

# A New Restatement— For the International Age

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Is it time for a third restatement of conflicts? What would that third restatement look like? How should we prepare and eventually draft it?<sup>1</sup> When conflicts scholars discussed these questions at the Annual Meeting of the Association of American Law Schools in New Orleans on January 9, 1999, they proffered an impressive panoply of ideas and arguments. Yet, in the whole discussion one major consideration was glaringly absent: the transnational and comparative perspective. Neither the formal papers presented,<sup>2</sup> nor the ad hoc oral contributions, addressed the need for a new conflicts restatement to reflect the rapid internationalization of life and law that we have witnessed since the current text was adopted almost three decades ago. It was almost as if conflicts issues arose solely on the domestic level.<sup>3</sup>

Perhaps this should not come as a surprise in light of the insularity that has marked American conflicts scholarship for most of the last fifty years. But then again, scholars like Dean Symeon Symeonides and Professor Friedrich K. Juenger, who both spoke at the meeting, are not exactly parochial types. In fact, they know more about the international and comparative dimensions of conflicts law than almost anyone else in this country,<sup>4</sup> certainly including myself. But since they did not put international perspectives on the agenda of a third restatement, I will.<sup>5</sup>

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1. Professors William M. Richman and William L. Reynolds phrased the first of these three questions. See William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 417 (2000). I added the third; my answers are summarized in Part V of this Comment.

2. See Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403 (2000); Richman & Reynolds, *supra* note 1; Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437 (2000); Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475 (2000).

3. I could not attend the meeting but I read the papers presented and listened to the tape recording of the discussion. See Audio recording of AALS Annual Meeting (January 9, 1999), recorded by Recorded Resources Corporation, tapes 122 and 123. The papers of Dean Symeonides and Professors Richman & Reynolds contain virtually no reference to international concerns. Professor Weinberg does address the extraterritorial application of American law. See Weinberg, *supra* note 2, at 480. Professor Juenger duly complains about American parochialism and hints at the special nature and needs of international dispute resolution. See Juenger, *supra* note 2, at 411. However, neither scholar presents a sustained analysis of international concerns or relates them specifically to the project of a third restatement.

4. This is amply demonstrated by their major works. See, e.g., FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* (1993); SYMEON SYMEONIDES, *PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS?* (1999); SYMEON SYMEONIDES, WENDY COLLINS PERDUE & ARTHUR T. VON MEHREN, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* (1998). Both scholars also have published articles on foreign, comparative, and international conflicts law that are too numerous to mention.

5. In other contexts, Professor Juenger has repeatedly called for an international and

What I have to say is plain and straightforward. (I) The *Second Restatement* is largely blind to international concerns, mainly because it is a legacy of the heyday of parochialism in American conflicts theory. (II) Since the *Restatement's* adoption, however, international issues have become routine, primarily in the real world of legal practice. (III) In that regard, the *Second Restatement*, like much of our current conflicts theory, is out of date; our need to catch up with real world developments is a strong argument in favor of drafting a successor. (IV) If we engage in such an adventure, we must ensure that a third restatement will be thoroughly informed by international perspectives. (V) Otherwise, the legal theories expressed therein would be irrelevant for a large and ever increasing share of cases.

### I. THE LEGACY OF PAROCHIALISM

The *Second Restatement* displays a provincial attitude towards conflict of laws. Its principles and rules are admittedly drawn from interstate cases<sup>6</sup> and they are designed for the interstate, that is domestic, context. The *Restatement* postulates that these domestic principles and rules apply to disputes involving foreign nations as well, because there are no fundamental differences between interstate and international cases. While the *Second Restatement* does alert the reader to the fact that every once in a while, such differences may arise, it regards these differences as limited to particular instances and gives them extremely short shrift.<sup>7</sup> As a consequence, the *Second Restatement* contains very few references to, and even fewer rules about, international conflicts. It hints at them vaguely in some of its introductory sections,<sup>8</sup> briefly mentions that international law may limit personal jurisdiction,<sup>9</sup> deals with the recognition of foreign nation judgments,<sup>10</sup> and contains a section about notice and

comparative approach to conflicts law, most recently in Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309 (1999).

6. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 10 cmt. a (1971) [hereinafter SECOND RESTATEMENT].

7. *Id.* § 10 cmts. c and d. Comment d lists four such considerations which seem to be really just two: greater political, social, and cultural differences on the international level ((1) and (4)) and non-applicability of certain constitutional provisions ((2) and (3)).

8. *See id.* § 1 (recognizing that the world is composed of territorial states though that hardly needs restating). Section 3 defines the word "state" in a way that includes both states within the Union and foreign countries. *See id.* § 3. However, comment e also announces that the word "nation" will be used specifically for foreign countries. *See id.* § 3 cmt. e. Section 6(a)(2) mentions "the needs of the interstate and international systems" as one of seven Choice-of-Law Principles, but neither the section itself nor comment d draws any distinction between interstate and international systems needs or tells the reader what exactly these needs are. *See id.* § 6(a)(2). Such needs are mentioned again in section 247 comment a, but left completely undefined there as well. *See id.* § 247 cmt. a.

9. *See id.* §§ 83, 92 cmt. g; *see also id.* § 31 cmt. a (distinguishing between the United States, the states of the Union, and foreign countries).

