researchers have undertaken this task in fits and starts over the past fifteen years or so,[10] and the conflicts giant Dean Symeon Symeonides has been at the forefront of the project.[11] His highly anticipated and ambitious new book, *The American Choice-of-Law Revolution: Past, Present and Future*, is the pinnacle of his efforts and aims to be the authoritative word on the impact of the revolution. First delivered as a series of lectures at The Hague Academy of International Law in 2002 and now widely available for the first time, it should be required reading for anyone engaging in conflicts scholarship.

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2. Symeon C. Symeonides, *The First Conflicts Restatement Through the Eyes of Old: As Bad as Its Reputation?*, 32 S. ILL. U. L.J. (forthcoming 2007) (manuscript at 2), *available at* http://ssrn.com/abstract=963267.

3. *Id.*

4. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

5. LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS, at xiii (1991).

6. Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 403 (2000).

7. Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134, 2149 (1991).

8. William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1371 n.5 (1997).

9. *See, e.g.*, Patrick J. Borchers, *Empiricism and Theory in Conflicts Law*, 75 IND. L.J. 509, 509-10 (2000) (arguing for more empirical work in the field and consideration of how empiricism and theory should interact); William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 434-35 (2000) (calling for further empirical studies).

10. *See* Richman & Reynolds, *supra* note 9, at 426-33 (reviewing the empirical studies).

11. *See id.*

At its best, *Revolution* offers the finest, most rigorous account of conflicts doctrine as it functions in the courts, as well as a penetrating and thoughtful analysis on how the doctrine should evolve. The overarching normative point, based on thorough empirical analysis, is that the American conflicts experiment has moved radically from too rigid and arbitrary "rules" to too flexible "approaches" (pp. 423-37). Symeonides argues that the modern day flexibility is far preferable to the old system's rigidity,[12] but he contends that it is time to find a middle ground, one that provides firmer guidance for judges and lawyers while still respecting the insights of the choice-of-law revolution and maintaining its flexibility (p. 425).

Unfortunately, though it pushes the field in the right direction, Symeonides's account does not go far enough. Putting aside the question of whether balance between rigidity and flexibility can ever be achieved,[13] *Revolution* defines its terms too narrowly. It is simply not enough to develop a view of the revolution by reading only published cases, which has been the orthodox approach since the start of the revolution, but which reflects and encourages an unhealthy and unproductive disengagement from legal practice.

Instead, the *full* impact of the choice-of-law revolution can only be judged by careful analysis of the view from the bottom, from the standpoint of busy trial court judges, lawyers, litigants, and potential litigants. And that story would in all likelihood be quite different from the story Symeonides tells. Indeed, if we were to engage practice in a serious way, we may find that the modern approaches, instead of introducing fairness and rationality into the doctrine, have introduced a new set of costs and a different kind of arbitrariness. Whatever the gains in rationality brought by the revolution, they may be trumped by the price of uncertainty.

Thus, *Revolution* is exemplary within both meanings of the word:[14] it is the *best* example of conflicts scholarship, but it also demonstrates by example what is missing from the field, namely serious consideration of the practical consequences of legal theory.

This Book Review proceeds as follows. In Part I, I briefly review the history of the revolution. Here, my goals are limited; I aim only to put Symeonides's project into historical focus and to provide a primer for the uninitiated. Part II reviews *Revolution*'s structure, methodologies, and findings, and considers its contributions to conflicts scholarship more broadly.

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12. P. 423 ("[F]lexibility is preferable to uncritical rigidity . . . .").

13. Symeonides himself notes that there is no such thing as perfect choice-of-law rules (p. 346), and I have my own doubts about how flexibility and predictability can ever come to terms with one another.

14. "Exemplary" can mean both "worthy of imitation" and also "typical."

