A Third Conflicts Restatement?†

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INTRODUCTION

How does one restate gibberish? Anyone who looks at American judicial opinions dealing with choice-of-law issues must conclude that the field is in a desolate state. Deprecating current case law, Kramer said that "[e]xisting decisions on choice of law are products of a long tradition of confused and misguided thinking."[1] Indeed, the judicial prose has an Alice-in-Wonderland kind of quality: one reads about "contacts" and "interests" as if these concepts were pretty much the same thing, or perhaps closely related;[2] one has to plow through lengthy and wholly unconvincing dissertations about the interests states have in effectuating the dubious policies that supposedly inform guest statutes;[3] one finds authors who are at doctrinal loggerheads peacefully united in a single footnote;[4] one encounters prose so turgid and stilted that one suspects the judge (or more likely the law clerk who actually drafted the opinion) never really grasped the idea behind the particular conflicts approach the court purports to follow.

Even more depressing, however, at least to those who teach the subject, is the disarming candor with which some judges deplore the "post-revolutionary" conflicts law.[5] Coherence and clarity are hardly the hallmark of academic writing; scholarly opinions differ vastly on what contacts count, and whether interests—the magic ingredient of "modern" choice-of-law analysis—actually exist.[6] Hence, before

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

2. "'[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)). This mantra leaves unclear whether (and how) contacts automatically spawn interests, whether all of them or only some of them do, and what precisely the interrelationship between these two commodities happens to be.

3. *Compare* Neumeier v. Kuehner, 286 N.E.2d 454, 455 (N.Y. 1972) (Fuld, C.J.) (protecting drivers and owners from ungrateful guests), *with* Babcock v. Jackson, 191 N.E.2d 279, 284 (N.Y. 1963) (Fuld, J.) (preventing drivers from colluding with passengers to defraud insurers). As to the real "policy" informing these enactments, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 215-16 (5th ed. 1984).

4. *See, e.g.*, First Nat'l Bank v. Rostek, 514 P.2d 314, 318 n.4 (Colo. 1973); O'Connor v. O'Connor, 519 A.2d 13, 18 n.8 (Conn. 1986); Beaulieu v. Beaulieu, 265 A.2d 610, 616 n.1 (Me. 1970).

5. *See In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 739 (C.D. Cal. 1975) ("The law on 'choice of law'... is a veritable jungle, which, if the law can be found out, leads not to a 'rule of action' but a reign of chaos...."); Fisher v. Huck, 624 P.2d 177, 178 (Or. 1981) (stating that applying the *Restatement* is like "skeet shooting with a bow and arrow").

6. *See* FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 135 (1993).

embarking on a new restatement, we would be well advised to heed Yogi Berra's warning that "You got to be careful if you don't know where you're going, because you might not get there."

Given the present state of conflicts law and literature, it should come as no surprise that some courts prefer the wisdom of the past[7] and there may even be academics who long nostalgically for the days when rules were clear and precise. In fact, one reads that this country's Constitution requires conflicts rules of the traditional type,[8] although one might question whether the conflict of laws (a discipline that did not really matter much in this country before Story wrote his famous *Commentaries*)[9] was uppermost in the Founding Fathers' minds. Certainly, one cannot help but shudder when thinking about the Supreme Court's taking an active role in this field considering what it has done to the far simpler subject of jurisdiction.[10] And yet, some conflicts scholars have urged the Justices to take a more active role,[11] though few would share the view that the Court should ordain territorialist rules akin to (albeit more sophisticated than) those of the *Restatement of the Law of Conflict of Laws*[12] ("*First Restatement*").

I. THE SECOND RESTATEMENT

The cacophony of discordant voices suggests that conflicts law, both the academic and the judicial variety, is in a sad and unrestateable shape. Even if it were possible to penetrate the gibberish and to find out what the courts are actually doing,[13] the

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7. *See, e.g.*, Fitts v. Minnesota Mining & Mfg. Co., 581 So. 2d 819, 820, 823 (Ala. 1991) (stating that lex loci delicti "has been the rule in Alabama for almost 100 years" and that "newer approaches to choice of law problems are neither less confusing nor more certain"); Boudreau v. Baughman, 368 S.E.2d 849, 854 (N.C. 1988) (explaining that the lex loci delicti rule represents an "objective and convenient approach").

8. *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 317-19, 322-31, 337 (1992).

9. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834).

10. *See generally* Friedrich K. Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C. DAVIS L. REV. 907 (1981). *But cf.* William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417 (2000) (noting the desirability of restating the *Second Restatement*'s jurisdictional rules to take account of Supreme Court case law).

11. *See, e.g.*, Peter Hay, *Full Faith and Credit and Federalism in Choice of Law*, 34 MERCER L. REV. 709, 722, 727-29 (1983); Laycock, *supra* note 8, at 331-36, 337; Willis L.M. Reese, *The* Hague *Case: An Opportunity Lost*, 10 HOFSTRA L. REV. 195, 201-02 (1981).

12. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT]. For the view that the Court should ordain territorialist views, see Laycock, *supra* note 8, at 330-31, 337.

13. Two statistical analyses suggest answers. *See* Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989). Regrettably, the answers they suggest differ substantially. Concerning the nced for such an analysis see Richman & Reynolds, *supra* note 10, at 419 n.15.

subject—in spite of its venerable age[14]—seems to lack the maturity one ought to require before attempting to cast it in concrete. In fact, the *Restatement (Second) of Conflict of Laws*[15] ("*Second Restatement*") stands as a warning against the efforts to enshrine disparate and vacillating conflicts doctrines in black-letter rules. For good reasons, the Reporter's valiant attempt to present the widely divergent views extant at the time and to jumble together incompatible schools of thought has been criticized on the ground that it "does not significantly refine and discipline theory and analysis."[16]

Many courts seem to like the "mishmash," or "kitchen-sink,"[17] concoction the restaters produced;[18] after all, it enables judges to decide conflicts cases any which way they wish. To be sure, the *Second Restatement*'s unprincipled eclecticism has done little to strengthen the intellectual underpinnings of our discipline. Nevertheless, that *Restatement*, notwithstanding its "ungainly and doubtful apparatus,"[19] did faithfully reflect the onslaught of ideas advocated during a "period of transition,"[20] when traditional wisdom succumbed to the *nouvelle vague*. In fact, we have not progressed much beyond the salad days of the "conflicts revolution"[21] whose achievements its Reporter attempted to codify, as best he could, when all was new and wonderful and "revolutionaries" boldly forged ahead. After all, there were good reasons for inventing novel approaches that defied the conventional conflicts wisdom enshrined in the *First Restatement*, whose lex loci delicti rule[22] all too often yielded unpalatable decisions in interstate and international cases.[23]

The *Second Restatement*, vague and unprincipled as it was, had the distinct virtue of suggesting to judges that they are not bound by any hard and fast rules, which inevitably prompted undesirable outcomes in interstate and international cases. Its eclectic jumble of "disparate elements"[24] included tentative near rules, nonrules that used a soft "'most significant relationship'" connecting factor, as well as state

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14. *See* JUENGER, *supra* note 6, at 11.

15. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter SECOND RESTATEMENT].

16. Arthur T. von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 964 (1975).

17. William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645 (1983).

18. *See* Symeon C. Symeonides, *Choice of Law in American Courts in 1997*, 46 AM. J. COMP. L. 233, 266 (1998) [hereinafter Symeonides, *Choice of Law in American Courts*]; *see also* Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248 (1997).

19. Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475, 478 (2000).

20. Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 443 (2000).

21. An expression apparently coined by Ehrenzweig, one of the "revolutionaries." Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966).

22. *See* SECOND RESTATEMENT, *supra* note 15, §§ 377, 378, 384.

23. *See infra* text aecompanying notes 82-90.

24. Richman & Reynolds, *supra* note 10, at 424.

"interests" and "policies."[25] This arsenal allowed courts to select, from among a panoply of possibilities, those rules of decision which they found most useful in the pursuit of multistate justice.[26] In a way, it was a non-*Restatement*: by mixing together all manner of doctrinal currents, it simply furnished courts with any number of plausible reasons to support whatever results they wished to reach. That, no doubt, is the principal reason why judges like it[27] and academics detest it.

II. THE DEARTH OF NEW IDEAS

Little has happened in American conflicts law since. Current judicial opinions still rely on the approaches the *Second Restatement* enshrines and in the academic realm the gospels of yesteryear's prophets are still discussed,[28] albeit with "diminishing returns."[29] I say prophets because, not without reason, modern choice-of-law thinking has been compared to theology.[30] In particular, the writings of followers of the late Brainerd Currie, whose school of "interest analysis" continues to dominate American scholarly discussion, have attained the status of a credo. They have spawned cults that dot the conflicts swamp with "stagnant pools of doctrine, each jealously guarded by its adherents."[31] In these murky surroundings they continue, to this day, to debate such figments of the legal imagination as conflicts true and false and the unprovided-for case.[32] Of course, the fact that these self-inflicted embarrassments of interest analysis[33] still have not been laid to rest thirty-three years after Currie's death hardly inspires confidence in that particular school of thought.

Lacking new ideas, our discipline is stuck in a time warp, as a recent symposium vividly illustrates.[34] This may explain why the conflict of laws has lost much of the

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25. JUENGER, *supra* note 6, at 105-06.

26. Some, of course, may consider this a vice rather than a virtue. *See* Symeonides, *supra* note 20, at 439.

27. *See* Richman & Reynolds, *supra* note 10, at 429-30; Symeonides, *supra* note 20, at 440 n.14.

28. *See* William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1384 (1997).

29. Richman & Reynolds, *supra* note 10, at 426.

30. *See* Courtland H. Peterson, *Weighing Contacts in Conflicts Cases: The Handmaiden Axiom*, 9 DUQ. L. REV. 436, 441 n.30 (1971) (commenting on interest analysis); *see also* Friedrich K. Juenger, *What Now?*, 46 OHIO ST. L.J. 509, 509 (1985).