10. *See id.* § 98. There are references to foreign nation judgements in the comments to various other sections as well. *See id.* §§ 31 cmt. c, 100 cmt. d, 102 cmt. g, 115 cmt. f, 117 cmt. c. However, they simply repeat the basic rule that the Full Faith and Credit Clause does not apply in this context.

proof of foreign law.<sup>11</sup> That's about it.<sup>12</sup> All in all, the *Second Restatement* allocates less than two percent (about 20 of its over 1200 pages) of text and comment to issues involving foreign countries. The bulk of the text, especially the part on choice-of-law, is almost completely devoid of international perspectives. To put it bluntly, from the *Second Restatement's* point of view, it does not matter whether the choice is between the law of New York and New Hampshire or between the law of New York and New Guinea.

This insular approach is neither the fault of the principal draftsman nor accidental. Instead, the *Second Restatement*, like all such documents or codifications, is a child of its time. We can see this more clearly if we consider its place in the history of American conflicts scholarship. There is no need here for a full-fledged rendition of that history, particularly since others have already told it.<sup>13</sup> It will suffice here quickly to consider whence our discipline came, where it stood in the 1950s through the 1970s, and where it might be headed now.

As far as the significance of international and comparative perspectives is concerned, we can distinguish several periods. The first began with the foundation of the conflicts discipline in this country, with the work of Joseph Story. During the first hundred years, scholars conceived of conflicts law primarily as part and parcel of international law, namely the part that deals with private entitlements and litigation. Story thus christened the discipline "private international law."<sup>14</sup> As the name indicates, and a casual look at Story's, or even Joseph Beale's works illustrates, it was a discipline rich in international and comparative perspectives.<sup>15</sup> A new era began in the 1950s, under the influence of Legal Realism. In this second phase, conflicts scholars no longer saw their discipline as part of international, but of domestic American, law. Their focus narrowed to the interstate perspective and they developed their various theories in isolation from the rest of the world.<sup>16</sup> As a result, conflicts law almost completely lost its comparative and international perspectives.<sup>17</sup>

11. *See id.* § 136.

12. There are casual references to international law or foreign legal systems in a few other places. *See id.* §§ 13 cmt. a, 60 cmt. b, 299 cmt. f, 387 cmt. h; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS: ADMINISTRATIVE ESTATES, Introductory Note at 356 (1971). However, they are so insignificant that they are barely worth mentioning.

13. *See* Juenger, *supra* note 5 (providing the most recent historical overview); *see also* JUENGER, *supra* note 4, at 88-146.

14. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 9 (Morris L. Cohen et al., eds., Arno Press 1972) (1834).

15. *See id.* at xi-xiv (providing a list of authors cited); JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS at xi-lxxx (1916).

16. This was already noted by foreign observers at the time. Gerhard Kegel spoke of American conflicts theorists "cooking in their own juice." Gerhard Kegel, *Wandel auf dünnem Eis*, in FRIEDRICH K. JUENGER, ZUM WANDEL DES INTERNATIONALEN PRIVATRECHTS 35, 41 (1974).

17. It is often overlooked that Legal Realism turned not only American conflicts theory, but also most of American legal scholarship inward. The international and comparative perspectives that were quite prevalent in the decades before, were by and large abandoned in the 1930s and 1940s, in part in reaction to totalitarianism in Europe, and in part as a result of the Realist obsession with the process of appellate adjudication specifically in the United States. This entailed a loss of cosmopolitan perspective from which American legal thought

This phase lasted until very recently. In the last ten years or so, we may have moved on to yet another period, although it is too early to tell for sure. Be that as it may, the present situation in American conflicts scholarship is marked not only by exhaustion after the turmoil of the 1960s, 1970s, and 1980s, but also by a rekindled interest in comparative and transnational perspectives. We have begun to look beyond American borders once again.<sup>18</sup>

This brief sketch shows that the *Second Restatement* is a product not only of the so-called “conflicts revolution” but also of the simultaneous heyday of parochialism in American conflicts theory. The 1950s and 1960s were the time when interest in foreign law and transnational issues was at an all-time low among American conflicts thinkers. It is true that there have always been scholars in the United States who looked beyond American borders,<sup>19</sup> but they had relatively little influence on the mainstream of American conflicts law in this second phase.<sup>20</sup> Moreover, Willis Reese, the *Second Restatement*'s principal draftsman, was not a member of this cosmopolitan group. International and comparative sophistication were not among his many strengths as a scholar.<sup>21</sup> Reese was a representative of the “curiously

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has not yet fully recovered.

18. See JUENGER, *supra* note 4, at 26-27 (noting growing comparative interest in American conflicts scholarship); see also *infra* text accompanying notes 29-34, 36-38.

19. Among the previous generation, Albert Ehrenzweig, Kurt Nadelmann, and Hessel N. Yntema come to mind. One might also include Ernst Rabel who, though not an American, wrote his magisterial treatise at the University of Michigan. ERNST RABEL, *THE CONFLICT OF LAWS, A COMPARATIVE STUDY* (1945-1958). Among the present, though by now older, generation, Peter Hay, Friedrich K. Juenger, Andreas Lowenfield, and Arthur T. von Mehren, among others, have maintained a comparative and international perspective.

20. Albert Ehrenzweig, for example, repeatedly demanded that international cases be treated differently from interstate ones. See ALBERT A. EHRENZWEIG, *CONFLICT OF LAWS* 16-21 (1962); Albert A. Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717 (1957). He actually co-authored a multivolume treatise on international conflicts law. See ALBERT A. EHRENZWEIG & ERIK JAYME, *PRIVATE INTERNATIONAL LAW* (3 vols. 1967-1977). However, it seems that his work in this area was largely ignored even during his lifetime; today it is all but forgotten.