Part III is the core of my critique. In it, I discuss *Revolution*'s primary shortcomings and argue that, as a result of its limitations, *Revolution* is simply too removed from the practicalities of actual litigation and too theoretical to serve as a touchstone for the development of the law. I first cast doubt on Symeonides's empirical findings because of his flawed data set and methodology. I also argue that by ignoring the impact of the revolution on the process of litigation, Symeonides effectively captures only part of it—and perhaps a less important part, at that. Finally, I conclude by briefly discussing how scholarship in the field should develop in order to respond to these weaknesses and by laying out a course of analysis and research through which scholarship and practice can meaningfully reengage one another.

I. THE REVOLUTION

The past fifty years have witnessed a dramatic change in American conflicts scholarship and doctrine (pp. 9-121),[15] particularly in the tort context (p. 123).

Once, in what have become known as the bad old days, courts followed the First Restatement when deciding choice-of-law issues (pp. 10-11). The First Restatement provided fairly strict rules about which state's law should govern any case (*id.*).[16] In the tort context, with some important exceptions, the substantive law of the jurisdiction in which an injury took place governed the lawsuit.[17] For example, if a resident of California collided with a resident of New York on a freeway in Michigan, Michigan law would apply, and no further analysis would be necessary.

Beginning in as early as the 1920s, legal realists took aim at the First Restatement's rigidity, formalism, and arbitrariness (pp. 11-35). They argued that sometimes the state in which an injury occurs has no interest in a lawsuit, and some other state has manifestly greater interest (pp. 12-13). They claimed, in classic realist terms, that the formalistic rules of the First Restatement were irrational and unjust (pp. 12-24).[18] And they maintained that the apparently strict rules of the First Restatement actually contained so many escape hatches that judges could effectively do whatever they wanted (p. 26), leading to arbitrary results. Although these views gained little traction in courts at first, and although the doctrinal prescriptions of these early critics have never

15. *See also* LEA BRILLMAYER, *supra* note 5, at 22-36; R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 1-135 (4th ed. 1987); D. SIEGEL, CONFLICTS IN A NUTSHELL 202-07, 242-69 (1982).

16. *See also* RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

17. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (1934).

18. *See, e.g.*, David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

enjoyed much support (pp. 11-13), their driving concerns about rationality, justice, and flexibility set the stage for the revolution to come.

In the 1960s, Professor Brainerd Currie eloquently expanded the critique and provided a new framework for approaching choice-of-law questions (pp. 13-22). His central innovation, the state interest analysis, became the basis for virtually every proposed doctrine that followed (pp. 22-24). Under his approach, for example, if State Z has laws that protect manufacturers, then it has a strong interest in having its law applied to manufacturers that operate within its borders, whereas it has no interest in protecting manufacturers that operate in other states. Therefore, if an injury occurs in State Z, an out-of-state manufacturer should not automatically be entitled to the application and protections of State Z's law.

Currie and his followers maintained that a flexible, case-by-case approach to choice-of-law problems that focused on state interests would be the most rational and fair. Although Currie's specific doctrinal recommendations have not been implemented in very many jurisdictions, his vision continues to dominate the academic debate today (pp. 22-24). Indeed, when we refer to the "choice-of-law revolution" we speak primarily of the introduction of state interest analysis and the rejection of "rules" in favor of "approaches."

Predictably, scholars began to debate Currie's approach in earnest, with each offering another twist, a new approach, or a different analysis (pp. 24-25). Not so predictably, this academic discourse actually had an almost immediate impact on judicial doctrine (pp. 37-62). Indeed, perhaps more so than in any other field of law, courts have taken their doctrinal cues in conflicts cases directly from legal scholars.[19] Beginning tentatively in the 1960s, and then in earnestness in the 1970s and the 1980s, courts began to reject the First Restatement and to adopt the modern approaches instead (pp. 37-43).