31. Herma Hill Kay, *The Use of Comparative Impairment To Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577, 615 (1980).

32. These strange phenomena continue to occupy scholars. *See, e.g.*, Larry Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045 (1989); Joseph W. Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197 (1991). They also still feature prominently in case books. *See, e.g.*, ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 138-206 (5th ed. 1993); SYMEON C. SYMEONIDES, WENDY COLLINS PERDUE & ARTHUR T. VON MEHREN, CONFLICT OF LAWS, AMERICAN, COMPARATIVE, INTERNATIONAL 119-244 (1998).

33. Concerning the reasons for these conundrums, see JUENGER, *supra* note 6, at 138, 156.

34. *See* Symposium, *Choice of Law: How It Ought To Be*, 48 MERCER L. REV. 623 (1997). For critical comments, see Patrick J. Borchers, *Back to the Past: Anti-Pragmatism in American Conflicts Law*, 48 MERCER L.REV. 721 (1997); Friedrich K. Juenger, *Choice of Law: How It Ought Not to Be*, 48 MERCER L. REV. 757 (1997); *see also* Richman & Reynolds, *supra* note

glamor it once enjoyed. The author of the first American conflicts treatise called it "the most interesting, the most delicate, and the most embarrassing and difficult" legal subject;[35] it prompted Story to write a magisterial treatise; and Cardozo still credited conflicts law with being "one of the most baffling subjects of legal science"[36] (albeit criticizing it for being "blind to final causes").[37] Current opinions about it are far less flattering. Of course, the conflict of laws has always been an opaque discipline; but it has become even more so after the late Dean Prosser scathingly denounced it as a "quaking quagmire[]."[38] By now, many states have dropped the subject from their bar examinations.[39] In fact, the conflict of laws seems to embarrass the University of Michigan sufficiently to suppress that title in the law school catalogue; while it is still taught at that institution, it parades under the label "Jurisdiction and Choice of Law" (even though judgments recognition as well is covered).[40] Thus, the subject's very name is in jeopardy; indeed, a recent student contribution keeps calling it (as many nowadays do) "conflicts of law."[41] What can we do to restore its previous prestige; would a new restatement help?

III. BLACK-LETTER RULES

Last August, Dean Symeonides served as the General Reporter on the topic of "Private International Law at the End of the Twentieth Century: Progress or Regress?" for the XV Aunual Congress of the International Academy of Comparative Law. He maintained—as he does in this Symposium—that we need written choice-of-law norms.[42] By way of example, he referred to the *Neumeier* rules developed by the Court of Appeals of New York,[43] the conflicts provisions of the American Law

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10, at 419-26. Introverted and preoccupied with marginal problems, American conflicts law has also lost the urbanity and comparative law perspective that used to characterize it. *See* Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309 (1999).

35. SAMUEL LIVERMORE, DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS 1 (New Orleans, B. Levy 1828).

36. BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 67 (1928).

37. *Id.* at 68.

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

39. One may lament the fact that the bar examiners have eliminated the subject, *see* Weinberg, *supra* note 19, at 478 n.16, but how are they to grade the examinees' answers given the current confusion?

40. The University of Michigan Law School, All Course Descriptions (visited Nov. 29, 1999) <http:/www.law.umich.edu/cfusion/template/course.dbm?CourseID=693All>. At Stanford the subject is apparently no longer taught at all. *See* William H. Allen & Erin A. O'Hara, *Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1047 (1999).

41. Jason Andrew Macke, Note, *Of Covenants and Conflicts—When "I Do" Means More Than It Used To, But Less Than You Thought*, 59 OHIO ST. L. J. 1377 *passim* (1998). The Note won an award, whose judges presumably labored under the same difficulty as the author.

42. *See* Symeonides, *supra* note 20, at 447.

43. Neumeier v. Kuehner, 286 N.E.2d 454, 457-58 (N.Y. 1972).

Institute's ("ALI") Complex Litigation Project[44] and those of the Louisiana Civil Code,[45] of which he was the principal draftsman. Similarly, Professor Courtland Peterson, the American National Reporter, after noting that "[s]ome pessimistic observers are appalled"[46] by the current disarray of American conflicts doctrine, voiced the hope for a "system of principled rules."[47] He as well referred to the *Neumeier* rules and those of the ALI's Complex Litigation Project.[48]

I, for one, question whether either the New York case law or the provisions of the Louisiana Civil Code and the ALI Project are models that deserve emulation.[49] In my opinion, the *Neumeier* rules (which were designed to deal with foreign guest statutes, an issue that has since largely evaporated)[50] leave much to be desired. In practical application they are bound to produce results that are even worse than those compelled by the *First Restatement*'s inflexible lex loci delicti rule, as the "notoriously wrong case"[51] of *Schultz v. Boy Scouts of America, Inc.*[52] demonstrates. That case dealt with tort actions against the Boy Scouts for negligent supervision of an aberrant priest, who had molested two New Jersey boys in New York and in New Jersey, one of whom killed himself. The court of appeals dismissed the complaints of his parents and surviving brother because, according to the majority, *Neumeier* required application of a New Jersey statute that had resurrected the charitable immunity doctrine[53] (which New Jersey's highest court had earlier disavowed as incompatible with reason and justice).[54] Even the wooden and mechanical lex loci delicti rule would have yielded a less appalling result.