21. Reese himself confessed ignorance about foreign conflicts rules. Willis L.M. Reese, *General Course on Private International Law*, 150 RECUEIL DES COURS 1, 9 (1976). Fewer than a handful of the articles he published dealt with international matters. See *id.* at 6-7. Nor is there any evidence, as far as I know, suggesting that he studied foreign models in drafting the *Second Restatement*. It is true that he knew something about English law and was cognizant of its proper-law approach to contract conflicts. See Willis L.M. Reese, *Contracts and the Restatement of Laws Second*, 9 INT'L & COMP. L.Q. 531, 537, 540-41 (1960) (referencing English law). However, he seems to have paid little attention to most of the rest of the world. As far as I can see, the *Second Restatement* mentions only one foreign country, the United Kingdom—twice. SECOND RESTATEMENT, *supra* note 6, §§ 3 cmt. a, 278 cmt. e.

omphaloscopic<sup>22</sup> period of American conflicts scholarship; he thought overwhelmingly in domestic terms and accordingly produced an insular *Restatement*.<sup>23</sup> Viewed from this perspective, it even made sense, at least at the time.

## II. MEANWHILE IN PRACTICE . . .

When the *Second Restatement* was adopted, international issues played a marginal role in American conflicts law. In the thirty years since, their importance has increased continuously and dramatically. Today they represent a substantial and integral part of our discipline.

As usual, the changes occurred first in the real world. Suffice it to point to three major developments in legal practice. The first concerns quantity. As we all know, the number of international disputes has grown continuously in the last few decades. In the 1960s, they were rather exotic exceptions; by the end of the century they are routine fare. The second development took place in the courts' attitude toward international cases. Conflicts decisions from the 1950s through the early 1970s tended to ignore the fact that the other jurisdiction involved was not an American state but a foreign country.<sup>24</sup> This began to change the year after the *Second Restatement* was published. In *The Bremen v. Zapata Offshore Co.*,<sup>25</sup> the United States Supreme Court brushed parochial worries aside and enthusiastically embraced an internationalist attitude. The decision turned out to be a trendsetter. In subsequent cases, the Court has emphasized the unique nature of international disputes time and again, liberating the law of international arbitration from traditional constraints<sup>26</sup> or tailoring specific rules for foreign litigants.<sup>27</sup> Similar observations can be made in many lower courts. While the judicial track record in international cases is far from perfect, judges today are much more aware of the specific problems posed by these

22. The term is, of course, Fritz Juenger's. See Juenger, *supra* note 2, at 411.

23. See SECOND RESTATEMENT, *supra* note 6, § 10 reporter's note (recognizing that American courts and writers have, by and large, not distinguished between international and interstate cases for choice of law purposes).

24. We are all familiar with such classics as *Hurtado v. Superior Court*, 522 P.2d 666, 670-81 (Cal. 1974), *Milkovich v. Saari*, 203 N.W.2d 408, 412-17 (Minn. 1973) (involving Ontario and Minnesota), *Neumeier v. Kuehner*, 286 N.E.2d 454, 456-58 (N.Y. 1972) (involving Ontario and New York), *Babcock v. Jackson*, 191 N.E.2d 279, 283-89 (N.Y. 1963) (involving Ontario and New York), and *Auten v. Auten*, 124 N.E.2d 99, 101-03 (N.Y. 1954) (involving England and New York).

25. 407 U.S. 1, 15 (1972) (upholding the selection of England as the forum in a contract between an American and a German party).

26. See *Vimar Seguros y Reaseguros S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-39 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 638-40 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974). As Patrick J. Borchers has pointed out, the Court eventually extended the liberal attitude first displayed in international cases to purely American disputes. See Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 VAND. J. TRANSNAT'L L. 421, 440 (1995).

27. In *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 114-16 (1987), the Court hinted at greater due process protection for foreign defendants. In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981), it held that suits can be dismissed more easily under the doctrine of *forum non conveniens* when the plaintiff is a foreigner.

disputes than they were a generation ago.<sup>28</sup> The third development is the rise of new international issues that were either unknown or at least not prominent thirty years ago. Today, courts must determine not only their jurisdiction over foreign parties, the applicability of foreign law, or the recognition of foreign judgments. They must also deal with multiple conventions affecting private entitlements,<sup>29</sup> hear human rights claims,<sup>30</sup> construe the Foreign Sovereign Immunities Act,<sup>31</sup> determine the extraterritorial application of a host of regulatory statutes,<sup>32</sup> consider antisuit injunctions involving parallel litigation abroad,<sup>33</sup> and decide *forum non conveniens* motions involving foreign parties in hundreds of cases every year.<sup>34</sup> Consider the combined effect of these changes—in quantity of cases, judicial attitude, and the nature of issues—and it becomes obvious that international conflicts law today just isn't what it was in 1970.

Conflicts scholarship and teaching have begun to react to this evolution, albeit with a considerable time lag. In marked contrast to the 1950s through the 1970s, when

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28. Of course, this is no guarantee that these concerns will always receive due consideration. Even the United States Supreme Court all but disregarded the international nature of the dispute in *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414-16, 418-19 (1983).

