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A COMMENT ON TWERSKI AND MAYER: A PRAGMATIC STEP TOWARDS CONSENSUS AS A BASIS FOR CHOICE-OF-LAW SOLUTIONS

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It is refreshing to read in a recent law review article by Aaron Twerski and Renee Mayer[1] that realism and practicality should play a larger role in accommodating conflicting state policies. In their view, a number of apparently thorny conflicts questions can be analyzed as reflecting disagreement about the standard of proof. They seek to show that often "the underlying substantive law is not in conflict; rather, the conflict lies in the method by which the substantive rights may be established."[2] For that reason, it is possible to construct multistate rules[3] responsive to the policies of both jurisdictions. In the case of host-guest statutes and the statute of frauds, for example, both jurisdictions presumably are concerned with the potential for fraud and collusion, although in the particular crystallization of the rules one jurisdiction imposes liability while the other does not. The authors argue that instead of choosing one jurisdiction's rule, a court should construct a multistate solution that permits recovery when liability is proved by "clear and convincing evidence."[4] Twerski and Mayer contend that this reso-

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1. Twerski & Mayer, *Toward a Pragmatic Solution of Choice-of-Law Problems—At the Interface of Substance and Procedure*, 74 NW. U.L. REV. 781 (1979).

2. *Id.* at 786.

3. Twerski and Mayer define a multistate rule as

> a rule created by the courts to resolve conflicts by giving effect to the domestic interests of the contact states without applying the domestic rule of either state. The multistate rule differs in content from the domestic rule, but attempts to address the basic policy concerns that motivated the adoption of the domestic rule. It seeks accommodation with the rules of other concerned jurisdictions when such an accommodation reflects sensitivity to a state's own real interests, which have been subordinated in purely domestic litigation.

Id. at 783-84.

4. *Id.* at 797.

lution reconciles the two jurisdictions' differing perceptions of how best to realize similar objectives.[5]

Particularly intriguing is the authors' suggestion that in many instances the difference between a negligence standard and a strict liability standard for products liability can be reduced to a disagreement over the appropriate standard of proof. They argue that this disagreement can be resolved by shifting the burden and requiring the defendant to show an absence of negligence.[6] This multistate rule is attractive, especially if the substantive policy of the state applying strict liability is satisfied by a multistate rule shifting the burden of proof. The difficulty, however, will be in satisfactorily establishing that the local rule does in fact comprehend a more limited substantive policy supplemented by a procedural rule that seeks to save judicial resources by denying the defendant an opportunity to establish non-negligence.[7]

Although these proposals are provocative and promising, I do not propose to discuss them in any detail. What concerns me is whether they can suggest practical and realistic solutions to a far wider range of issues than those in which a compromise on burden of proof is possible.

TRADITIONAL EXAMPLES OF MULTIJURISDICTIONAL OR SHARED POLICIES

Of particular interest to me is Twerski and Mayer's disclaimer of association with the type of multistate rules I have proposed: Their multistate rule supposedly exists merely to resolve conflicts, while mine seeks to further "multijurisdictional or shared policies."[8] As I have suggested elsewhere,[9] new rules may on occasion need to be constructed to deal with multistate problems. Although their content can often be drawn from the domestic-law rules of two or more concerned jurisdictions, at times they may not be contained in the domestic law of any jurisdiction. These proposed multistate rules, rejected by Twerski and Mayer, would be derived from a comparative analysis of the law of many jurisdictions. This

5. *See id.*
6. *Id.* at 799.
7. *See id.* at 800.
8. *Id.* at 783 n.12 (citing Trautman, *The Relation Between American Choice of Law and Federal Common Law*, LAW & CONTEMP. PROB., Spring 1977, at 105).
9. Trautman, *The Relation Between American Choice of Law and Federal Common Law*, LAW & CONTEMP. PROB., Spring 1977, at 105, at 117-19. *See also* A. VON MEHREN & D. TRAUTMAN, LAW OF MULTISTATE PROBLEMS 230-32 (1965).

analysis will often reveal that apparently contrary rules reflect a large degree of consensus and a widespread acceptance of common or shared policies. What Twerski and Mayer propose can be thought of in this way, and I should like to think that any differences between the two approaches are of degree and emphasis only. However, I suspect that the authors might well disagree and insist that the route to the result is important.

It is useful first to consider some examples of multijurisdictional or shared policies. They have not emerged in tort but in areas of private ordering, such as contract and trust, in which shared policies of validation have been widely recognized.