Nor are the Complex Litigation Project's choice-of-law rules, which have not attracted uniform acclaim,[55] or the Louisiana Civil Code's choice-of-law provisions, which Dean Symeonides drafted, likely to promote multistate justice. As to the latter, let me quote their introductory provision:

> Except as otherwise provided in this Book, an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.[56]

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44. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 6.01(d) (1994).

45. *See* LA. CIV. CODE ANN. arts. 3515-3549 (West 1994 & Supp. 1999).

46. Courtland H. Peterson, *Private International Law at the End of the Twentieth Century: Progress or Regress?*, 46 AM. J. COMP. L. 197, 225 (Supp. 1998).

47. *Id.* at 226.

48. *See id.* at 226, 227.

49. *But see* Symeonides, *supra* note 20, at 447 n.55.

50. Apparently, the only state that still has such a statute is Alabama. *See* ALA. CODE § 32-1-2 (1989).

51. Weinberg, *supra* note 19, at 504.

52. 480 N.E.2d 679 (N.Y. 1985).

53. *See* N.J. STAT. ANN. § 2A:53A-7 (West 1987 & Supp. 1999).

54. *See* Collopy v. Newark Eye & Ear Infirmary, 141 A.2d 276 (N.J. 1958); Dalton v. Saint Luke's Catholic Church, 141 A.2d 273 (N.J. 1958).

55. *See* Symposium, *American Law Institute Complex Litigation Project*, 54 LA. L. REV. 833 (1994).

56. LA. CIV. CODE ANN. art. 3515(1) (West 1994 & Supp. 1999).

This mantra, reiterated in subsequent articles,[57] harkens back to Baxter's 1963 article,[58] which—wittingly or unwittingly—borrowed an idea from the French conflicts author Pillet, who had advocated what he called the "law of least sacrifice."[59] How you go about measuring the impairment of policies or interests, constructs of the legal imagination that lack physical attributes such as weight or length, I do not know; the attempt at calibrating intangibles reminds me of Justice Traynor's rhetorical question how you can possibly "'weigh a bushel of horse feathers against next Thursday.'"[60]

The second paragraph of the introductory code provision is hardly more plausible than the first. It reads as follows:

> That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.[61]

This provision foists a formidable task on the judiciary. Perhaps Louisiana judges are a particularly hardy breed that is undaunted by the hodgepodge of factors demanding simultaneous attention. But if judges can indeed be trusted to perform that feat, why should we not simply stick with the equally eclectic nonrules of the *Second Restatement*? After all, that book is already available in most law libraries and presents pretty much the same amorphous blob of considerations, leaving courts—as article 3515 does—with a lot of choices but without any real guidance.

The tort rules Dean Symeonides contributed to this Symposium[62] are equally questionable. The distinction he draws between "conduct regulation" and "loss distribution" is, as he admits,[63] a difficult one. Yet he feels that this dichotomy is necessary and useful for attaining an equilibrium between the territorial and the personal reach of laws.[64] Alas, that "equilibrium" (whatever the term may mean) is threatened by the fact that—as the much maligned Joseph Beale already informed us—every law has both a personal and a territorial dimension.[65] As the glossators' vain attempts to divide "statutes" into real and personal (as well as mixed!) ones[66] go to show, such an undertaking is doomed to failure. Worse yet, the provisions Dean Symeonides drafted for this Symposium incorporate inconsistent methodologies.

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57. *See id.* arts. 3537 (contracts), 3542 (torts).

58. *See* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

59. Antoine Pillet, *Théorie continentale des conflits de lois*, 2 RECUEIL DES COURS 447, 466-71, 482 (1924).

60. Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963) (quoting Roger J. Traynor, *Res Ipsa in California*, 37 CAL. L. REV. 183, 225 (1949)).

61. LA. CIV. CODE ANN. art. 3515 (West 1994 & Supp. 1999).

62. *See* Symeonides, *supra* note 20, at 450-51.

63. *Id.* at 452-53.

64. *See id.* at 453.

65. 3 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS app. § 53, at 1929 (1935).

66. *See* JUENGER, *supra* note 6, at 14-15.

While he speaks of "interests,"[67] his rules are of the multilateral variety (as they must be because, like other unilateralist approaches, interest analysis is antithetical to rules).[68] But unilateralism and multilateralism are antithetical to each other and therefore do not mix well; at best they yield an unstable emulsion reminiscent of that which the *Second Restatement* bestowed upon us.

