

# Prologomenon<sup>†</sup> to an Empirical Restatement of Conflicts

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## INTRODUCTION

The topic for this year's annual meeting Symposium, "The Third Restatement of Conflict of Laws," poses at least two basic questions: First is it time for a third conflicts restatement; and, second if it is, what should that third restatement look like? There has already been some enlightened speculation on the question of timing. Two years ago at this meeting, when the topic was the *Restatement (Second) of Conflict of Laws*<sup>1</sup> ("*Second Restatement*") on the occasion of its twenty-fifth anniversary, Dean Symeonides noted that the *Restatement of the Law of Conflict of Laws* ("*First Restatement*"), published in 1934, was only nineteen years old when the ALI began work on its successor.<sup>2</sup> Now that successor is nearly thirty years old, so, purely as a chronological matter, it does not seem to be too early to begin.

Further, the circumstances surrounding the drafting of the *Second Restatement* also suggest that early reconsideration is not unwarranted. It was clearly a transitional work. The battle over choice-of-law theory was just beginning at the start of the project, and in full force at the time of its completion. Attempting to "restate" the law of choice of law in 1971 was analogous to trying to write a history of World War II during the Battle of Stalingrad. Considering that drafting history, it is not surprising that the *Second Restatement* began as one sort of work and ended as another. Originally intended as a descriptive work, and only an incremental departure from its

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† From the Greek, meaning "before word" and thus just a fancy form for the English "prologue." We use the term to atone for past sins of omission, since we have never used (in print) the words epistemic, semiotic, deontological, heuristic, exegetical, hermeneutic, or hegemonic. Our other motive is that it allows us to share a fascinating piece of etymology uncovered during research for this piece. The word in the title must be distinguished from the similar-sounding "prolegomenon." Again from the Greek and sharing the prefix, its root "legum" is entirely different. It denotes a genus of plants whose fleshy, starchy seedpods were in classical times, as well as today, an important source of dietary protein. Thus the compound word translates literally to "before the beans." Used in approbation to mean an unmannered, unilted discussion, it initially referred to the early part of a symposium, which occurred before the main meal, after which the discussion became less fresh.

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

2. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT]; see Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1281 (1997).

predecessor, it ended as a radically different normative document designed to incorporate the insights of and paper over the differences between the judicial and academic choice-of-law revolutionaries.<sup>3</sup>

Perhaps the best way to attack the timing problem is by reference to the second question, the likely content of a third restatement. The proper time for a third restatement is when societal conditions and/or conflicts thinking have changed enough to make a reformulation both possible and fruitful. If the American Law Institute ("ALI") were to undertake the project now, what sort of result should it try to produce?

### I. SOME QUICK THOUGHTS NOT ABOUT CHOICE OF LAW

Probably, Chapters 3 and 4, Judicial Jurisdiction, would profit from some reexamination. The sections on jurisdiction received some attention in 1986 in light of the decision in *Shaffer v. Heitner*<sup>4</sup> and the promulgation of the *Restatement (Second) of Judgments*,<sup>5</sup> but more revisions are warranted to take account of the Supreme Court's recent fascination with the topic.<sup>6</sup> It might be useful, for instance, to devote special attention to the operation of the due process limits with respect to alien defendants and to the increasingly important and complex law of forum non conveniens and venue transfer.<sup>7</sup>

Finally it is clear that some retooling is needed to accommodate the increasing amount of communication and commerce conducted electronically over the Internet. At the end of the century, that development poses as great a challenge to the regime of *International Shoe*<sup>8</sup> as nationwide commerce and the automobile did to *Pennoyer v. Neff*<sup>9</sup> at its beginning. A medium that creates a whole new form of "space" is bound to unsettle any jurisdictional regime that still depends in part on territorialism.

The Chapter on Judgments also should receive some attention in light of the Supreme Court's renewed interest in the subject. After two hundred years of full faith

3. Thus one commentator remarked recently that because of its history the final product "could not . . . be fairly called a 'restatement of anything.'" Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1237 (1997).

4. 433 U.S. 186 (1977).

5. RESTATEMENT (SECOND) OF JUDGMENTS (1982).

6. See *Burnham v. Superior Court*, 495 U.S. 604 (1990); *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

7. For instance, it has been nearly twenty years since the Supreme Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and the lower court decisions have effectively modified the rules established there. See generally William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663 (1992).

8. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

9. 95 U.S. 714 (1877).

and credit, it may be possible now to determine the deference that the forum state owes to a sister-state injunction.<sup>10</sup> Also it would be useful for the ALI to address an increasingly serious problem—the effect of a judgment (especially a consent judgment) on nonparties. The Supreme Court offered no valuable guidance in *Baker v. General Motors Corp.*,<sup>11</sup> and the bench and bar would profit from the ALI's view. Further, now that section 103's<sup>12</sup> potential for mischief is apparent,<sup>13</sup> it may be the right time to abandon it, with all due respect to its illustrious sponsor.<sup>14</sup> Finally, it may be appropriate to include a more comprehensive treatment of judgment recognition in the international context in light of the progress toward a comprehensive recognition convention.

