

For a Third Conflicts Restatement— But Stop Trying To Reinvent the Wheel

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I. WHY IT IS UNNECESSARY TO REINVENT THE LAW OF CHOICE OF LAW

I am concerned here only with those aspects of a third restatement involving choice of law.

In all areas of judge-made law, with the sole exception of choice of law, the reform of what is perceived to be bad law proceeds incrementally, by a process of erosion and modification; and even such gradualism is fraught with large and small disasters.¹ It is hard to create good law, as law teachers above all should know.

Forty-two years ago Brainerd Currie announced his discovery that the traditional choice-of-law rules are so mired in technical arbitrariness as to be irrelevant to our economic and social institutions and shared values—indeed, worse than irrelevant, for to consider the traditional rules would only obscure the problem, so that the sensible course is to refrain from examining them for even glimmerings of light, which in any event *would not be found*.² Currie's demonstration of this point has been accepted as irrefutable both by those who have followed his prescriptions for interest analysis³ and those who have not. Virtually all have agreed that choice-of-law rules, if there are to be such rules, must be formulated anew.⁴

In Currie's foundation articles he devised a set of hypothetical problems in contract and tort, and compared results reached (1) under the *Restatement of the Law of Conflict of Laws* ("First Restatement"); and (2) under a methodology that he believed to implement the governmental interests of the states involved.⁵ But the *First Restatement* was a highly conceptualistic and rigid set of rules, drafted under the influence of a theory that eminent conflicts scholars had long thought to be ludicrous.⁶ As for governmental interests, rationally pursued, Currie said that, for the

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1. A general statutory solution is not practicable unless it takes the form of a codification of the best of existing judge-made law.

2. See Brainerd Currie, *Married Women's Contracts: A Study in Conflict of Laws Method*, 25 U. CHI. L. REV. 227 (1958) [hereinafter Currie, *Married Women's Contracts*]; Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958) [hereinafter Currie, *Survival of Actions*].

3. I firmly believe, with Currie, that choice-of-law rules should reflect governmental interests. I also believe that, basically, this is what they have always done.

4. For a rare exception, see Robert A. Sedler, *Continuity, Precedent, and Choice of Law: A Reflective Response to Professor Hill*, 38 WAYNE L. REV. 1419, 1467-69 (1992). Sedler believes that the traditional system makes sense generally, except in the case of torts. See *id.* at 1439-52; cf. Earl M. Maltz, *The Full Faith and Credit Clause and the First Restatement: The Place of Baker v. General Motors Corp. in Choice of Law Theory*, 73 TUL. L. REV. 305, 316-29 (1998) (defending the *First Restatement*).

5. See Currie, *Married Women's Contracts*, *supra* note 2; Currie, *Survival of Actions*, *supra* note 2.

6. See, e.g., FRIEDRICH KARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS 147 (W. Guthrie trans., 2d ed. 1880) (The vested rights theory "leads into a complete circle; for we

purpose of simplification, the interests postulated in his foundation articles were those that would be pursued by "a quite selfish state . . . blind to consequences, and interested only in short-run gains."⁷ "No such state exists," he said, "at least in this [C]ountry."⁸ Thus Currie compared results under a distorted version of the traditional methodology with results under a concededly flawed system of his own devising. This proved nothing about the operation of the traditional rules.

The flaw in Currie's methodology was omission of a governmental interest of special pertinence in choice of law. A "selfish" state that, "blind to consequences," pursues only "short-run gains," would be a state that *misconceives* its own interests. That there is no such state may manifest a universal sense that the forum's self-interest requires a measure of accommodation to the interests of other concerned states. Currie was aware of the desirability of accommodation, but he assumed—arbitrarily, it seems to this writer—that accommodation is exclusively within the province of the legislature.⁹ Thus Currie's system consigned the courts to a practice that actually defeated the interests of the forum; the courts were to make bad law while waiting for the legislature to make good law. His way out of this dilemma emerged in later writing. The forum, he stated repeatedly, should use "moderation and restraint" in determining the out-of-state reach of local policies, with a view to mitigating clashes with other states.¹⁰ This of course was accommodation by another name. And those who are now prescribing rules to resolve real conflicts are usually working for accommodation, whether or not they use that term.

Does the traditional methodology really neglect long-term governmental interests? Currie did not see how it could be otherwise. Apart from his criticism of the specifics of the *First Restatement*, he believed that traditional choice-of-law rules were essentially the product of "metaphysical" speculations "concerning the nature of law and its abstract operation in space."¹¹ He even suggested that these speculations were grounded in "superstition and sorcery."¹² Writing after the appearance of Currie's earliest articles, I expressed incredulity that a body of law that has engaged so many minds for so many centuries should be thought totally irrelevant to the needs of the

can only know what are vested rights, if we know beforehand by what local law we are to decide as to their acquisition.").

7. Currie, *Married Women's Contracts*, *supra* note 2, at 237 (internal quotation marks omitted).

8. Brainerd Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258, 286 (1961).

9. In his view, an accommodationist policy would require "subordination" of the interests of the forum to those of another jurisdiction. He stated that this was an inappropriate role for a court, without saying why. See Currie, *Married Women's Contracts*, *supra* note 2, at 250. What his system really entailed was subordination of the long-term interests of the forum, for no understandable reason.

10. Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 69 (1959); see also Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 179-80 [hereinafter Currie, *Notes on Methods*]; Currie, *supra* note 8, at 285-87.

11. Currie, *Notes on Methods*, *supra* note 10, at 173-74.

12. Brainerd Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 778 (1961).

societies in which this body of law emerged. I put this view in conclusory terms, since it seemed obvious to the point of banality.¹³ Currie replied with an expression of skepticism, and let it go at that.¹⁴ Twenty-five years later I wrote an article entitled *The Judicial Function in Choice of Law*,¹⁵ in which I attempted to show that, good or bad, these rules were not arbitrary constructs blind to governmental interests. This article has gone unchallenged.