IV. THE RAW MATERIAL FOR A THIRD RESTATEMENT

Must we not conclude, then, that it would be premature, if not foolhardy, to embark on the task of drafting yet another conflicts restatement? Certainly, if my experience as a member of the American Law Institute (especially as regards the Institute's endeavor to produce a third torts restatement) is any indication, one can hardly expect that body to fashion a silk purse from a sow's ear. In any event, restatements ought to reflect judicial practice, and what courts are currently doing with conflicts cases may be difficult to reproduce in black-letter form. Not only do the theoretical foundations on which judges purport to rely vary from state to state,[69] one cannot even trust judicial opinions to adhere faithfully to the doctrines they claim to follow.

To cite but one striking example: West Virginia ostensibly follows the old lex loci delicti rule,[70] and the state is counted among those that has escaped the "conflicts revolution."[71] In fact, however, the West Virginia Supreme Court has consistently deviated from it whenever that rule invokes a substandard foreign rule of decision. As Judge Workman explained:

> It is the strong public policy of this State that persons injured by the negligence of another should be able to recover in tort.
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> . . . .
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> We therefore adhere to the rule that the doctrine of lex loci delicti will not be invoked where the "application of the substantive law of a foreign state . . . contravenes the public policy of this State."[72]

For this reason, the court applied the West Virginia comparative negligence rule rather than the lex loci delicti's contributory negligence rule. Thus, the approach the

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67. Symeonides, *supra* note 20, at 474.

68. For this reason Currie said, "We would be better off without rules." BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 183 (1963).

69. Annual surveys published in the *American Journal of Comparative Law* contain charts that attempt to categorize the courts' handiwork, dividing states by the doctrines their highest courts profess to follow. For the latest one to be published, see Symeonides, *Choice of Law in American Courts*, *supra* note 18, at 266.

70. *See* Mills v. Quality Supplier Trucking, Inc., 510 S.E.2d 280, 282 (W. Va. 1998). In fact, the court said that this rule "'has long been the cornerstone of our [conflict of laws] doctrine. The consistency, predictability, and ease of application provided by the traditional doctrine are not to be discarded lightly.'" *Id.* (citation omitted) (quoting Paul v. National Life, 352 S.E.2d 550, 555 (W. Va. 1986)).

71. Symeonides, *Choice of Law in American Courts*, *supra* note 18, at 266.

72. *Mills*, 510 S.E.2d at 282, 283 (last omission in original) (quoting *Paul*, 352 S.E.2d at 556), in which the court had refused to apply the accident state's guest statute. *See id.* at 283.

West Virginia Supreme Court purports to follow is not that which it actually applies; in effect, that state ought to be counted among those that use the "better-law" component of Leflar's "choice-influencing considerations."[73]

West Virginia is not the only state where theory and practice clash. Judicial eclecticism, which treats disparate doctrines as interchangeable,[74] makes it a hazardous venture to allocate any given state to particular conflicts theory. Even if states could be pigeon-holed in this fashion, they do not consistently follow the dogmas to which they profess allegiance, nor do lower courts and federal judges necessarily adhere to what the state supreme court has ordained. In the words of one commentator, "it is hard to read a lot of choice of law opinions without being terribly disappointed in the quality of the analysis, which tends to be unsophisticated, unthoughtful, and often unreasoned."[75] Apparently, judges use the modern approaches to short-circuit choice-of-law problems and to apply whatever rules of decision they wish to apply, usually those of the forum. If there is any consistency at all, Currie's ethnocentric version of the governmental interest analysis approach, according to which foreign law is rarely applied, may be said to predominate:[76] in the large majority of cases the courts seek refuge in the lex fori. In consequence, American conflicts law—which, since Story's times, had been informed by an urbane comparativist approach,[77]— has become curiously omphaloscopic.

If American courts do in fact invariably apply the lex fori on one pretext or another, it would be futile to insist on the subtle ratiocinations required by esoteric conflicts theories. Why waste paper on a new restatement, if the gist of the judicial handiwork can be stated in one simple sentence: "Thou shalt not apply foreign law"? Yet, while such a rule may well reflect current conflicts practice—at least in tort cases—it would hardly be desirable. Clearly, applying forum law without exception makes no sense in other contexts. California courts would be ill-advised, for instance, to determine the incidents of a marriage contracted in Pakistan by Pakistani nationals and domiciliaries by reference to California law, should a dispute relating to that marriage arise in California.[78] Nor would the homing trend implicit in interest analysis and other modern approaches serve the interests of trade and commerce. Should American conflicts law preclude, for instance, an American corporation from stipulating that its contract with a German company is governed by English law?[79]

Obviously, common sense and justice require courts to apply, at least in some instances, foreign law, even if scholars may be unable to tell them when that should

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73. ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW § 95, at 277-79, §§ 103-08, at 290-303, § 138, at 389-91 (4th ed. 1986).

74. *See supra* text accompanying notes 17-18.

75. Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 466 (1991).