Three final areas that have seen enough development since 1971 to warrant reconsideration in a third restatement are corporations, estate administration, and especially family law.<sup>15</sup> But to pose the issue of a third restatement of conflicts is not to ask whether there are useful incremental improvements to be made to the sections on jurisdiction, judgments, and family law. The real question that brings us here is whether the time is right to overhaul the *Second Restatement's* choice-of-law regime.

## II. THE SECOND RESTATEMENT IN CAPSULE

Even the most aggressive surgeons (or pathologists) are willing to conduct a brief examination of the patient (or body) before beginning work. Thus, before attempting to cure or bury the *Second Restatement*, it makes sense to examine its provisions at least briefly. The *Second Restatement* adopts a complex, layered approach to choice of law that borrows from a wide array of traditional and modern methodologies. Like its predecessor, it is comprehensive and detailed, containing hundreds of territorial choice-of-law rules divided by subject matter (torts, contracts, property, etc.). It also

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10. See *Baker v. General Motors Corp.*, 522 U.S. 222 (1998).

11. *Id.*

12. "A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State." SECOND RESTATEMENT, *supra* note 1, § 103.

13. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980) (plurality opinion, based in part on the rationale of section 103, that would cast doubt on the basic principles of full faith and credit). For further discussion, see WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 352-60 (2d ed. 1993).

14. See Willis L.M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 176-77 (1949).

15. In several of these areas, a third restatement could clarify recent developments and lend the authority of the American Law Institute to current solutions of difficult problems. Corporate law, for example, would benefit from the Institute's guidance concerning the effect of *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), on state regulatory authority. Probate and family law have been the targets of numerous uniform acts, and a restatement's concise rendition of those statutes and the decisional law interpreting them would be most useful. Finally, the third restatement could weigh in on the unresolved, although very important, question of whether a court needs personal jurisdiction over both parents before it can award custody to either. See RICHMAN & REYNOLDS, *supra* note 13, at 383-85.

incorporates, however, much modern learning from the choice-of-law revolution including the grouping-of-contacts technique, interest analysis, validation, and party autonomy.

Holmes's famous aphorism that a page of history is worth a volume of logic applies with special force to the *Second Restatement*. It is difficult to understand the document and its hybrid method without some understanding of its eighteen-year drafting history. The project began in 1953 as an attempt to respond to the withering academic criticism of the *First Restatement* and to accommodate the beginnings of a conflicts revolution that was occurring in the courts. It ended in 1971 as a complex, negotiated settlement among several warring factions of choice-of-law revolutionaries. As a descriptive "restatement," it was doomed to failure from the outset because it is impossible to "restate" a revolution that is in progress and whose outcome is in doubt. As a normative "pre-statement," it has proved to be a huge success among the courts but an object of academic derision.

Repudiating the dogma of vested rights, the early drafts nevertheless retained the *First Restatement's* strong territorial bias but broadened its scope. Thus they contained a multitude of specific jurisdiction-selecting rules but also incorporated the "center of gravity" or "grouping of contacts" approach that had begun to appear in progressive judicial opinions. Conspicuously absent, however, was any serious attempt at policy analysis or consideration of the content of competing internal rules. The predictable result of those omissions was scathing criticism from the academic proponents of the more modern theories, particularly Albert Ehrenzweig.<sup>16</sup> The response of the drafters and their leader, Willis Reese, was to attempt to co-opt the critics by incorporating many of their ideas in the choice-of-law principles of section 6.<sup>17</sup> The result was the final 1971 draft, depending upon your point of view, either a balanced and sophisticated amalgam or an incoherent mishmash.<sup>18</sup>

Three basic elements define the choice-of-law approach of the *Second Restatement*: (a) section 6 and the most significant relationship,<sup>19</sup> (b) a few grouping-of-contacts sections, and (c) numerous sections that provide choice-of-law rules for specific legal claims and issues.

The concept of the "most significant relationship" lies at the intellectual heart of the *Second Restatement*. It appears in section after section, sometimes as a general residual choice-of-law directive to be used when no specific section applies,<sup>20</sup>

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16. See, e.g., Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230 (1965); see also *infra* notes 72, 73.

17. See SECOND RESTATEMENT, *supra* note 1, § 6.

18. For more on the history of the drafting process, see Borchers, *supra* note 3, at 1235-40; Michael S. Finch, *Choice-of-Law Problems in Florida Courts: A Retrospective on the Restatement (Second)*, 24 STETSON L. REV. 653, 655-57 (1995); William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1390-91 (1997); Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 357 (1997).