The problem today is that, in consequence of Currie's "proof," the dogmatics of the *First Restatement* are confused with the corpus of traditional choice-of-law rules. The *First Restatement* was an attempt to rationalize the entire field on the basis of the theory of vested rights. But living law is not the product of a theory. Theories, often conflicting with one another, are advanced to make sense of the living law, which, largely because it reflects the social condition, is complex and unruly. It is true that theories often tend to generate their own rules, but this leads to sterility when the logic of the theory prevails over promotion of the public good—the *First Conflicts Restatement* being an example. The value of a particular rule should be determined by the desirability of the *outcomes* it produces.

Take, for example, *lex loci delicti*. This rule has long been dominant throughout the world.¹⁶ To say that this should count for nothing is to make a breathtaking assertion about the lack of good sense of jurists in most times and places other than the United States today. Surely such a rule does not owe its purchase to abstract speculation about the nature of law in space. Consider that the effect of this rule is that the alleged tortfeasor is held to the behavioral standards of the place where he or she acted or where the conduct foreseeably took effect; and that the victim's rights are governed by the law of the same place, just as the burden of that law would be imposed upon the victim for his or her tortious conduct there. Whether tortfeasor or victim, the foreigner is not discriminated against *qua* foreigner. The accommodationist nature of the rule should be apparent. I think that, at bottom, the objections to *lex loci delicti* are not that it produces these effects, but rather that it produces other, less desirable, effects, by application to a wide range of collateral issues. This need not be so. It is an illusion to suppose that *lex loci delicti* must be swallowed whole or not at all.

It is submitted that for the most part the traditional rules lend themselves to analysis along similar lines. Current opinion may vary about the desirability of these rules in operation, but this calls for modification of the rules accordingly rather than wholesale rejection.¹⁷

13. See Alfred Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 502-04 (1960).

14. See Currie, *supra* note 8, at 181.

15. Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585 (1985).

16. See ERNST RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 235 (2d ed. 1960).

17. Traditional choice of law has been attacked as comprised of so-called jurisdiction-selecting rules, calling for application of the law of a particular jurisdiction without regard to whether that law has a rationally defensible bearing on the issues in controversy. Those who are framing choice-of-law rules in the modern era are confident that their own rules are not deficient on this score. They believe that a rule like *lex loci delicti* is obviously deficient because, strictly applied, it produces what are now thought to be some bad results. But, despite their best efforts, their own rules may also be subject to such criticism; it is notorious that the

II. BUILDING ON THE *SECOND RESTATEMENT*

Again, my concern here is only with choice of law.

Basically, the *Restatement (Second) of Conflict of Laws* ("*Second Restatement*") consists of two parts: (1) an apparatus; and (2) specific rules.¹⁸ The latter, which comprise by far the greater part of the *Second Restatement*, commonly bear a close resemblance to the pre-Currie rules, and are usually supported by abundant precedent. It is these specific rules, modified as thought desirable, that can serve as building blocks for the third restatement. They already conform in large measure to the issue-by-issue approach, which is the great positive achievement of the conflicts revolution.

The apparatus of the *Second Restatement* consists basically of prescription of the law of the place of the most significant relationship as an overarching principle. Various check lists are provided for aid in determining the place to be chosen. Of these, the most important is that provided in section 6, which itemizes what are described as the basic objectives of choice of law.¹⁹ The *Second Restatement* took the final form it did because its framers became increasingly receptive to the new learning. They believed in rules (as distinct from Currie's ad hoc methodology), but they were apparently persuaded that a deliberate admixture of interest analysis would be useful in the development of desirable rules.

These hopes have not been realized. Scholars have derided the *Second Restatement*, without arriving at any consensus of what the law ought to be, or whether there ought to be any law. The courts on the other hand have largely purported to follow the *Second Restatement*. But except when some of the *Restatement's* specific rules have been applied, the result of their labor has been chaos. A common solution has been application of the law of the forum, which (almost) everybody agrees is the negation of any law of choice of law. What is particularly striking about the usual judicial reasoning in these cases is its sheer shallowness. This is not the fault of the judges, who are even less suited to reinvention of the law than scholars, lacking the abundance of time available to the latter. The task would probably be too much even for the Hercules of Ronald Dworkin's fancy. Besides, his forte is to reason from the law—not invent it from scratch. I think it would be well to jettison the apparatus of the *Second Restatement* altogether, including section 6. Even if a checklist methodology has any value (in my view, none), I think that value is substantially outweighed by a tendency to promote indiscriminate counting as a substitute for thought, especially on the judicial level.

Finally, we must consider that restatements, like statutory codes, are typically closed-ended; they do not have escape clauses. This has less potential for harm in a restatement, since it is never binding on a court. Nevertheless escape clauses would be useful in one devoted to choice of law because of the unsettled state of the field,

proponents of these rules disagree with each other. It is time to recognize that the jurisdiction-selecting label is not a useful one. The traditional rules, like those now being developed, are devoted, however articulated, to advancement of governmental interest. The question, pertinent to the old and new rules alike, is how effectively they do so, and how much needs to be done to make them do it better.

18. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

19. See *id.* § 6.

and also because this would be conducive to consensus among those whose support for a third restatement would be important. The difficult question is how such clauses should be worded. I have a tentative solution, to wit: "unless the court is satisfied that the law of some other place would produce a more just outcome, considering the nature of the issue to be decided." I would leave this to the common sense of the judges, and not burden them with checklists or other guides.