Today, the most common approach to choice-of-law problems is provided by the Second Restatement (p. 88), which is really a mixture of many other modern approaches, and a fairly meaningless mixture at that,[20] though other jurisdictions have adopted other modern and flexible approaches (pp. 48, 65). Either way, many contemporary scholars agree that, in practice, the various doctrinal approaches do not provide much guidance for, or constraints on, judges at all.[21] So the story is mixed: legal scholars have succeeded in

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19. P. 9 ("[C]hoice-of-law . . . is one of the few branches of American law that has been heavily influenced by scholastic writings."); *see* Earl M. Maltz, *Do Modern Theories of Conflict of Laws Work? The New Jersey Experience*, 36 RUTGERS L.J. 527, 527 (2005) ("[L]egal scholars have probably had more influence of the judicial treatment of choice-of-law problems than in any other area of the law.").

20. *See* Reynolds, *supra* note 8, at 1385-89.

21. According to Larry Kramer, "[I]t hardly comes as news that the Second Restatement is flawed. But one needs to read a lot of opinions in a single sitting fully to

overturning an arbitrary but fairly (or at least potentially) predictable regime with a supposedly more rational, though apparently indecipherable, one.

This is where Symeonides comes in. His is an effort to extrapolate hidden patterns and silent rules for how judges actually decide conflicts questions, to assess those patterns and rules, and to shape the discourse on the basis of that assessment.

II. HIDDEN PATTERNS TODAY AND A RETURN TO RULISM TOMORROW?

Revolution is both an introduction for the foreign student to contemporary American conflicts doctrine and a serious empirical and normative commentary on the doctrine. As such, it occupies a middle space between a basic text and an academic tome, addressed equally to the beginner and the specialist. Surprisingly, it occupies that space quite comfortably, serving both audiences well.

Revolution succeeds in reaching its first audience, the foreigner unfamiliar with the common law and federalist traditions,[22] by virtue of Symeonides's patience in explaining core concepts, his easy, uncluttered, and engaging style and clear organization, and his use of easily interpreted tables, charts, and diagrams.[23] Yet, despite his care for the novice, the apparent straight talk belies a deep and rich critical discourse on the law.

Symeonides begins his empirical story by carefully explaining the basic contours of the various modern conflicts theories that the revolution produced (pp. 9-121). As I have said, the competing theories do share some important features, including the flexibility they encourage and the state interest analysis they require (pp. 22-24, 71-72). Still, while these similarities are important, the fact that scholars endlessly debate the relative merits of each alternative approach must indicate that the methodologies should yield differing results, at least in some measurable range of cases. After all, what would be the use of quibbling over doctrine if the end results were the same?

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appreciate just how badly the Second Restatement works in practice." Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 486-87 (1991).

22. The book is addressed to this audience for two reasons. First, Symeonides remembers his own days as a "foreign observer" and an "outsider" confronting a choice-of-law system that was "alien in both language and logic," and foreign students therefore have a special place in his heart (p. vii). Second, *Revolution* is based on a series of lectures initially delivered at the Hague Academy of International Law, and so foreign students and scholars were, quite literally, the audience (p. vii-viii).

23. *See, e.g.*, pp. 39, 40, 44, 48-49, 50, 51, 151, 170, 177, 195, 213, 234. This list simply provides examples of the many useful tables, charts, and diagrams in *Revolution*. It is by no means complete.

It is therefore surprising—or perhaps unsurprising, depending on where one finds oneself on the formalist/realist/crit spectrum—that Symeonides, drawing on his own prior empirical work and that of others, declares that "methodology rarely drives judicial decisions" (p. 70). In other words, it simply does not matter which methodology or theory a court adopts; the result will be driven by the judge's preference.[24] As Symeonides puts it, "[O]f all the factors that may affect the outcome of a conflicts case, the factor that is the most inconsequential is the choice-of-law methodology followed by the court."[25]

In various places throughout the book, Symeonides suggests two related reasons for this dynamic. First, it may be due to the flexibility and indeterminacy inherent in the approaches themselves, which do not constrict the choice-of-law analysis in particularly meaningful or effective ways (pp. 91-92).[26] For example, the Second Restatement, which has been adopted by at least twenty-two jurisdictions for conflicts in tort cases (pp. 48, 65), provides a "deliberately malleable list" of relevant factors for a judge to consider (p. 92). To be precise, there are two lists, one that provides seven "principles,"[27] and another that enumerates the four relevant "contacts."[28] It is difficult to imagine that mathematics of this sort could provide any "right" answer.