19. See *supra* notes 3, 7.

20. See, e.g., SECOND RESTATEMENT, *supra* note 1, § 145.

sometimes as a check, such as a limit on party autonomy in contract,<sup>21</sup> and sometimes as an escape device used to avoid the irrational result of a presumptive territorial reference.<sup>22</sup>

The *Second Restatement* contains no explicit definition of the concept of “most significant relationship.” Nevertheless, the implication is clear that the state of the most significant relationship is the state whose law would be applied by a court committed to the choice-of-law principles of section 6. In the absence of a choice-of-law statute,<sup>23</sup> section 6(2) counsels a choice based on a series of factors that capture many of the themes of the choice-of-law revolution:<sup>24</sup>

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result,
- (g) ease in the determination and application of the law to be applied.<sup>25</sup>

The second major component of the *Second Restatement’s* choice-of-law program is a host of specific sections treating a large number of specific issues via a wide variety of choice-of-law strategies. By far, the largest number are territorial presumptions of varying strength, most of which may be overcome by reference to section 6.<sup>26</sup>

21. See, e.g., *id.* § 187.

22. See, e.g., *id.* § 140 cmt. c.

23. Section 6(1) directs a court to follow a statutory directive of its own state on choice of law. Although the subsection is uncontroversial, its range of application is fairly narrow as statutory directives on choice of law are quite rare. As comment c suggests, “legislatures usually legislate . . . only with the local situation in mind.” SECOND RESTATEMENT, *supra* note 1, § 6 cmt. c. There are, however, a few exceptions; the Uniform Commercial Code, for example, contains choice-of-law provisions, as do many no-fault automobile accident compensation statutes.

24. Although the list of factors first appeared in an article co-authored by the Reporter for the *Second Restatement*, Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 962-81 (1952), it reveals a debt to Currie, Leflar, comparative impairment and other true-conflict-resolution devices, and even the *First Restatement*. The drafters deliberately chose to list the factors in no particular order of importance, and acknowledged that “[v]arying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law.” SECOND RESTATEMENT, *supra* note 1, § 6 cmt. c.

25. SECOND RESTATEMENT, *supra* note 1, § 6(2).

26. The strength of the presumption varies widely among the sections. In some cases, the presumption is very strong indeed. Thus nearly all issues of procedure and evidence except for limitations, burden of proof, and privilege are referred to the law of the forum with no “most significant relationship” exception clause. See *id.* §§ 123-143. Similarly, and much more controversially, the sections dealing with real property point absolutely to the law that would be applied by the courts of the situs, see *id.* §§ 223-235, and most of those dealing with the succession on death of personal property refer, without an exception clause, to the law that would be applied by the courts of decedent’s domicile. See *id.* §§ 236-243. (Note that these two sets of sections specifically call for application of the doctrine of renvoi and thus leave the

In addition to its territorial presumptive references, the *Second Restatement* also uses other choice-of-law methodologies in several of its specific sections. Party autonomy, for instance, figures importantly in the provisions governing consensual, planned transactions.<sup>27</sup> Substantivism—choosing law by the result that it produces—is the basis for other sections, the clearest example being the validating provisions affecting usurious contracts, powers of appointment wills, foreign incorporations, and contract formalities.<sup>28</sup> Finally, a few sections are purely interest-analytic. The best examples are the sections on presumptions and burdens of production and persuasion, which refer to the law of the forum “unless the primary purpose of the relevant rule of the state of the otherwise applicable law is to affect decision of the issue rather than to regulate the conduct of the trial.”<sup>29</sup>

The final component of the *Second Restatement's* choice-of-law system is a set of familiar grouping-of-contacts sections, most notably section 145 (torts)<sup>30</sup> and section

forum court with at least the possibility of escape from the law of the situs or the decedent's domicile. The possibility of escape is not great, however, because these sections also contain provisions suggesting that the courts of the situs or decedent's domicile will “usually apply their own local law.”)

The language of other sections reveals less confidence in the presumptive reference. Thus for many types of tort claims, *see id.* §§ 146-156, and for many types of contracts, *see id.* §§ 189-207, the *Second Restatement* refers to a particular territorial contact, “unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6,” *id.* §§ 189-197, to the claim and the parties. Sections treating particular contract and tort issues are even more tentative, suggesting only that the supplied territorial reference will “usually” control. *Id.* §§ 157-158.

Finally, some sections include no presumptive territorial reference at all, referring instead to the appropriate general grouping-of-contacts section which, of course, incorporates by reference the choice-of-law principles of section 6. For more thorough discussion of the *Restatement's* territorial presumptions, see Shaman, *supra* note 18, at 357-64; Symeon C. Symeonides, *Exception Clauses in American Conflicts Law*, 42 AM. J. COMP. L. 813 (Supp. 1994).

27. Thus, the drafters give the parties total control over the construction of wills, *see* SECOND RESTATEMENT, *supra* note 1, § 268; trusts, *see id.* §§ 269, 271, 272, 277; and contracts, *see id.* § 187(1); and substantial control over the validity of contracts, *see id.* § 187(2); and inter vivos trusts of movables, *see id.* § 270. On the party autonomy provisions, see Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 480-86 (1991); Andreas F. Lowenfeld, “Tempora Mutantur . . .”—*Wills and Trusts in the Conflicts Restatement*, 72 COLUM. L. REV. 382 (1972).

28. *See, e.g.*, SECOND RESTATEMENT, *supra* note 1, § 139 (providing for the admission into evidence of a communication if it is admissible according to the privilege law of either the forum or the state which has the most significant relationship with the communication). On substantivism as a choice-of-law strategy, see GENE R. SHREVE, *A CONFLICT-OF-LAWS ANTHOLOGY* 139-52 (1997).