76. *See* Robert A. Sedler, Essay, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a Response*, 23 U.C. DAVIS L. REV. 865, 866 (1990).

77. *See* JUENGER, *supra* note 6, at 29-30.

78. *See In re* Dalip Singh Bir's Estate, 188 P.2d 499, 502 (Cal. Ct. App. 1948) (upholding inheritance rights of wives of a bigamous marriage).

79. *Cf.* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (upholding a forum-selection clause).

be the case. We ought to pay more attention to that question instead of indulging in nonrule approaches that leave judges frustrated and bewildered, as their complaints demonstrate.[80] Conflicts teachers may thrive on far-fetched theories and will-o'-the-wisp approaches, but Rosenberg was surely right to remind us, during the "conflicts revolution's" early stages, that multistate cases are not "rare and esoteric conundrums, conceived for the titillation of philosophers . . . . Scholars, in their fascination with conflicts, should not forget that the game is not being played so they can flex their jurisprudential muscles, but in order to better the human condition through law."[81] Yet, given current conditions, one wonders whether a third restatement might not turn out to be even worse than the second.

V. THE LURE OF THE LEX FORI

There are good reasons why the *First Restatement* lost favor with the courts and why they embraced methodologies with a distinctive homing trend. It was not so much Beale's silly vested rights doctrine[82] that soured judges on his work product; rather, judicial instinct rebelled against the unpalatable results his hard and fast tort choice-of-law rules produced in practical application. The "conflicts revolution" mirrored changes in substantive tort law. It flared up around the time when the rules that govern accidents, especially traffic accidents, were undergoing serious reforms (not the kind of thing that nowadays parades under that name). In those bygone days, legislatures abrogated misconceived statutory provisions, such as caps on wrongful death damages,[83] courts began to overrule long-standing precedents that barred recovery whenever the victim had been negligent,[84] that allowed charities to maim and kill with impunity[85] and that prohibited family members from suing each other,[86] and some went as far as to invoke constitutional provisions to strike down substandard statutes, such as those that barred passengers from suing drivers.[87]

Once a legislature, or the highest tribunal of a state, has put its own house in order, judges are wont to take a dim view of unreformed foreign tort law a domestic choice-

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80. *See, e.g., In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 739 (C.D. Cal. 1975) (lamenting that the state of conflicts law was "a veritable jungle"); Fisher v. Huck, 624 P.2d 177, 178 (Or. Ct. App. 1981) (comparing the "most significant relationships" approach of the *Second Restatement* to "skeet shooting with a bow and arrow").

81. Maurice Rosenberg, Comment, *Comments on* Reich v. Purcell, 15 UCLA L. REV. 551, 644 (1968).

82. *See* JUENGER, *supra* note 6, at 90.

83. *See* 2 STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH AND INJURY § 7:1 (3d ed. 1992).

84. *See, e.g.*, Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

85. *See, e.g.*, President of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); *cf.* Colby v. Carney Hosp., 254 N.E.2d 407 (Mass. 1969) (stating intention to abolish the charitable immunity doctrine the next time it came before the court).

86. *See, e.g.*, Klein v. Klein, 376 P.2d 70 (Cal. 1962); Freehe v. Freehe, 500 P.2d 771 (Wash. 1972).

87. *See, e.g.*, Brown v. Merlo, 506 P.2d 212 (Cal. 1973); Whitworth v. Bynum, 699 S.W.2d 194 (Tex. 1985).

of-law rule may invoke. Courts can hardly be blamed for not allowing defendants to drag in from abroad contributory negligence, charitable and intrafamily immunities, limitations on wrongful recovery, guest statutes, and other relics that the forum had just abolished. After all, judges tend to favor fair results.[88] Because plaintiffs can shop for a favorable forum, such results can, in many interstate and international tort cases, be achieved by simply applying the reformed lex fori. If one reads the series of "revolutionary" tort choice-of-law decisions from *Kilberg v. Northeast Airlines, Inc.*[89] to *Tooker v. Lopez*,[90] one notices a stereotyped pattern underlying the case law of the New York Court of Appeals: the defendant (or rather counsel furnished by the defendant's insurer) invokes the lex loci delicti, which contained some odious foreign tort rule, such as a guest statute, that is at odds with forum law.

It should be obvious why judges liked the new approaches scholars advocated during the "conflicts revolution": the *Second Restatement*'s nonrules and Currie's "governmental interest" analysis allowed them to ward off substandard foreign rules of decision.[91] Thus, the revolutionary doctrines' homing trend had, in general, a benign effect (even though the modern doctrines could be easily "misinterpreted").[92] The fact that these doctrines improved the level of interstate justice does not, however, necessarily support the conclusion that they are sound and desirable. Indeed, it seems to me that the "revolution" has had a pernicious effect on American conflicts law. Serving as a handy pretext, the *nouvelle vague* prevented courts from articulating the true reason for deciding as they did; the true reason being, in my opinion, that the judges wanted to dispense an interstate justice that was not qualitatively inferior to that meted out in purely domestic cases.