29. See, e.g., *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707-08 (1988) (referring to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638); *Societe Nationale Industrielle Aerospatiale v. United States*, 482 U.S. 522, 539-41 (1987) (referring to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444). Recently, American courts have also become increasingly concerned with the Convention on Contracts for the International Sale of Goods, April 11, 1980, 19 I.L.M. 668. See Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention*, 14 J.L. & COM. 153 (1995). In addition, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, has been interpreted through case law for several decades. See, e.g., *Vimar Seguros*, 515 U.S. at 538; *Mitsubishi Motors Corp.*, 473 U.S. at 619 n.3, 631, 638; *Scherk*, 417 U.S. at 519-20 nn.14-15.

30. The best-known example is *Filartiga v. Pena Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (finding torture is contrary to international law). See also *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 722 (9th Cir. 1992) (holding the U.S. court had possible jurisdiction over Argentina on allegation of torture).

31. See 28 U.S.C.A. §§ 1330, 1602-1611 (West 1993, 1994, & Supp. 1999); see also *Saudi Arabia v. Nelson*, 507 U.S. 349, 356-63 (1993); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612-20 (1992).

32. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-99 (1993); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 255-59 (1991); *Mannington Mills Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *Timberland Lumber Co. v. Bank of America*, 549 F.2d 597, 608-12, 615 (9th Cir. 1976); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1333-34 (2d Cir. 1972).

33. See, e.g., *Allendale Mutual Ins. v. Bull Data Sys., Inc.*, 10 F.3d 425, 432-33 (7th Cir. 1993); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 37 (2d Cir. 1987); *Laker Airways v. Sabena*, 731 F.2d 909, 926-34 (D.C. Cir. 1984).

34. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981); *In re Union Carbide Corp.*, 809 F.2d 195, 202-03 (2d Cir. 1987).

academic work on international conflicts law was rare,<sup>35</sup> the literature in this field has grown to impressive proportions in the 1980s and 1990s. Virtually every topic mentioned in the previous paragraph has been written well-nigh to death. Today, there is a veritable surplus of international and comparative law journals publishing dozens of articles about international conflicts issues year after year. Most modern conflicts casebooks include foreign and transnational perspectives<sup>36</sup> and teachers are beginning to include them in their courses.<sup>37</sup> Conflicts scholars have even created an entirely new sub-discipline focusing exclusively on international matters, called it "international litigation," and furnished it with its own courses, casebooks and textbooks.<sup>38</sup> To be sure, much remains to be done. We have no current comparative study of the caliber of Rabel's work.<sup>39</sup> Much of the academic literature is shallow, redundant, or both, and insular attitudes are far from extinct in American conflicts scholarship. But on the whole, we have made considerable progress in overcoming the parochialism of the previous decades.

### III. THE NEED TO CATCH UP

In suggesting that we begin to work on a successor text, Dean Symeonides has called the *Second Restatement* "dated," and pointed out "that it is virtually silent on or inadequate for many of the conflicts which have been increasingly occupying American courts in the last two decades and which will continue to do so in the future . . ."<sup>40</sup> As illustrations, he mentions the *Second Restatement's* inadequacy on issues such as internet use, insurance coverage for environmental pollution, "mega torts," and punitive damages.<sup>41</sup> All this is true.

But as the previous Part has shown, the *Second Restatement* is also hopelessly behind the times with respect to the internationalization of private law and litigation, both on account of its inherent parochialism and of its age.<sup>42</sup> Check its provisions against the situation in the legal world and you will see that the *Second Restatement*

35. *But see supra* text accompanying notes 19-20.

36. *See, e.g.*, LEA BRILMAYER, *CONFLICT OF LAWS: CASES AND MATERIALS* 885-972 (4th ed. 1995); ROGER C. CRAMTON ET AL., *CONFLICT OF LAWS* 644-717 (5th ed. 1993); ANDREAS F. LOWENFELD, *CONFLICT OF LAWS: FEDERAL, STATE, AND INTERNATIONAL PERSPECTIVES* 869-1007 (2d ed. 1998); MAURICE ROSENBERG ET AL., *CONFLICT OF LAWS* 726-756 (10th ed. 1996); SYMEONIDES, *supra* note 4, at 543-601, 699-739, 854-91.

37. *See Editor's Introduction*, 28 *VAND. J. TRANSNAT'L L.* 359, 359 (1995) (introducing the Symposium on the Conflict of Laws in the Global Village: International Conflicts Issues for the General Course in Conflict of Laws).

38. *See* GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* (1996); ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* (1993); VED P. NANDA & DAVID K. PANSIUS, *LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS* (1986); LAWRENCE W. NEWMAN & DAVID ZASLOWSKY., *LITIGATING INTERNATIONAL COMMERCIAL DISPUTES* (1996); LOUISE ELLEN TEITZ, *TRANSNATIONAL LITIGATION* (1996); RUSSEL WEINTRAUB, *INTERNATIONAL LITIGATION AND ARBITRATION* (2d ed. 1994). In addition, there are a large number of practitioner manuals.

39. *See* RABEL, *supra* note 19.

40. Symeonides, *supra* note 2, at 441.

41. *Id.*

42. *See supra* Part II.

simply fails to address most of the problems that currently plague the courts in international cases. It tells the bench and bar nothing about the degree of due process protection for foreign defendants, service of process abroad, arbitration of transnational disputes, suits against foreign sovereigns, human rights claims, international conventions, antitrust enforcement overseas, injunctions against foreign litigants from proceeding in their own courts, or discovery of evidence in foreign countries. From the perspective of modern transnational litigation, the *Second Restatement* is not only close to useless, it is a vestige from a bygone era.