29. SECOND RESTATEMENT, *supra* note 1, §§ 133-134.

30. *Id.* § 145. That section states the following:

The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

188 (contracts),<sup>31</sup> that serve a residual function when an issue or a claim is not treated by a specific choice-of-law directive.<sup>32</sup>

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(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

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

*Id.*

31. *Id.* § 188. That section states:

Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties, the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

*Id.*

32. The grouping-of-contacts sections are the lineal descendants of the “center of gravity” opinions that appeared early in the choice-of-law revolution, especially in New York. That approach, which dominated the early drafts of the *Second Restatement*, is vulnerable to two fundamental criticisms. *See* Finch, *supra* note 18, at 687-90. First, like the hard-and-fast rules of the *First Restatement*, the grouping-of-contacts approach is jurisdiction selecting; it does not take into account the contents of the competing internal rules. Second, it offers no way of measuring the significance of contacts, and, without a measure of significance, the center of gravity system amounts to little more than contact counting. *See* Shaman, *supra* note 18, at 359-61.

Later drafts of the grouping-of-contacts sections provide a greater role for policy analysis. Thus the final version of section 145 calls for application of the law of “the state which . . . has the most significant relationship to the occurrence and the parties under the principles stated in § 6.” SECOND RESTATEMENT, *supra* note 1, § 145(1). Correspondingly, the role of the enumerated contacts is diminished; they are simply “to be taken into account in applying the principles of § 6.” *Id.* § 145(2). Comment e to section 145 demotes the contacts to mere presumptions, thus making the relative importance of policy analysis and content enumeration even more clear:

In applying the principles of § 6 to determine the state of most significant relationship, the forum should give consideration to the relevant policies of all

Consisting, as it does, of several disparate elements, the *Second Restatement* could have used an owner's manual, but the drafters did not indicate explicitly how the various elements should be coordinated. Probably they intended the following decision procedure: In the absence of a statutory choice-of-law directive, a court should turn first to a specific section that covers the issue or claim before it. Nearly all of those, however, refer to section 6 (and perhaps to one of the grouping-of-contacts sections, as well) to suggest possible avoidance or qualification of the black letter. If no specific section covers the issue or claim before the court, the court should refer to the general grouping-of-contacts sections, which also include a reference to section 6. Thus, whether it uses the specific sections or the general grouping-of-contacts sections, eventually the court will need to apply the section 6(2) factors.<sup>33</sup>

Subsections 6(2)(b) and (c) clearly contemplate the court's performing some sort of interest analysis. Presumably if that analysis indicates a false conflict, the court should apply the law of the only interested state. If the case is a nonfalse conflict, the court should use the factors of section 6(2)(d)-(g) to resolve the true conflict or unprovided-for case. In no event, however, should the court use the grouping-of-contacts sections to justify a center-of-gravity or contact-counting approach. The contacts enumerated in the grouping-of-contacts sections have no independent significance and are relevant only insofar as they implicate the factors of section 6(2).<sup>34</sup>

### III. WORK LEFT UNDONE

Perhaps the most impressive achievement of the *Second Restatement* has been its contribution to the choice-of-law revolution.<sup>35</sup> Most of the states that have abandoned the *lex loci* rules have opted for the *Second Restatement*, and it seems fair to conclude that progress away from the traditional dysfunctional rules would have been much slower without the *Second Restatement*. A sensible question, therefore, when contemplating a third restatement, is whether there is work left undone from the revolution. Reform of the *situs* rule is the clearest example.

Although the *Second Restatement* hastened the demise of most of the *lex loci* rules, it left "one of most dysfunctional" of all,<sup>36</sup> the *situs* rule, intact.<sup>37</sup> The problem with

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potentially interested states and the relevant interests of those states in the decision of the particular issue. Those states which are most likely to be interested are those which have one or more of the following contacts with the occurrence and the parties.

*Id.* § 145 cmt. e.

33. *Id.* § 6(2).

34. In fact, of course, many of the courts that purport to "follow" the *Second Restatement* perform no such analysis and in fact use a rough grouping-of-contacts approach. See *infra* text accompanying notes 58-71.

35. See Symeonides, *supra* note 2, at 1255; Russell J. Weintraub, "At Least, To Do No Harm": Does the *Second Restatement of Conflicts* Meet the Hippocratic Standard?, 56 MD. L. REV. 1284, 1309-10 (1997).

36. Weintraub, *supra* note 35, at 1307.

37. See SECOND RESTATEMENT, *supra* note 1, §§ 223-224.



the situs rule, demonstrated a generation ago by Professors Hancock<sup>38</sup> and Weintraub,<sup>39</sup> is an imbalance between its scope and rationale. The scope of the rule extends to nearly all questions involving title to real property, but its rationales work in only a fraction of those cases. One argument for the rule is that only the situs courts can directly affect land within the situs state; therefore every nonsitus court should apply the law of the situs to insure that courts of the situs state will enforce the forum-court's judgment. The argument fails to take account of the considerable power of a nonsitus court with personal jurisdiction over the contestants for the land. Often such a court will not need the good will of the situs to ensure enforcement. Further, the argument does not apply at all when the forum court *is* the situs.