Second, Symeonides suggests that, perhaps as a result of this lack of clear guidance, judges (and presumably the attorneys upon whose briefs the judges

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24. *See also* Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 951 (1994) ("[T]he result in the case often appears to have dictated the judge's choice of law approach . . . .").

25. P. 70 (quoting Symeon C. Symeonides, *Choice of Law in the American Courts in 1994: A View "From the Trenches,"* 43 AM. J. COMP. L. 1, 2 (1995)).

26. *See also In re* Paris Air Crash of Mar. 3, 1974, 399 F. Supp. 732, 739 (describing choice of law as a "veritable jungle" leading to a "reign of chaos dominated . . . by the judge's 'informed guess'").

27. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971). The principles enumerated in this section are:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Id.

28. *Id.* § 145(2). The relevant contacts enumerated in this section are:

> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.

Id. Obviously the more parties there are to the case, the more the number of relevant contacts grows.

rely and rule) do not understand how to apply the various methodologies (p. 427). It should be less than shocking, therefore, that judges are guided by their own intuitions more than by any particular doctrine.

This finding must make the reader pause, for it begs two questions. First, if it does not matter which approach a court adopts—modified interest analysis (pp. 72-74), comparative impairment (pp. 24-25, 74-75), the better-law approach (pp. 25-28, 81-87), the Second Restatement (pp. 88-98), the significant contacts approaches (pp. 98-101), various combined approaches (pp. 115-16), or New York's unique rules (pp. 101-14)—and if a judge will ultimately choose whatever law she thinks best (or throw her hands up in exasperation and hope not to get overturned on appeal), what is the point in choosing from among these theories in the first place? Why do courts spend so much time and energy talking about them, if not just to provide rhetorical cover for results-oriented decision making? This, of course, is not a new critique; it is just the by-now-familiar (though admittedly simplified) charge leveled by realists and crits across the board.[29]

But Symeonides's finding about the relative unimportance of methodology begs a second question as well—one that is both more specific to the conflicts field and more uncomfortable for scholars: why should we be driving the doctrine in the first place? If the endless theoretical and doctrinal debates are ultimately meaningless once filtered through courts, then perhaps theorists' energies are best directed elsewhere, and perhaps judges and policymakers would do better looking elsewhere for doctrinal cues.

For better or worse, Symeonides, in full descriptive mode, does not address these points head on, at least not in this part of his story. Instead, having established that it makes little difference which methodology a court or jurisdiction employs, he rolls them all together in order to determine how courts across the board decide choice-of-law cases that feature similar patterns. He begins this process by dividing tort conflicts into three categories: loss-distribution conflicts (which stem from competing "tort rules that are designed primarily to allocate between parties the losses caused by admittedly tortious conduct") (pp. 123, 140-210), conduct-regulating conflicts (which stem from "tort rules that are designed primarily to regulate conduct") (pp. 123, 211-63), and product-liability conflicts (pp. 123, 265-364). He has his reasons for these distinctions,[30] and, though they are controversial,[31] they have a surface-level credibility.

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29. For an engaging account of the realists and their critique, see LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (2001). For an account of critical legal studies, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

30. Theoretically, at least, the state in which the injury occurs is most interested in those tort rules that regulate conduct, whereas it is less interested in those rules that seek to allocate losses (pp. 123-40). Symeonides offers product liability cases as a separate category

Having created these three categories, he then gets into the dirty and difficult work of dividing the hundreds of cases that he has reviewed among the categories and subdividing them further by their patterns. So, for example, he finds fifty loss-distributing common-domicile conflicts (cases in which both parties to a tort reside in one jurisdiction, but the tort occurs in another) from among all of the United States jurisdictions. In forty-four of these cases, the courts applied the law of the common domicile rather than that of the site of the injury (pp. 145-59). He continues this process for every imaginable conflict pattern among the three categories of cases and extrapolates unstated rules that guide the cases (pp. 145-364). He presents his findings with marvelous clarity, which, standing alone, is a gift to anyone who grapples with conflicts theory. To lay plain what courts actually *do* with the doctrine is an enormous achievement, for it demystifies a complex doctrinal area and provides actual guidance for scholar, judge, and practitioner alike.