Consider the long-accepted view that some contracts, notably those where usury is in issue, often are upheld if they are valid under the law of any jurisdiction with which they have a substantial relationship.[10] This method of sustaining such an arrangement is often called "alternative reference." Presumably it is acceptable in cases where concerned jurisdictions share the same underlying policy but choose slightly different ways of expressing it in domestic cases.

Analytically, there are two distinct situations covered by rules of alternative reference. The first occurs when one state's rule is a completely adequate substitute for the rule of a concerned jurisdiction, effectuating identical substantive policies through a different formal requirement that is nevertheless equally effective in achieving the same result. A good example is found in the grand old case of *Polson v. Stewart*[11] in which Justice Holmes, speaking for the Supreme Judicial Court of Massachusetts, accepted a North Carolina couple's contract to release marital rights in each other's land.

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10. Such a rule is adopted in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971):

> § 203. Usury
>
> The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.

Authorities in support of the rule are collected at *id.* § 203, Reporter's Note. *See also* Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927).

Another interesting example of the adoption of a multijurisdictional or shared policy is found in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269(b)(ii) (1971) (if validity of testamentary trust of movables cannot be sustained by local law of testator's domicile at death, reference should be made to local law of place of administration).

11. 167 Mass. 211, 45 N.E. 737 (1897).

The husband's release of his interest in his wife's Massachusetts land was specifically enforced, even though under Massachusetts law a conveyance to the wife would have been ineffective. Justice Holmes, albeit in a characteristically cryptic opinion, analyzed the differing procedures in Massachusetts and North Carolina, both presumably designed to protect married women. He apparently found the two techniques equivalent; in any event, he unequivocally found "no reason" and "no ground of policy" for not enforcing the contract in Massachusetts:[12] "Indeed, all the purposes of the covenant could have been secured at once in the lifetime of the wife by a joint conveyance of the property to a trustee upon trusts properly limited."[13]

Another example is the more recent, and perhaps more familiar, case of *Shannon v. Irving Trust Co.*[14] in which the New York Court of Appeals accepted New Jersey's Rule Against Perpetuities in preference to the New York rule. The court found New Jersey's rule the appropriate limitation on a New York inter vivos trust established in New York by a New Jersey domiciliary who had stipulated that New Jersey law should govern the perpetuities questions. The court stated:

> Consideration of the New Jersey law and our own relating to perpetuities and accumulations of income will indicate that our policy in that connection is substantially the same as that of New Jersey. . . . The general policy of New Jersey and New York to put some limitation on the absolute suspension of the power of alienation of property and the accumulation of income from trusts is the same. Difference arises only as to the ending of the period during which such power to suspend alienation and to provide for accumulation of income may be permitted.[15]

Therefore, the settlor's stipulation for New Jersey law would be honored.[16] In *Polson* and *Shannon*, then, the courts saw the other state's technique as an adequate substitute for their requirements because the same underlying substantive policy is effectuated.

The other situation encompassed by rules of alternative reference is where underlying substantive policies are identical or substantially equivalent but one jurisdiction's formal requirements are

12. *Id.* at 215, 45 N.E. at 738.
13. *Id.* at 215-16, 45 N.E. at 738.
14. 275 N.Y. 95, 9 N.E.2d 792 (1937).
15. *Id.* at 103-05, 9 N.E.2d at 794-95.
16. *Id.* at 105, 9 N.E.2d at 795.

slightly less adequate than the other's for effectuating those policies. A clear example would be an eight-percent interest rate limit in one jurisdiction as opposed to a six-percent limit in another. This situation would also occur if the North Carolina technique in *Polson* or the New Jersey rule in *Shannon*[17] were less strict than the Massachusetts or New York requirements respectively.[18]

Presumably Twerski and Mayer accept, and indeed are proceeding from, the analysis that underlies the justification for alternative reference when it involves the first of the two situations described. They maintain that "creating a multistate rule that raises or lowers the standard of proof . . . can accommodate differing views. This accommodation is possible because the underlying substantive law is not in conflict; rather, the conflict lies in the method by which the substantive rights may be established."[19] The identified conflict in "method" is permissible, in their view, because only the procedural issue of standard of proof is involved. I can perceive no noteworthy difference between that and other conflicts in methods, such as those in *Polson* and *Shannon*. If the conflicting methods achieve the same substantive purpose, there is no real conflict.

Perhaps the authors go further. To the extent that they propose varying the standard of proof, they are also in the realm of the second alternative-reference situation. Possibly, this explains their use of the term "deep false conflict";[20] it seems that acceptance by a strict-liability state of a lesser standard that substantially effectuates the same policy is precisely what I have suggested occurs in the second situation.