A second argument for the rule relies on recording systems. Title searching should be made as simple as possible; the searcher should be able to examine conveyances in the chain of title and determine their effect easily, an exercise that is feasible only if the effect of such instruments is controlled by the law of the situs. Again, however, many land cases involve parties that have not relied on the land reporting systems, and, as long as the prevailing party properly records the interest conferred by the judgment, the application of nonsitus law will not mislead future purchasers.

A final argument focuses on the strong interest that the situs state has in land within its borders, but again, the rationale applies to only a small fraction of the relevant cases. The situs, as situs, surely has the strongest interest in resolving issues of land use, environmental protection, and alienability of title; but it is hard to see how the situs state's interest in its land is implicated by disputes involving succession, marital rights, or legitimacy, issues in which nonsitus states often will have vital interests. In light of the long-familiar flaws in the arguments for the situs rule, the third restatement has an immediate contribution to make by abandoning the rule. Having attended the meetings of the ALI at which tentative restatement drafts are debated, we offer the following proposed sections with the level of trepidation that we otherwise reserve for bungee-jumping:

#### § 223. The General Principle

- (1) Except as provided in § 223A, the rights and liabilities of the parties with respect to an issue involving title to immovable property are determined by the law of the state which, with respect to that issue, has the most significant relationship to the property and the parties under the principles stated in § 6.
- (2) Contacts to be taken into account in applying the principles of § 6 to determine the applicable law include:
  1. the situs of the immovable property,

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38. See Moffatt Hancock, *Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness*, 20 STAN. L. REV. 1 (1967); Moffatt Hancock, *Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo*, 18 STAN. L. REV. 1299 (1966).

39. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 412-60 (3d ed. 1986).

- (b) the domicile, residence, nationality, place of incorporation, and place of business of the parties,
- (c) the place where any relevant transaction involving the immovable occurred.

These contracts are to be evaluated with regard to their relative importance to the particular issue and the policies behind the competing internal laws.

#### § 223A. The Law of the Situs of the Immovable Property

Notwithstanding the principal of § 223, the rights and liabilities of the parties with respect to an issue involving title to immovable property are determined by the whole law of the situs of the immovable if,

- (1) Application of the law of a state other than the situs would disadvantage a party that relied reasonably on the law of the situs in conducting a title search or evaluating its results.
- (2) Enforcement of the order of the court is likely to be impossible unless the court applies the law of the situs.

In addition to these sections, more intrepid drafters should supply comments indicating that the reason for the two sections is the limited application of the arguments in defense of the situs rule. Also useful would be examples of situations in which each section would apply. Another possible addition would be several specific sections devoted to issues for which territorial references or other specific choice-of-law directives would be useful. What comes to mind immediately are sections dealing with succession on death that presumably would mirror the current provisions for succession on death to movable property, thus preserving the policy of uniformity that animates the place-of-decedent's-domicile rule.

### IV. THE NEW SCHOLARSHIP

#### *A. Empirical Studies*

There is other work for a third restatement that is not left over from the choice-of-law revolution. That revolution owed a substantial debt to the academy, the work of two generations of choice-of-law theorists, who demonstrated the dysfunctional nature of most of the *First Restatement* rules. But after sixty years, the theoretical debates are reaching the point of diminishing returns. As Professor Westbrook remarked in 1975, if six or seven centuries of debate among the statisticians did not solve the unilateralist/multilateralist debate, differences of opinion on such fundamental questions are not likely to disappear.<sup>40</sup> Further the contemporary version

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40. See James E. Westbrook, *A Survey and Evaluation of Competing Choice-of-Law*

of that debate seems mannered and cloistered; we interpret and reinterpret the same sacred texts and write about the same few cases even though nearly a thousand choice-of-law cases are decided every year.<sup>41</sup> The theoretical scholarship, while adequate to demonstrate the faults of the *First Restatement*, does not seem to be able to produce consensus on the proper modern approach. The reason is that like the metaphysical discussions criticized by the Logical Positivists, it is directed toward questions that can only be debated, not resolved.

Lately, however, a new type of scholarship has begun to emerge. Unlike the theoretical work, it is inductive, rather than deductive. The former begins with basic postulates about the fundamental questions of choice of law: multilateralism versus unilateralism, the nature of sovereignty, the need for comity, and the teleological nature of law. It then deduces consequences for practical choice-of-law problems. This new work proceeds inductively instead. It reasons from multiple results in actual cases toward choice-of-law rules of thumb that courts actually follow. This style of reasoning is not unknown in the law. It is essentially the program of the Realists, who were concerned with what courts do, rather than what they say. Further, it has a place in the history of choice of law; Robert Leflar adopted such a strategy to produce his "choice influencing considerations,"<sup>42</sup> and Albert Ehrenzweig used it to search for "true rules."<sup>43</sup>

To see the difference in the two approaches, consider the problem of party autonomy. For Beale it was forbidden since it involved an act of sovereign power performed by private parties. Currie, a staunch positivist, largely ignored the problem as irrelevant to his concerns with achieving rational solutions based upon the states' policy goals. The new scholarship simply takes party autonomy for granted because it is accepted by nearly all domestic and foreign courts; it then seeks to determine how prevalent the practice is, how willing the courts are to enforce choice-of-law clauses in different types of transactions, and how often they are willing to override the clause for public policy reasons.