After presenting the results of his painstaking study, Symeonides moves in a normative direction. He suggests that although the flexibility, nuance, and individuality of the modern approach is preferable to the rigidity and dogmatism of the First Restatement, the revolution has led to unfortunate excesses, chief among them excessive flexibility and unpredictability (pp. 423-37). As he says late in the book, "In the United States, the movement of conflicts law from certainty to flexibility has been impulsive, rash, and wholesale . . . . [A]ll [of the modern] approaches are open-ended and call for an individualized, *ad hoc* handling of each case" (pp. 412-13). He argues that we have gone from "bad rules" to "no rules" (p. 412) and that the next development in the continuing evolution should be the attempt to find the middle ground and to develop flexible rules—rules that would be both fair and predictable. Symeonides suggests some general contours of these rules (pp. 435-37) as well as some specific examples (pp. 346-64), and it is on this note—with the hope that smart, flexible rules are in our future (p. 437)—that the book closes.

Revolution pushes conflicts discourse in the right direction in two crucial respects. First, empiricism must be the starting point for conflicts scholarship. Empiricism, of course, is enjoying its moment in the sun in every field of legal scholarship, and for good reason. Too often, conventional wisdom,

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entirely because they are uniquely complex (pp. 123, 265-66).

31. This is not the first time that Symeonides and others, including courts, have used the loss-distribution vs. conduct-regulating method of categorization. For some commentators, however, the distinction is too incoherent or incomplete to be useful. *See, e.g.*, Wendy Collins Perdue, *A Reexamination of the Distinction Between "Loss-Allocating" and "Conduct-Regulating Rules,"* 60 LA. L. REV. 1251 (2000). Symeonides goes to some lengths to defend these categories (pp. 129-140). In the end, though, I suspect that those who agree with him are persuaded by his defense, and those who do not are not. For my part, I am agnostic.

conventional assumptions, and common sense are wrong, and elegant theories miss the mark. Therefore, to comment authoritatively on the law and to make grand, or even small, normative claims about its development requires real knowledge about what the law actually does and what impact changes to the law will likely have.

The need for empiricism in legal scholarship is probably even more important in a relatively obscure field like conflicts than it is in other areas. Unlike in many substantive fields, in conflicts, few other than legal scholars are even likely to know that the field exists, and no one—neither the legislature, nor other academic disciplines, nor public policy organizations—is likely to notice changes in the law or challenge them. The lack of countervailing forces has given legal scholars unusual power to shape the law;[32] and when the very first finding of an empirical review is that the dueling theories that scholars propose and courts adopt are actually put to use no differently from one another,[33] well, let us just say that the case is settled that choice of law should go nowhere without further empirical study.

Second, and as important, Symeonides's normative argument in favor of rules is welcome. He is not, of course, the first to suggest that unchecked flexibility is undesirable, but he makes the case more persuasively than most, and, flowing as it does from his empirical findings, it is likely to gain some traction. Others will have more to say about Symeonides's specific doctrinal recommendations than I do, but if the debate in conflicts scholarship centers itself on which *rules* to adopt, as opposed to which *approaches*, then Symeonides's contribution will be lasting indeed.[34]

III. THE REST OF THE REVOLUTION'S STORY

The central problem with *Revolution* is that the data set is problematic. I mean this first in the narrowest sense: to the extent Symeonides seeks to describe what goes on in courts, his collection of cases is too restricted to be revealing. But there is also a broader difficulty with his data set: even if it were representative, it *still* would not tell us what we need to know about the impact of the revolution in order to evaluate the revolution. Simply put, an empirical assessment of the choice-of-law experience cannot rest on judicial opinions alone. The story of the revolution lies not only, or even primarily, in what

32. *See supra* note 19 and accompanying text.