Nowadays, in an era of a new kind of "tort law reform,"[93] the modern teachings' forum bias has the opposite effect. That "reform," promoted by powerful lobbies, has succeeded in persuading state legislatures to curtail, in various and sundry ways, the rights of accident victims.[94] Since not two of these statutes are alike, the "reformers" have managed to balkanize American tort law. In consequence, nowadays in many instances inferior domestic law, which is the product of astute lobbying rather than the judicious reevaluation of existing rules, conflicts with superior foreign law.

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88. "Justice in the individual case has always been one of the objectives of law, and judges properly take pride in the effort to achieve it." LEFLAR ET AL., *supra* note 73, § 88, at 262.

89. 172 N.E.2d 526 (N.Y. 1961).

90. 249 N.E.2d 394 (N.Y. 1969).

91. *See* JUENGER, *supra* note 6, at 146-48.

92. *See* Richman & Reynolds, *supra* note 10, at 431.

93. Concerning the relevance of "tort law reform" to conflicts law, see Louise Weinberg, *Mass Torts at the Neutral Forum: A Critical Analysis of the American Law Institute's Proposed Choice Rule*, 56 ALB. L. REV. 807, 824-26 (1993).

94. For a quick glance at the motley array of statutory provisions, which range from inroads on the collateral-source rule to the abolition of the collateral-source rule, see the state-by-state listing in Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 220-22 (1990); *see also* Mark Thompson, *Letting the Air out of Tort Reform*, A.B.A. J., May 1997, at 64, 65. The balkanizing effect of "tort reform" has been enhanced by the fact that by "the end of 1996, high courts in 24 states had handed down 61 different decisions overturning all or parts of laws that attempted to limit damages or erect other hurdles to discourage tort suits." *Id.*

Accordingly, instead of raising the level of interstate justice, in present circumstances the forum bias of modern conflicts approaches is bound to lower it. Hence, while the first wave of the "conflicts revolution" improved the lot of interstate and international accident victims, given current realities, one may expect it to have the opposite effect in future tort cases.

The potential for bad results is not the only thing new and old conflicts approaches share. Often overlooked is their common philosophy. Interest analysts, as well as those who prefer hard and fast rules of the traditional kind, may fail to notice that Beale and Currie were birds of a feather.[95] Both subscribed to legal positivism and made the notion of sovereignty[96] central to their teachings. They shared the belief that interstate and international transactions must, of necessity, be submitted to the law of a particular state or nation. In reality, however, interstate and international transactions are, by their very nature, sufficiently different from purely domestic ones to pose the legitimate question whether they ought not to be governed by some form of international or supranational law.[97] At the very least, as scholars have pointed out[98] and judges have acknowledged,[99] rules adopted for domestic consumption can present an obstacle to international commerce because they may be ill-suited to deal with transnational realities.

To be sure, of these scholars Currie was the more chauvinistic. The *First Restatement*'s Reporter at least acknowledged that overarching considerations of federalism and internationalism are important in interstate and international cases, in short, that comity counts.[100] In marked contrast, Currie believed that judges, being mere mouthpieces of the legislature, lack the freedom (which they enjoy in other civilized legal systems)[101] of sacrificing domestic policies when the forum is "interested" in some fashion.[102] To hypothesize, as Currie did, a "Hobbesian state of nature"[103] that supposedly prevails among the component states of this country defies

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95. *See* JUENGER, *supra* note 6, at 159-60.

96. This, of course, is the reason why, as Richman and Reynolds, *supra* note 10, at 427, point out, both rejected or ignored the important concept of party autonomy.

97. *See* JUENGER, *supra* note 6, at 160-61.

98. *See* QUINTÍN ALFONSÍN, TEORÍA DEL DERECHO INTERNACIONAL PRIVADO 46-47 (1955); D. JOSEPHUS JITTA, LA MÉTHODE DU DROIT INTERNATIONAL PRIVÉ 44 (Paris, Marchal et Billard 1890).

99. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972); Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842).

100. *See* 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 1.3, at 4-5 (1935). Beale was, however, of a sufficiently positivistic mind-set to take issue with the notion of comity. *See id.* § 6.1, at 53-55.

101. In Europe, for instance, there has been a wave of conflicts codification ranging from Portugal to Russia, and even the United Kingdom has seen fit to enact a choice-of-law statute. *See* Friedrich K. Juenger, *Two European Conflicts Conventions*, 28 VICTORIA U. WELLINGTON L. REV. 527, 536 (1998). For a partial list of codifications see SYMEONIDES, PERDUE & VON MEHREN, *supra* note 32, at ix-x. The large majority of statutory choice-of-law rules are of the traditional multilateral variety, which invoke foreign law with considerable frequency. That is also true in France, even though most of the French choice-of-law rules are judge-made. *See* BERNARD AUDIT, DROIT INTERNATIONAL PRIVÉ 20 (1991).

102. *See* CURRIE, *supra* note 68, at 183-84.