The new studies take two principal forms. The first form to appear consisted of descriptive studies of large bodies of cases. This work differs from the more traditional writing primarily in its focus on large numbers of cases instead of particular results from well-known courts. Here the leaders have been Phaedon Kozyris and Symeon Symeonides, who for years have surveyed the annual choice-of-law decisions of American courts.<sup>44</sup> More promising yet, is a new form of study,

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*Methodologies: The Case for Eclecticism*, 40 MO. L. REV. 407, 446-47 (1975). The 25 years since Westbrook's prediction have validated it; the debate between interest analysts (such as Sedler and Posnak) and their critics (Juenger and Brilmayer) remains alive and well.

41. See Reynolds, *supra* note 18, at 1384.

42. See William L. Reynolds & William M. Richman, *Robert Leflar, Judicial Process, and Choice of Law*, 52 ARK. L. REV. 123, 134-36 (1999).

43. See *infra* discussion accompanying notes 72-73.

44. See, e.g., Phaedon J. Kozyris, *Choice of Law in the American Courts in 1987: An Overview*, 36 AM. J. COMP. L. 547 (1988); Symeon C. Symeonides, *Choice of Law in the American Courts in 1998: Twelfth Annual Survey*, 47 AM. J. COMP. L. 327 (1999). Other useful surveys have been produced by Herma Hill Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983); Kramer, *supra* note 27; William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its*

introduced independently by Pat Borchers and Mike Solimine, involving statistical analysis of choice-of-law decisions. The sequence here is reminiscent of progress in the history of science. At first scientists speculated about the phenomena, then conducted limited observations of relatively few instances, then multiplied and systematized their observations, and finally began to test hypotheses statistically.<sup>45</sup> The corresponding progressive increase in predictive power is why today in most inquiries we prefer anecdotal evidence to speculation and consider empirical evidence the best of the three.

### B. Preliminary Findings

Thus far there have been relatively few studies, but the results already show the potential to solve persistent choice-of-law problems or at least radically alter the terms of their debate.

#### 1. Eclecticism

One of the clearest examples of the ability of the new research to alter the course of a long-standing choice-of-law dispute involves the debate on eclecticism. One effect of the choice-of-law revolution was the multiplication of choice-of-law methodologies to the extent that six or seven modern methods were adopted by the several states, and some courts, embarrassed at the riches, seemed to vacillate among the new methods. Defending eclecticism, Professor Leflar remarked that in most cases the modern methods "would all ordinarily lead to the same conclusion as to who should win the case."<sup>46</sup> Professor Reppy challenged that assertion by demonstrating analytically that the modern methods in fact can produce different results in particular hypothetical cases.<sup>47</sup> And so the matter stood, another of many choice-law disputes that could be debated, but never resolved.

More recently, two independent statistical studies carried out by Dean Borchers and Professor Solimine take the debate to a new and more informed level. The studies compared the actual performance in tort cases of courts professing several different modern methods. On three crucial variables—the frequency with which decisions were pro-forum law, pro-recovery, and pro-forum resident—both reported that the records of the modernist courts were statistically indistinguishable regardless of the differences in their methodological allegiances.<sup>48</sup> It may be that the empirical studies

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*Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196 (1997); Gregory E. Smith, *Choice of Law in the United States*, 30 HASTINGS L.J. 1041 (1987); and Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989).

45. The final step in science, experimentation by manipulating variables, may be hard to accomplish in choice of law.

46. Robert A. Leflar, *Choice of Law: A Well-Watered Plateau*, LAW & CONTEMP. PROBS., Spring 1977, at 10, 11.

47. See William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645, 650-51 (1983).

48. See Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992); Solimine, *supra* note 44.

do not resolve the eclecticism debate completely. After all, statistical identity of results does not mean that every concern of the anti-eclectics is allayed, but the debate certainly is advanced by the results of the studies in a way that no theoretical analysis could.

## 2. Choice-of-Law Methodology

The Borchers and Solimine studies,<sup>49</sup> along with several others, also change the terms of the persistent debate on choice-of-law methodology. After all, why continue to debate the relative merits of competing modern theories if all produce the same pattern and frequency of results? In the words of the leading observer of American choice-of-law decisions, "the reality of the case law cannot be ignored. That reality suggests that methodology plays a relatively minor role in explaining the results in actual cases."<sup>50</sup> Further, the statistical studies also show that the result patterns of *First Restatement* courts differ significantly from those of modernist courts, thus suggesting that any left-over energy for theoretical debate is better directed toward convincing recalcitrant courts to abandon the *lex loci* rules than to debating the relative merits of the competing modern systems.