The authors limit their proposal to procedural matters. I do not believe that its scope is properly so limited. When a jurisdiction with a stricter requirement is prepared to settle for something less, other significant policies must have come into play. These policies, which can be described as multistate, have sufficient

17. This probably was the case with the New Jersey requirements, at least as to the accumulation of income. *Id.* at 103, 9 N.E.2d at 794.

18. Perhaps the most familiar example of alternative reference, apart from usury, occurs with respect to the formalities required for the execution of wills; whenever a jurisdiction with stricter requirements, for example, three witnesses signing the bottom of each page of a will, accepts less, for example two witnesses signing at the end of the will, the phenomenon described in the text would occur. *See* MODEL EXECUTION OF WILLS ACT § 7 (1940); A. VON MEHREN & D. TRAUTMAN, *supra* note 9, at 231 & n.166.

19. Twerski & Mayer, *supra* note 1, at 786.

20. *Id.*

weight to justify more than procedural accommodations. When by alternative reference a jurisdiction settles for requirements less strict than those it employs in domestic cases, the explanation is that some independent, and I insist substantive, policy has come into play. This policy is often referred to as one of validation.[21]

Twerski and Mayer have uncovered an interesting aspect of alternative reference, hitherto buried, and I applaud their discovery. They seek to tighten a play in the joints that has always been tolerated in conflict of laws by heeding "real interests, which have been subordinated in purely domestic litigation."[22] But is there any sense in heeding such subordinated interests only in those situations where the adjustment can be described as procedural? To put my question another way, why are the authors reluctant to embrace a broader explanation for the phenomenon they describe? Even the *Restatement* accepts comparable analytical techniques and concedes that other important policies have come into play to justify them.[23]

THE BROADER APPROACH

I suspect that the problem has something to do with the broader problems of theory permeating conflicts thinking today, and although this comment is not the place to do more than refer to those problems, their probable relevance seems worth mentioning.

As I have suggested elsewhere,[24] our past emphasis on conflict and our blindness to the "common pool of ideas"[25] from which American law has drawn led us down some unfortunate paths. Alternative reference arose and prospered in a general climate

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21. The *Restatement (Second)* has accepted this approach most openly in a comment on usury:

> A prime objective of both choice of law . . . and of contract law is to protect the justified expectations of the parties . . . . [T]he courts will not apply an invalidating rule to strike down the contract unless the value of protecting the justified expectations of the parties is outweighed in the particular case by the interest of the state with the invalidating rule in having this rule applied. Usury is a field where this policy of validation is particularly apparent.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203, Comment b (1971).

22. Twerski & Mayer, *supra* note 1, at 784.

23. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971) (usury).

24. *See, e.g.*, Trautman, *supra* note 9, at 114, 117-19. *See also* McDougal, *Choice of Law: Prologue to a Viable Interest-Analysis Theory*, 51 TUL. L. REV. 207 (1977).

25. H. HART & A. SACKS, THE LEGAL PROCESS 27 (tent. ed. 1958).

characterized by vested-rights[26] and territorial thinking.[27] Although fundamentally at odds with the premises of those schools of thought, the mechanism of alternative reference offered realistic and practical solutions that gained acceptance in appropriate circumstances.[28] However, the hold of vested-rights and territorial thinking may have had an influence. The mechanism of alternative reference did not assume that a multistate rule could be constructed by comparative analysis of the law of all jurisdictions and held to operate, and be sufficient for multistate cases, without support in the domestic law of any one jurisdiction.[29] Had alternative reference emphasized the commonality of all states' laws and their shared values, rather than the conflicts and divergences among local variations, a simpler and more appealing analytical framework could have emerged.

A few illustrations of this broader approach can be made within the legal contexts discussed above. Rules of alternative reference for usury could be built on shared interests in carrying out the intentions of the parties. The shared interests would prevail unless a considered departure from those shared interests had been taken in some concerned jurisdiction and that jurisdiction had a legitimate reason to insist on its diverging rule in the particular case. For example, if merchants of relatively equal bargaining strength negotiated a contract at arm's length calling for a rate of interest regarded as permissible in any of the concerned jurisdictions, their agreement would be accepted. No reason to interfere with their bargain would exist and much reason would exist to enable them to plan and order their affairs without falling into a trap that did not reflect important policy concerns but only the difficulties created by the existence of several legal orders with some claim to regu-

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26. Justice Holmes explained the theory as follows: "The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation . . . which . . . follows the person, and may be enforced wherever the person may be found." Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904), *quoted in* A. VON MEHREN & D. TRAUTMAN, *supra* note 9, at 39. *See generally* A. VON MEHREN & D. TRAUTMAN, *supra* note 9, at 37-42.