103. Arthur T. von Mehren, Book Review, 17 J. LEGAL EDUC. 91, 94 (1964) (reviewing

reality, as does his exaggerated emphasis on sovereign prerogatives.[104] Even as regards international transactions, Currie's notion of splendid isolation looks curiously dated now that "globalization" has become the cliché of choice. It is also out of sync with the conflicts philosophy that prevails elsewhere. As a German conflicts scholar, for instance, put it more than twenty years ago, "the idea of *sovereignty*, which in our century has become dubious even in international law, does not, at least in private international law, perform any useful service."[105]

VI. WHAT TO DO

Given the doctrinal confusion that currently prevails, it may prove difficult to re-restate the law of conflicts. Instead of attempting to cast in black letters the unrestateable mixture of academic teachings and judicial fumbling that characterizes American conflicts law, we might do better to reassess the foundations of our discipline. It has long been my contention that such a reassessment will inevitably have to answer the question whether it is true—as both Beale and Currie thought—that results do not matter in interstate and international cases.[106] The proposition that judges should be oblivious to the outcomes of the cases they decide[107] is unique to the conflict of laws; no other legal discipline harbors such a strange idea. As Roscoe Pound put it:

> [Law] must be judged by the result it achieves, not by the niceties of its internal structure; it must be valued to the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.[108]

I submit that it is high time to make this objective *the* focal point of inquiry. As I have shown elsewhere,[109] there are but three basic choice-of-law methods: multilateralism, unilateralism, and the substantive law approach. Whereas the first two methods elevate geography over teleology,[110] the substantive law approach is designed to achieve fair results in multistate cases. The first two approaches have had a long run; multilateralism was the hallmark of the *First Restatement*, unilateralism that of Currie's interest analysis, and both informed the eclectic *Second Restatement*. For far too long, the substantive law approach[111] has been neglected by most scholars and

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BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963)).

104. *See* JUENGER, *supra* note 6, at 135-36, 159-61.

105. PAUL HEINRICH NEUHAUS, DIE GRUNDBEGRIFFE DES INTERNATIONALEN PRIVATRECHTS 71 (2d ed. 1976) (emphasis in original).

106. *See* JUENGER, *supra* note 6, at 233-37. *But see* Weinberg, *supra* note 19, at 492-97.

107. *But see* LEFLAR ET AL., *supra* note 73, § 88, at 261-63; David F. Cavers, *A Critique of the Choice-of-Law Process*, 47 HARV. L. REV. 173, 189 (1933).

108. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908).

109. *See* JUENGER, *supra* note 6, at 45-46.

110. As Weinberg asks rhetorically, "[W]hat difference can the location of the discrimination make?" Weinberg, *supra* note 19, at 481.

111. *See* GENE R. SHREVE, A CONFLICT-OF-LAWS ANTHOLOGY 139-52 (1997).

restaters,[112] even though courts have practiced it,[113] not only after they embarked on the "conflicts revolution"[114] but even when rules were still seemingly hard and fast.[115] In fact, as a recent West Virginia Supreme Court decision shows,[116] courts in states that have retained the seemingly insensitive rules mandated by the *First Restatement* may be able to mete out a better measure of interstate justice than the "progressive" New York Court of Appeals.

Certainly, the advocates of a third restatement ought to make some concession to what courts actually do. But even those who question the value of such a project need to consider the substantive law approach.[117] That approach has the definite merit of promoting not only multistate justice but also domestic law reform.[118] If we can agree that this approach deserves serious consideration, we may find it easy enough to draft some fairly simple, straightforward alternative reference rules that would enshrine it.[119] Should it be inadvisable to put rules of that nature into a new conflicts restatement, because courts and scholars keep paying obeisance to the unilateralist and multilateralist schools of thought, they could of course be incorporated into a model (or a uniform)[120] act.[121]

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112. *See id.* at 34-40.

113. Thus, as regards contract choice of law for instance, they have promoted substantive policies by recognizing the fundamental principle of party autonomy, a principle that is at odds with both the multilateral and the unilateral approaches. *See* JUENGER, *supra* note 6, at 218-20.

114. *See supra* text accompanying notes 89-90.

115. *See* JUENGER, *supra* note 6, at 96, 173-77.

116. *See supra* text accompanying notes 70-73.

117. *See* Richman & Reynolds, *supra* note 10, at 435.

118. *Cf.* Weinberg, *supra* note 19, at 507 (discussing the forum adopting better foreign law).

119. *See* JUENGER, *supra* note 6, at 196-97 (drafting example of products liability choice of law); Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-of-Law Rules*, 54 LA. L. REV. 907, 923 (1994) (choice-of-law rules for mass torts).

120. *But see* Kramer, *supra* note 1, at 2146-49.

121. Richman and Reynolds point out that in the United States "statutory directives on choice of law are quite rare." Richman & Reynolds, *supra* note 10, at 421 n.23. In many countries, including the United Kingdom, however, the conflict of laws has been codified in whole or in part. *See supra* note 101.