Also significant for the issue of methodology are the results of a series of case surveys conducted by Deans Symeonides and Borchers, and Professors Solimine, Kramer, and Richman. All demonstrate that the *Second Restatement* is the dominant choice-of-law system among the state and federal courts.<sup>51</sup> The majority of courts that have abandoned the *lex loci* rules have opted for the *Second Restatement*, and the trend continues to accelerate. We can continue to debate the relative merits of the *Second Restatement*<sup>52</sup> and its competitors, but the courts seem to have made their decision.

A final methodological issue illuminated by the new wave of empirical research is the question of rules versus approach, considered by some to be the central choice-of-law problem today.<sup>53</sup> The victory of the *Second Restatement* over other less rule-oriented systems might suggest that the courts have opted for the certainty and security of rules over the flexibility offered by an approach.<sup>54</sup> After all, the

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49. See Borchers, *supra* note 48; Solimine, *supra* note 44.

50. Symeonides, *supra* note 2, at 1263; see also Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 951 (1994) ("[T]he result in the case often appears to have dictated the judges choice of law approach at least as much as the approach itself generated the result.").

51. See, e.g., Richman & Riley, *supra* note 44; Symeonides, *supra* note 44; Symeonides, *supra* note 2.

52. The *Maryland Law Review* contains the most recent set of evaluations of the *Second Restatement*. See Symposium, *The Silver Anniversary of the Second Conflicts Restatement*, 57 MD. L. REV. 1193-1411 (1997) (articles by Richman and Riley, Borchers, Symeonides, Weintraub, Weinberg, and Reynolds).

53. See, e.g., Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972).

54. The most well-known attempts at rule formulation are the *Neumeier* rules of the Court of Appeals of New York, the Louisiana Codification, and the ALI Complex Litigation Rules. The most "unruly" systems today seem to be the *lex fori* approaches of Nevada, Michigan, and

*Restatement* goes beyond the mere provision of hundreds of rules and seems to rank them according to how much is needed to overcome the rule's presumption. The recent empirical studies, however, disprove the rules-are-favored hypothesis.<sup>55</sup> In fact, Dean Borchers's comparative citation study and Dean Symeonides's observations show that in tort and contract cases *Second Restatement* courts tend to rely primarily upon the general sections of the *Second Restatement* (sections 6, 145, 188) and ignore the vast majority of the territorial presumptions, even when one is precisely on point.<sup>56</sup> This counterintuitive result is the sort that comes only through the reading or systematic study of hundreds of decisions. It would be foolhardy to undertake a new restatement in ignorance of so significant a finding.<sup>57</sup>

### 3. Abuse of the *Second Restatement*

Although some courts correctly interpret and faithfully follow the *Second Restatement's* complex, layered choice-of-law provisions,<sup>58</sup> a fairly consistent finding of the empirical studies is that others misinterpret and abuse the most significant relationship device. Examination of the choice-of-law principles of section 6(2)<sup>59</sup> shows that the *Second Restatement's* drafters intended the most significant relationship device to amalgamate much of the learning that inspired the choice-of-law revolution. In particular, the debt to interest analysis (including the various true-conflict-resolution devices), Leflar, the new territorialists, and the center-of-gravity theory are most apparent. Nevertheless many *Second Restatement* courts use sections 6,<sup>60</sup> 145,<sup>61</sup> and 188<sup>62</sup> to perform a much cruder choice-of-law analysis, similar to the grouping-of-contacts approach.

An especially egregious example is *Nationwide Mutual Insurance Co. v. Black*.<sup>63</sup> The plaintiffs and the defendant, all Ohio residents, drove in the defendant's car to Ontario, where the defendant's negligence caused a collision with an Ontario driver. When the plaintiffs sought recovery in Ohio for their personal injuries, the courts faced a choice between the Ontario no-fault statute, which prohibited plaintiff's claim against the defendant and Ohio law, which did not. The Ohio appellate court began

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Kentucky. On the excesses of the latter, see Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: The Tenth Annual Survey*, 45 AM. J. COMP. L. 447, 448-51, 457 (1997) (discussing Nevada and Michigan); Symeon C. Symeonides, *Choice of Law in the American Courts in 1997*, 46 AM. J. COMP. L. 233, 240-49 (1998) (discussing Michigan and Kentucky).

55. See, e.g., Borchers, *supra* note 48; Solimine, *supra* note 44.

56. See Borchers, *supra* note 3.

57. That may explain in part the ALI's unfortunate decision in the Complex Litigation Project to opt for territorial rules, which have met with virtually complete rejection.

58. See, e.g., *Esser v. McIntyre*, 661 N.E.2d 1138 (Ill. 1996) (demonstrating a correct policy-sensitive decision of false-conflict personal injury case; where the injury occurred in Mexico and the parties were domiciled in Illinois).

59. See SECOND RESTATEMENT, *supra* note 1, § 6(2).

60. *Id.* § 6.

61. *Id.* § 145.

62. *Id.* § 188.