Of course, one could respond that these international issues are so idiosyncratic that they are not really conflicts problems to begin with. It is true that some of them are not conflicts issues as defined by the *Second Restatement*, which limits the field to the time-honored questions of personal jurisdiction, choice of law, and judgments recognition.<sup>43</sup> Thus, one might argue, a conflicts restatement does not have to address these issues, particularly since some of them are dealt with in the *Restatement (Third) of Foreign Relations Law of the United States*.<sup>44</sup> Yet, such an argument would be completely wrong-headed. It is now a fact of life that these international issues arise all the time in private transboundary disputes. At their core, they are not issues of American foreign relations (though they touch on them), but of international civil litigation. In short, they have become part of the conflicts menu, whether we like it or not. If they transcend the classical notion of conflicts law, the appropriate response is not to shut them out but to adjust the traditional concept of our discipline to fit the real world.

Thus, mainstream conflicts law needs to catch up with the realities of the much-trumpeted global age. This need is a clear argument in favor of moving beyond the parochialism of the *Second Restatement*. I am not convinced that international concerns alone are a sufficient reason to engage in the formidable task of drafting a successor, nor am I sure how much weight these concerns carry in relation to other arguments for or against such an endeavor. But let me proffer three reasons why the catch-up argument should be taken seriously.

First, preparing a third restatement will provide a good opportunity to bring our conflicts theory and practice up to speed for the ongoing internationalization of law. It will force us to take stock of what we have, to determine what we lack, and to decide what we want. What we currently have is largely a parochial blend of old-fashioned territorialism and the fruits of the "conflicts revolution."<sup>45</sup> What we lack is a profound understanding of international concerns; and what we should want is a clear statement of the principles and rules that reflect these concerns. There is plentiful material to work with. As I have pointed out, we have thirty rich years of case law, conventions, statutes, and scholarship about international conflicts law. We also have much greater agreement in most international questions than we ever had in domestic cases when the *Second Restatement* was in the making. Thus there is a lot to restate, and restating it should not be all that hard.

Second, if we succeed in drafting sound principles and rules for international

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43. SECOND RESTATEMENT, *supra* note 6, § 2 cmt. a.

44. RESTATEMENT (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES OF AMERICA §§ 401-488 (1987).

45. *See supra* Part I.



disputes, our product would greatly benefit legal practice. Of course, the bench and bar have handled international disputes for decades without help from the *Second Restatement*, and there is no indication that they have done worse than in domestic cases with its assistance. Still, a set of internationally oriented rules in a third restatement could be very valuable, in practical, as well as psychological ways. Practically, it would allow quick orientation for busy practitioners, serve as a starting point for further analysis and research, and provide a place to gather relevant material and to list references. Let us not forget that the vast majority of judges, especially in the state courts, do not have the time, the resources, or the interest to become specialists in international litigation. As their dockets include more and more such litigation, they need all the help they can get. Psychologically, a third conflicts restatement adequately addressing international issues would constantly remind counsel and judges that transnational disputes pose special problems and must be handled with particular care. Much of what is needed in such cases is a matter of awareness and attitude, and a restatement is more likely than academic scholarship to affect the way practitioners approach real world controversies.

The final reason for taking the catch-up argument seriously is simply that the argument becomes more powerful as time goes on. As the importance of international issues keeps growing, the *Second Restatement* keeps falling further behind and the need to move on becomes more pressing. Even if we start drafting a successor document tomorrow, it will not be adopted for at least another decade. By then, the *Second Restatement* will probably be no more than an artifact from a parochial age half-a-century ago—an era of which few active conflicts scholars will have any personal recollection.<sup>46</sup>

#### IV. INTERNATIONAL AND COMPARATIVE PERSPECTIVES IN A THIRD RESTATEMENT: A SHORT WISHLIST

If we actually decide to draft a new restatement, how should we go about it in order to ensure that the final product meets current and future needs in international disputes? The essential steps should be pretty obvious. As a preliminary matter, we must take stock of the specific international issues, cases, conventions, and other materials that a new restatement would have to address. Then we need to decide whether we want to separate them from the rest or integrate them with it. The answer might depend on how clearly distinct international concerns are, and since that varies, we may want to separate some and integrate others.<sup>47</sup> Finally, we must, of course, draft principles and rules that both reflect what the law currently is in international

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46. Of course, this argument rests on the assumption that the current internationalization of society and economy, and thus of law, will continue. I am not as sure of that as most of my contemporaries seem to be. Having been trained as a legal historian, I can think of times in the past in which similar internationalization processes came to an abrupt and grinding halt and were followed by periods of renewed isolationism, for political or other reasons. But at least for the time being, we have little choice but to assume a further increase of transnational disputes in the near future and to prepare for it.

47. For example, the extraterritorial application of American law is a specific international issue, while choice of law involving foreign countries does not invite treatment in a separate chapter. The recognition of foreign country judgments may lie somewhere in the middle.

disputes and suggest a direction in which it should develop. But beyond these basic steps, I have three wishes. I realize that nobody has granted them to me, thus I offer them only as food for further thought.

My first wish is that the drafters of a third restatement consider *every* principle and rule they devise not only in light of domestic scenarios but of international disputes as well. The main reason is that we can no longer afford to treat international cases as exceptions. They have become so frequent and significant that they cannot be safely relegated to a few isolated rules. A third restatement should come with an implied (or better yet express) warranty that all its principles and rules are fit for international use as well.