33. *See supra* notes 24-25 and accompanying text.

34. Interestingly, the doctrine already pays lip service to the ideals of empiricism and rulism. For example, the Second Restatement requires judges to consider the expectations of the parties (an empirical question) and to decide cases in a way that promotes certainty, predictability, uniformity of result, and ease of application (a nod toward rules). Unfortunately, until recently, the development of the field has not reflected these goals.

judges do with, and to, the law, but also in what the law does to the people affected by it.

A. *The Missing Cases*

Judges have broad powers to manage and shape cases. Included among these powers is the broad discretion they enjoy over whether and how to report their opinions.[35] Throughout the course of litigation, parties may file all kinds of motions, some dispositive and some nondispositive, on which the judge will rule, and the trial judge has a variety of options for how to handle any given motion. She may rule orally or in writing, and, if she issues a written opinion, she alone may decide whether to officially publish it or not. In making these choices, we must imagine that the judge is likely to be influenced by a mix of factors: her own judicial philosophy, her clerks' advice, the parties' needs, interests, and positions, the specifics of the case, the specifics of the motion, the importance of the subject matter, and court norms and rules, to name a few.

Surprisingly little research has been conducted that addresses the narrow issue of how representative published opinions are, and what research exists shows that the "differences between published and unpublished case decisions should serve to remind us that in examining published cases alone, we are investigating an unrepresentative subset of decisions which in turn may seriously compromise the validity of conclusions regarding judicial behavior."[36] Unpublished opinions may address issues that are as complex and important as those found in published opinions,[37] and they present district judges with "potential law making opportunities in which their values could shape the outcomes."[38]

It is something of a disappointment, then, that Symeonides's empirical analysis is based entirely on published opinions. To make matters worse, he purposely excludes from his study cases that have only "cursory" discussion of

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35. *See* Karen Swenson, *Federal District Court Judges and the Decision to Publish*, 25 JUST. SYS. J. 121 (2004).

36. Evan J. Ringquist & Craig E. Emmert, *Judicial Policymaking in Published and Unpublished Decisions: The Case of Environmental Civil Litigation*, 52 POL. RES. Q. 7, 33 (1999).

37. *See* Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782, 784 (1992) ("[P]ublished cases are neither a random sample of all district court cases nor a comprehensive selection of the important ones."); Donald R. Songer, *Nonpublication in the United States District Courts: Official Criteria Versus Inferences from Appellate Review*, 50 J. POL. 206, 213 (1988); s*ee also* Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC'Y REV. 1133, 1133-37 (1990).

38. Songer, *supra* note 37, at 213.

a choice-of-law issue (p. 267). This decision makes little sense, for surely litigants are equally affected by a choice-of-law decision regardless of the rigor of the written opinion.

To put a fine point on it, it may be true that in forty-four out of fifty published and "adequately reasoned" loss-distributing common-domicile published cases, the courts chose the law of the common domicile; but how many *other* cases, cursorily argued or unpublished or even unwritten, follow this pattern, and how were those cases decided? In the end, we really only know what *some* unspecified and perhaps unrepresentative sample of courts have done, which is not at all the same as knowing what courts *do*. We are left wondering what all of those other cases might reveal. Perhaps the unpublished cases, which may be the vast majority, are the "easy" cases,[39] and the published cases may be the unrepresentative and aberrational ones. Thus, in fact, it could be that the modern approaches work as intended in most cases, and the revolution may have proven a success. Alternatively, the unpublished cases may be particularly shoddily reasoned—and thus reveal that the flexibility of the modern approaches invites arbitrary outcomes.