27. Based on territorial thinking, the place where an event occurs determines the law to be applied in any particular case. *See generally* A. VON MEHREN & D. TRAUTMAN, *supra* note 9, at 59-65.

28. *See* text accompanying notes 10-18 *supra*. Professor Beale acknowledged the development but concluded that there were powerful arguments "in favor of a definite rule that the *lex loci contractus* always governs as to usury." 2 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 347.4, at 1245 (1935).

29. *See generally* Von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347, 349-56 (1974).

late. Similarly, in *Polson* and *Shannon*, where important planning interests of private parties were involved, no important policy ground exists for interfering with the parties' intentions. Fulfilling their intentions is a shared policy common to both jurisdictions and, more importantly, to all jurisdictions in the legal universe to which the particular concerned jurisdictions belonged.

More generally, as I have said elsewhere,[30] traditional approaches to choice of law that emphasize conflict overlook opportunities for building upon a large substratum of consensus. In the general legal climate, it is far more natural for judges and lawyers to make a first approximation to solution of a legal problem on the basis of general learning and then to identify through further probing any special factors requiring a more particularized solution. This seems a rational and satisfying way of arriving at the type of multistate rules that Twerski and Mayer propose. If thinking about alternative reference had been allowed to develop in this way, it is not unthinkable, for example, that states with stricter requirements would have been willing to accept "clear and convincing evidence" as a surrogate in cases where the authors propose their "multistate rule."[31]

Recognition of the independent interests in planning and validation also makes it possible to think in terms of identifying a degree of consensus among all jurisdictions rather than in terms of seeking a compromise between the laws of two concerned jurisdictions. Courts would then focus on whether the rule of the particular concerned jurisdiction reflects a legitimate divergent policy that ought to be recognized.

I have long thought, for example, that it was of some significance to Justice Traynor in deciding the celebrated statute-of-frauds case of *Bernkrant v. Fowler*[32] that there was an element of the transaction that strongly suggested that an oral promise to forgive indebtedness in fact had been made.[33] If a multistate rule had been available, requiring that the contract be proved by clear and convincing evidence, Justice Traynor's decision to enforce the promise could have been achieved with less difficulty. And of course the rest of his opinion would satisfy all of us who are look-

30. *See* Trautman, *supra* note 9, at 117-19.

31. *See also* McDougal, *The Process of Trans-State Agreement: Claims Concerning Oral Agreements*, 24 N.Y.L.S. L. REV. 367 (1978).

32. 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

33. *See* Trautman, *supra* note 9, at 107 & n.7.

ing for common policies: *Bernkrant* surely is a case in which common policies to carry out contractual arrangements existed and the common concern of California and Nevada with fraud, crystallized differently in the rules applicable to domestic cases, would also be satisfied.[34]

In tort, where planning and validation play less of a role, further identification of a substratum of consensus would be required. There are significant general movements in tort law. Increasingly, more jurisdictions are placing compensation and loss-spreading in a position of greater importance than in the past. If so, the question might well become whether such recovery-denying rules as guest statutes, charitable immunity, interspousal immunity, and limitation on the amount of recovery for wrongful death reflect a truly divergent policy so that the policy is entitled to respect despite a wide consensus that compensation and loss-spreading are the norm. If the policy is not truly divergent, however, effect can be given to the widely shared view. In the limited situation addressed by the authors, the conclusion that the policy is not truly divergent depends on a finding that an analytically procedural policy has been expressed in substantive terms; where that is so, so much the better: The process of decision is then perhaps more understandable and the reasons easier to communicate.

Twerski and Mayer's proposals add to the growing acceptance of the need to move away from our traditional emphasis on the conflict between states and to grope for approaches that encourage consensus and compromise based on vast reservoirs of shared values. I would accordingly urge that their suggestions should be viewed in this way.

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34. Justice Traynor says as much:

> Since there is thus no conflict between the law of California and the law of Nevada, we can give effect to the common policy of both states to enforce lawful contracts and sustain Nevada's interest in protecting its residents and their reasonable expectations growing out of a transaction substantially related to that state without subordinating any legitimate interest of this state.

55 Cal. 2d at 596, 360 P.2d at 910, 12 Cal. Rptr. at 270.