This is particularly important since international cases often present idiosyncratic challenges.<sup>48</sup> It is tempting to assume that whatever works (if it does) between California and Nevada will also work between California and Mexico, but it is no great news that that assumption is often wrong.<sup>49</sup> In many contexts, such as international jurisdiction, arbitration, or judgment recognition, this is too well known to belabor. But even at the very core of our discipline, in choice of law, cases transcending United States borders raise unique issues. Classic illustrations include the extraterritorial application of American regulatory statutes<sup>50</sup> and the foreign policy implications of international conflicts disputes.<sup>51</sup> Today, we also have to ensure the compatibility of choice-of-law rules with international trade agreements such as the WTO or NAFTA, and we have to explore the significance of emerging private law regimes on the supranational level, be they conventions like the CISG or texts without official authority like the UNIDROIT principles.<sup>52</sup>

Beyond all these international concerns, there is another, purely domestic, reason to consider every principle and rule in an international light. As Patrick Borchers has pointed out, transnational disputes bring the problems and deficiencies of conflicts rules into sharper relief.<sup>53</sup> We have known this for a long time with regard to the public policy exception, the use of which is particularly tempting, but also particularly dangerous, in international cases.<sup>54</sup> We can observe much the same

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48. For a general overview of special considerations in international, as opposed to domestic, American conflicts cases, see MATHIAS REIMANN, *CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE* 19-36 (1995).

49. See, e.g., Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 VAND. J. TRANSNAT'L L. 421, 431 (1995) (urging to resist the temptation to transplant ideas conceived for domestic cases to the international context); Juenger, *supra* note 2, at 414 (pointing out differences between domestic and international cases).

50. See *supra* note 32.

51. See *Zschernig v. Miller*, 389 U.S. 429 (1968); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

52. See UNIDROIT, *PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS* (1994). A third restatement should, for example, tackle the issue whether parties can choose such a set of international rules instead of a national law. See Barton S. Selden, *Lex Mercatoria in European and U.S. Trade Practice: Time To Take a Closer Look*, ANN. SURV. INT'L COMP. L., Fall 1995, at 111.

53. See Borchers, *supra* note 49, at 431.

54. Since the political, economic, and cultural differences tend to be greater in international than in domestic scenarios, public policy issues present themselves more starkly: on the one

exacerbation of dilemmas with regard to choice-of-law clauses,<sup>55</sup> interest analysis,<sup>56</sup> or the *lex fori* approach,<sup>57</sup> to name just a few examples. In short, international cases provide an opportunity to test the soundness of all rules under particularly tough conditions.

My second wish is that the drafters of a third restatement work comparatively, that they look at foreign conflicts law, thus reviving the tradition of Story to Beale. The material is extraordinarily rich. Especially in Europe, most countries have recently reworked their conflicts law, often (re-)codifying it, as in Austria,<sup>58</sup> Germany,<sup>59</sup> Italy,<sup>60</sup> Switzerland,<sup>61</sup> the Netherlands,<sup>62</sup> and even in England,<sup>63</sup> not to mention the

hand, foreign rules are more often objectionable, on the other hand, the need for sensitivity and tolerance is particularly great in cases involving alien cultures. For a vivid, and by now almost classic, illustration, see *In re Dalip Singh Bir's Estate*, 188 P.2d 499 (Cal. Ct. App. 1948) (establishing that public policy against polygamy prohibits in-state cohabitation with more than one wife but not succession of several wives upon the husband's death).

55. For example, the time-honored issue whether two parties from different jurisdictions should be allowed to choose the law of a *nonrelated* third jurisdiction comes into sharper relief when the parties are from different countries. On the one hand, the parties' need for a neutral regime is more legitimate in an international setting, while on the other hand, the danger of abuse is considerably greater. For a lively debate about the appropriate limits of party autonomy, see Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 VAND. J. TRANSNAT'L L. 421 apps. a, b (1995) (Letter from Friedrich K. Juenger to Harry C. Sigman, Esq. (June 23, 1994); Letter from Larry Kramer to Harry C. Sigman, Esq. (Aug. 4, 1994)).

56. It is risky enough to define the interests underlying the rules of another state within the United States but to ascertain these interests in case of a faraway, foreign country with a different language, political system, and notion of justice, is skating on terribly thin ice. Also, if American courts do not have a mandate to balance even the interests of sister states, see BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 181-82 (1963), they surely have no business weighing the interests of foreign nations. And if comparing the impairment of state interests is questionable business for an American judge, telling a foreign country that its interests are not all that affected, can easily become preposterous.

57. Witness that its advantages—ease of application and a lower likelihood of error—are much greater in international than in domestic cases, but so are its downsides: disregard of legitimate party expectations, violation of foreign state interests, and invitation to blatant forum-shopping.

58. See Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht *Bundesgesetzblatt* No. 304/1978. For an introduction and translation of Austrian law, see E. Palmer, *The Austrian Codification of Conflict of Laws*, 28 AM. J. COMP. L. 197 (1980).

59. See Gesetz zur Neuregelung des internationalen Privatrechts, v. 25.7.86 (BGB1.IS.1142) (Private International Law Revision Act). For an introduction and translation of the German law, see Rainer Gildeggen & Jochen Langkeit, *The New Conflict of Laws Code Provisions of the Federal Republic of Germany*, 17 GA. J. INT'L & COMP. L. 229, 237-59 (1987).

60. See legge 31 maggio 1995, n.218, Riforma del sistema italiano di diritto internazionale privato (Law of March 31, 1995, Reform of the Italian System of Private International Law), *Gazzetta Ufficiale*, Parte Prima, 3 giugno 1995.