The real lesson here may be that although cross-sectional quantitative analysis is among the most powerful tools available to legal scholars, it too has significant limitations, chief among them the problem of data. One solution to this problem might be to choose a small number of jurisdictions and collect all decisions, reported and unreported, reflecting choice-of-law decisions. The process would be painstaking, but it would offer some insight as to whether published decisions reflect unpublished decisions. Additionally, one could scour court records for motions raising choice-of-law questions and compare them to the decisions rendered on those motions to determine whether those decisions are generally published or not, whether they are written at all, and how they respond to the motions. Finally, one could actually speak to attorneys who regularly deal with conflicts issues and ask how courts deal with their motions. Admittedly, these tools are less powerful than broad cross-sectional quantitative analysis, and scholars have reason to distrust anecdotal research in particular. But when data is simply not available, the ambitious scholar who wishes to tell a complete story must find other ways to get at the problem.

39. Reynolds, *supra* note 8, at 1389 n.84 ("One always wonders at the validity of a critique based only on a sample of reported opinions. The success of a system depends in part on how it handles the easy, as well as the difficult, cases. By their very nature, however, the former will not be published, and, therefore, not evaluated by scholars.").

B. *The Missing Perspective*

The question of the missing cases addressed in the previous section is best thought of as one of depth: in trying to determine what judges do with the doctrine, how much information does one need, and how does one get it? There is a related and even more fundamental problem with *Revolution*, one that is best conceived of as a question of breadth: in trying to determine the impact of the revolution, where does one look? Symeonides has chosen to look only at judicial opinions. But to truly provide a complete assessment of the revolution, one would have to look far more broadly and consider its impact on lawyers, litigants, and potential litigants.

The driving concern of the scholars and judges who shaped the revolution was introducing rationality in the choice-of-law determination. They perceived the rigid First Restatement to be arbitrary, for if the state in which the injury occurs has no interest in the outcome, then why should its law govern? Hence, we have the state-interest analysis. But they did not consider the potential cost of flexibility. It should be uncontroversial and obvious that the introduction of flexibility into any legal doctrine creates uncertainty. I say that it *should be* uncontroversial and obvious because, for some reason, in conflicts scholarship and jurisprudence, this point has been almost totally ignored.

Uncertainty has a price, and the price is borne by litigants and potential litigants.[40] After all, a conflicts question that has no clear answer is a conflicts question that costs money and time to litigate. Everything in the case is up for grabs: the decision of where to bring the lawsuit is driven by uncertain choice-of-law considerations; both sides must formulate a strategy that accounts for both the substantive issues in the case and the conflicts questions; the value of the case becomes less clear, making settlement negotiations more difficult; and, of course, the case can stretch on, as the parties may have to await a choice-of-law ruling before even reaching substantive issues.

These hard costs would be bad enough if they fell on all parties to litigation equally. But they become far worse when we consider that they might not. The cost of uncertainty might fall disproportionately in some cases on plaintiffs,[41]

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40. *See, e.g.*, William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 272 (1976) ("[U]ncertainty will increase the private costs of negotiating out-of-court settlements of disputes . . . because the outcome of litigation over the meaning of the statute will be difficult to predict."); *see also* Borchers, *supra* note 9, at 510 (asking whether "conflicts cases [may be] needlessly harder to settle and thus needlessly more expensive").

41. Because tort plaintiffs often face greater financial pressure than do their defendants, they tend to be more risk averse and therefore have a tendency to undersettle their claims. The more uncertain their claims and the more drawn out the litigation, the more acute these financial pressures may become. *See* Janice Toran, *Settlement, Sanctions, and Attorney Fees: Comparing English Payment into Court and Proposed Rule 68*, 35 AM. U. L.

and the modern choice-of-law approaches may therefore favor deep-pocketed defendants. There could be a point at which attorneys, particularly those who work for contingency fees, elect not to accept cases that raise complex and unpredictable conflicts questions. Similarly, potential plaintiffs, when faced with the uncertainty and costs associated with modern doctrine, may choose not to litigate in the first place. These are hardly rational outcomes.