61. See Bundesgesetz über das Internationale Privatrecht vom 18. Dezember 1987 (Federal Law on Private International Law of December 18, 1987). For an introduction to the Swiss law see Symeon C. Symeonides, *The New Swiss Conflicts Codification: An Introduction*, 37 AM.

regimes on the European level, that is, the Brussels and Rome Conventions.<sup>64</sup> In addition, the drafters of a new restatement should consider conflicts law and scholarship in Latin America, Asia, and other parts of the world.<sup>65</sup> Again, I can think of several reasons why this would be a good idea.

Most obviously, foreign conflicts regimes are a rich source of inspiration and guidance. It is true that the purpose of a third restatement would be to represent American law, not the rules prevailing in other countries. But in every restatement, there is a normative element, that is a preference for one solution over another, and a general push in a particular direction. In making the inevitable choices, it would be imprudent, to say the least, to ignore the experience gathered abroad. This experience is particularly valuable since foreign regimes deal primarily with international cases—the very area in which our need for guidance is greatest.

Moreover, it is a truism of comparative studies that considering foreign law has a salutary effect on understanding one's own. To give an example, for decades American courts have struggled with the extraterritorial application of federal statutes under the heading of (subject matter) jurisdiction.<sup>66</sup> This wrong-headed approach has caused endless confusion. A look at foreign conflicts rules would have shown that this is really a choice-of-law problem, albeit a peculiar one, as Justice Scalia finally recognized.<sup>67</sup> European conflicts lawyers have known this problem for decades under the label of "mandatory rules."<sup>68</sup> At minimum, comparative studies can clarify such

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J. COMP. L. 187 (1989). For a translation, see Jean-Claude Cornu et al., *Swiss Statute on Private International Law of Dec. 18, 1987*, 37 AM. J. COMP. L. 193 (1989).

62. See Schets van een Algemene Wet betreffende het Internationaal Privaatrecht (Draft of General Law Concerning International Law) (Netherlands 1993), reprinted in 1993 WEEKBLAD VOOR PRIVAATRECHT, NORTARIAAT & REGISTRATIE 605.

63. See Contracts (Applicable Law) Act, 1990, ch. 36 (Eng.); *Private International Law (Miscellaneous Provisions) Act*, 1995, ch. 42 (Eng.); *Civil Jurisdiction and Judgements Act*, 1982, ch. 27 (Eng.).

64. See Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1990 O.J. (C 189) 2 (consolidated); Convention on the Law Applicable to Contractual Obligations, June 9, 1980, 1980 O.J. (L 266) 1 [hereinafter Rome Convention].

65. See, e.g., Tung-Pi Chen, *Private International Law of the People's Republic of China: An Overview*, 35 AM. J. COMP. L. 445 (1987); Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 AM. J. COMP. L. 195, 199 (1997); Friedrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 AM. J. COMP. L. 381 (1994); Chin Kim, *New Japanese Private International Law: The 1990 Horei*, 40 AM. J. COMP. L. 1 (1992); see also CODE CIVIL arts. 3076-3168 (Que.).

66. See, e.g., *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287, 1291-92 (3d Cir. 1979); *Timberland Lumber Co. v. Bank of America*, 549 F.2d 597, 608-15 (9th Cir. 1976); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1333-35 (2d Cir. 1972). These, and many other opinions, treated the applicability of the federal statutes on which the respective actions were based as a matter of federal jurisdiction under 28 U.S.C. § 1331 (1994).

67. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812-14 (Scalia, J., dissenting) (explaining that the applicability of the Sherman Act is not an issue of federal jurisdiction but of "jurisdiction to prescribe").

68. The problem is addressed in article 7, section 1 of the Rome Convention, *supra* note

issues, and clarity is a virtue when it comes to restating the law.

Finally, looking abroad would also help the drafters of a new restatement to produce a document that is in touch with worldwide trends. This does not mean that they should sacrifice American principles and rules simply in order to join the bandwagon; there may be good reasons not to do so. But at least they should make informed and intelligent choices in this regard. To take an obvious example, if they recognize that some American jurisdictional principles are highly idiosyncratic and thus unacceptable to other countries, they will have to decide whether their advantages at home are worth the risk of alienation and of nonrecognition of American judgments abroad.<sup>69</sup> Or, to provide an illustration pointing in the opposite direction, if they perceive that the *Second Restatement's* most-significant-relationship approach is very similar to many modern choice-of-law models abroad, and that the basic idea is gaining in worldwide acceptance,<sup>70</sup> they are likely to find themselves encouraged to preserve it.

My last, and most heretic, wish is that the drafting team for a third restatement include foreign advisers. This requires neither a particularly large number of additional members nor their constant presence at the working sessions. It would suffice if experts representing our most important trading partners as well as the major regions in the world were consulted on a regular basis. Their involvement would safeguard the consideration of foreign experience that I have advocated above.<sup>71</sup> Perhaps even more importantly, such experts could also provide feedback as to how American conflicts rules are likely to be perceived abroad. They could help us to draft rules that do not cause misunderstandings, frictions, or trigger outright rejection in other countries. The more agreeable, or at least tolerable, or at the very least understandable these rules are to non-Americans, the smoother the resolution of conflicts cases on an international level will be. After all, handling conflicts issues without regard for their perception abroad invites discord while considering foreign views engenders cooperation.<sup>72</sup> As the number of transboundary disputes increases,

64, 1980 O.J. (L. 266) at 3. On the issue of mandatory rules, as well as the various terms used in other languages, as well as for further references, see REIMANN, *supra* note 48, at 28-30. Whether European private international law has developed better solutions for the underlying problem than American conflicts law is, of course, a different question.

69. This is particularly true with regard to in personam jurisdiction on the basis of continuous and systematic contacts (doing business within a jurisdiction). See Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 135-37 (1992). For personal jurisdiction based on in-state service of process (tag jurisdiction), see Peter Hay, *Transient Jurisdiction, Especially over International Defendants*, 1990 U. ILL. L. REV. 593, 599-603.

70. See Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 VA. J. INT'L L. 571, 572-73 (1999).

71. As every comparative lawyer knows, it is dangerous to rely solely on statutory texts and scholarly books because they are too easily misunderstood, particularly when written in foreign languages. And as every American trial lawyer knows, you want live witnesses for the immediacy of their testimony as well as for the opportunity of cross-examination.

72. The aggressive extension of American regulatory and procedural measures beyond United States borders has engendered considerable alienation in foreign countries in the past.

international cooperation becomes ever more important.

As a beneficial side-effect, foreign experts could provide valuable assistance in the technical process of drafting, especially when they are from civil law countries. When it comes to formulating (quasi-)statutory language, civilian jurists are often superior to common lawyers, in part because the civilians have done it for centuries, and in part because they take greater pride in clarity and conciseness. Few of those familiar with codes and statutes on both sides of the Atlantic will deny this.<sup>73</sup> I, for one, would hope that the third restatement drafting team has at least one member trained in the French tradition.

#### V. SOME ANSWERS IN CONCLUSION

The introductory paragraph of this article posed three questions: Is it time for a third restatement? What would such a new restatement look like? And how should we prepare and eventually draft it?<sup>63</sup> Looking at these questions from the international side of conflicts law helps to answer them.

The response to the question of timeliness is a cautious yes. Our current situation in international conflicts disputes suggests that it is indeed time for a third restatement. Over the last three decades, international lawsuits have grown vastly in number as well as in importance but the *Second Restatement* is virtually silent on most of the salient issues. At least in this regard, it is way out of date. Again, while I think that the provincialism of the *Second Restatement* is a rather powerful reason for working towards a successor, I am not contending that it is in and of itself

*See, e.g.*, WALTHER J. HABSCHIED, DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN VON AMERIKA [THE JURISDICTION CONFLICT WITH THE UNITED STATES OF AMERICA] (1986); *see also* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 708-16 (1988) (Brennan, J., concurring) (emphasizing concerns of international comity and cooperation); Société Nationale Industrielle Aérospatiale v. United States, 482 U.S. 522, 547-68 (1987) (Blackmun, J., concurring in part and dissenting in part) (urging greater emphasis on international judicial cooperation).

73. Those who are not convinced should compare section 187 of the *Second Restatement* with article 3 of the Rome Convention, *supra* note 64, 1980 O.J. (L 266) at 2. Both deal with choice-of-law clauses in contracts and their content is very similar. Yet, their style is very different. Section 187 confounds the reader by convoluted language, double negatives, exceptions and counter-exceptions; very few courts fully grasp it and it takes students one of Professor Richman's flow charts to figure out what the section is trying to say. *See* William M. Richman, *Graphic Forms in Conflict of Laws*, 27 U. TOL. L. REV. 631, 638 (1996). At least by comparison, article 3 of the Rome Convention is straightforward, and one reading suffices to understand what it means. Another illustration is how the *Second Restatement* and the Rome Convention respectively handle escape devices. Both provide an exception from particular choice-of-law rules if the most significant relationship is clearly with a state other than the one chosen by the rule. The *Second Restatement* mind-numbingly repeats the very same language a full nine times for contracts alone, *see* SECOND RESTATEMENT, *supra* note 6, §§ 189-197, while the Rome Convention states it just once and for all, *see* Rome Convention, *supra* note 64, art. 4, § 5, cl. 2, 1980 O.J. (L 266) at 3. Further drafting problems are noted by Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L. J. 475, 477-83, 486-87 (2000).

63. *See supra* text accompanying note 1.

sufficient to justify such a project. The present *Restatement's* inadequacy in international issues is just one argument among many and should be weighed accordingly.

My answer to the question what a third restatement should look like is only a partial one because it deals merely with the international dimension. Yet, within these limits, the response is confident and straightforward. A third restatement would have to suit the needs of modern transnational litigation. Thus it would have to address the issues that arise time and again in international cases.<sup>64</sup> These specifically international issues need to be included even if it requires that we expand the traditional boundaries of conflicts law.

Finally, as far as the preparation and drafting of a third restatement is concerned, the needs of international litigation will require constant attention. Most importantly, every principle and rule should be tested for fitness not only in the domestic, but also in the international context. The drafters should work comparatively and seek the input of foreign conflicts experts so as to maximize international harmonization and cooperation. This will make their job more complex but it will also ensure a more cosmopolitan work-product.

In the year 2000, the parochialism of the *Second Restatement* is embarrassing, but at least it can be excused by the limited relevance of international issues at the time of the document's gestation. Provincialism in a third restatement would be worse than just embarrassing—it would render the whole project useless, if not dysfunctional, for a large and ever growing share of future cases. And there would be no excuse because the significance of international concerns today is as great as it is obvious. We may not want to restate conflicts law all over again in the near future, but if we do our product must fit the international age.

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64. See *supra* text accompanying notes 29-34.