It is unfortunate that conflicts scholars tend to characterize the interests of efficiency and predictability as something orthogonal to, or separate from, fairness and rationality; in truth, they are core elements of fairness and rationality. Therefore, perhaps the best approach would be a return to those very rigid and dogmatic rules that predate the revolution.

All of this is speculative, of course, but that is the very point: it is speculative because no one has bothered to inquire how the modern approach impacts litigants. We have spent fifty-plus years looking at judicial opinions to assess the costs of arbitrariness in choice-of-law judicial determination, and it was these costs that spurred the revolution and all that has followed. But if we look instead at the hard costs that the modern approaches have introduced and the potential arbitrary results that these costs have imposed—that is, if we were to fill in the other side of the ledger—we may feel altogether differently about the revolution itself.

Thus, while Symeonides seeks to tell the story of the American choice-of-law revolution, he makes the same mistake as the revolutionaries themselves: the scholar reads judicial opinions, the judge reads law review articles, and no one bothers to ask what is going on behind the scenes. We have no real sense of what the impact of the revolution has been or what the balance between rules and approaches should be.

CONCLUSION

Contrary to the opinion of many conflicts scholars, it is time for *less* theorizing in choice of law, rather than more.[42] Legal scholars must take more seriously the impact of theory on practice. What we need, in a sense, is a real restatement from practitioners—but not a prescriptive and normative restatement of the ALI sort popularized by the realists; instead, a law-and-society restatement that fills in the blanks and shows how choice of law operates from the bottom up. It would be used not to tell judges what to do, but rather to lay bare what judges and the law do. I can think of no better way to

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REV. 301, 326-28 (1986).

42. *See, e.g.*, Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 6-7 (2001) (urging for more theoretical work in conflicts scholarship).

accomplish this than by building on the empirical work pioneered by Symeonides and others and putting conflicts scholarship into contact with legal practice. I mean this in the most literal sense: scholars should speak with practitioners about the impact of theory and doctrine on real life cases and legal practice.

To do this in a serious way is more easily said than done. Bearing in mind that qualitative research does not carry the same weight as well-done quantitative analysis and that "the plural of anecdote is not data," the scholar who undertakes this sort of research faces serious obstacles. Initially, one must identify practitioners who have broad experience with choice-of-law questions. These might include plaintiff-side product liability specialists, personal injury attorneys, in-house counsel to manufacturers in specific industries, respected defense firms that regularly deal with tort cases, and counsel to insurance companies. Next, after identifying potential interview subjects, one must convince them to participate in this kind of study while respecting attorney-client privilege and general confidentiality issues.

But most important of all, one must decide what to ask practitioners. Conceptually, there are two different themes that one would need to explore in order to draw conclusions about the impact of the revolution on legal practice. First, how do lawyers think about the *law* of choice of law? That is, how do they understand and engage the doctrine? Symeonides and others have suggested that attorneys are not skilled at working with the modern approaches, and perhaps this is true. But perhaps they *understand* how to perform an "interest analysis" as the doctrine calls, but choose not to for strategic reasons. And if methodological soundness can be readily sacrificed at the altar of strategy without anyone catching on, then there is a very real problem with the methodology itself.

Second, and more important, how does choice of law shape legal practice? This is a much broader and more open-ended theme, and it breaks down into many other questions: Do the modern approaches help particular kinds of clients, or hurt them? What has the revolution done to settlement positioning and negotiation? How has it impacted the length of litigation and the choice of whether to litigate? How do attorneys approach choice-of-law questions from a strategic perspective? How often do attorneys encounter choice-of-law issues?

Exploring these themes in a systematic way will address the two primary weaknesses of *Revolution*: the missing cases and the missing perspective. Generally, it will help to build a far clearer picture of the revolution. More practically, it will help scholars think about how the substantive doctrine should develop and the procedural means by which it could do so, both very real questions for conflicts scholars—and both questions that are dominated, in the grand tradition of conflicts scholarship, by theory uninformed by practice.