63. 656 N.E.2d 1352 (Ohio Ct. App. 1995).

its analysis, as instructed by the Ohio Supreme Court, with section 146 of the *Second Restatement* and quoted the Supreme Court's interpretation of the *Restatement's* method for applying that presumption.<sup>64</sup>

Pursuant to this section, a presumption is created that the law of the place of the injury controls unless another jurisdiction has a more significant relationship to the lawsuit. To determine the state with the most significant relationship, a court must then proceed to consider the general principles set forth in Section 145. The factors within this section are: (1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; (4) the place where the relationship between the parties, if any, is located; and (5) any factors under Section 6 which the court may deem relevant to the litigation. All of these factors are to be evaluated according to their relative importance to the case.<sup>65</sup>

The court allowed that the *Second Restatement* emphasizes the parties' common domicile but rejected that choice because not all parties were Ohioans. (At this point the battle was between the parties' insurers, only one of which was an Ohio corporation.<sup>66</sup>) It cited the section 145 factors (the negligent conduct and the resultant injury) that favored Ontario and rejected the plaintiff's argument that the place of injury was merely fortuitous. It severely limited the "fortuitous" exception to the place-of-injury rule by relying on an unfortunate passage from the comments to section 145.<sup>67</sup> The comment suggests that the place of injury would be "fortuitous," for example, when an airplane traveling between two points in State X flies briefly over the territory of State Y where the pilot's negligence causes injury to a passenger.<sup>68</sup> "Unlike the example," said the court, "there is no evidence in the record that the [parties] momentarily strayed into Ontario, en route between two distinct points in Ohio, when the injuries occurred."<sup>69</sup>

In spite of that unfortunate language, the court still would have got it right had it performed the section 6 analysis; no such luck, for it completely misinterpreted the import of section 6.

Although [the Supreme Court of Ohio's interpretation of the *Restatement*] permits a court to consider, as a fifth factor, those considerations set forth in Section 6 of the *Restatement* that it deems relevant, those considerations largely require a weighing of the various policy interests involved. In the case sub judice, Ontario could likely advance as many policy reasons for its no-fault insurance law as Ohio could for its fault-based system. Essentially, these considerations offset one another.<sup>70</sup>

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64. *See id.* at 1355.

65. *Id.* (footnote omitted).

66. *See id.* at 1355-56.

67. *Id.* at 1356.

68. *Id.*

69. *Id.* at 1357. Professor Weintraub has cited the potential for mischief of this ill-chosen example. *See Weintraub, supra* note 35, at 1289.

70. *Black*, 656 N.E.2d at 1357.

Very likely, Professor Kramer had read a few too many *Black*-style opinions, grossly mishandling simple false conflict cases, when he remarked that "one needs to read a lot of opinions in a single sitting fully to appreciate just how badly the *Second Restatement* works in practice."<sup>71</sup> In any event, the newer studies have revealed the disturbing frequency of decisions that misread the *Second Restatement*, and the drafters of its successor would be foolish to proceed on the now-disproved assumption that the sophisticated dialectical process contemplated by section 6 is the one that all (or even most?) *Second Restatement* courts actually apply.

#### 4. New Evidence of "True Rules"<sup>72</sup>

As part of his Legal Realist agenda, Professor Albert Ehrenzweig coined this term to refer to a set of rules or generalizations that in fact predict the decisions of courts in choice-of-law cases. Unlike the *lex loci* rules, which were deduced a priori from the vested rights theory, these rules would be induced or abstracted from the tendencies of courts to reach certain choice-of-law *results* regardless of their announced methodology. Among the most prominent, he found, were the rule of validation (for marriages and most contracts), the rule permitting the parties to choose the law to govern their contract, and the *situs* rule for many issues involving immovables.<sup>73</sup>

The possibility, however, of finding and, more importantly, agreeing on "true rules" is relatively low absent the ability to survey and tabulate the results of large numbers of decisions. Here the new scholarship is especially valuable for its ability to find and document persistent choice-of-law practices that otherwise might have received little attention. Thus, Dean Borchers's citation study, while noting a widespread tendency among the courts to ignore most of the *Second Restatement*'s specific provisions, nevertheless found that some sections receive disproportionate attention in the reported decisions.<sup>74</sup>

Some come as no surprise; even a casual reader of conflicts cases would note that section 187<sup>75</sup> (party autonomy in contracts) has been extremely popular among the courts. Similarly, section 203<sup>76</sup> (validation in usury cases) is one of the usual suspects for inclusion on the "true rules" list. But there are some surprises as well. Casual observers might have been unaware of the success of section 149<sup>77</sup> (single state defamation), section 150<sup>78</sup> (multi-state defamation), sections 192<sup>79</sup> and 193<sup>80</sup> (life and

71. Kramer, *supra* note 27, at 486-87.

72. Albert A. Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach"*, 18 OKLA. L. REV. 340 (1965).

73. See ALBERT A. EHRENZWEIG, *CONFLICTS IN A NUTSHELL* 41-42 (3d ed. 1974); Ehrenzweig, *supra* note 72, at 340.

74. See Borchers, *supra* note 3, at 1242-46.

75. See SECOND RESTATEMENT, *supra* note 1, § 187.

76. See *id.* § 203.

77. See *id.* § 149.

78. See *id.* § 150.

79. See *id.* § 192.

80. See *id.* § 193.



casualty insurance), and section 196<sup>81</sup> (contracts for the rendition of services).<sup>82</sup> Some of these rules are so successful as to transcend the *Second Restatement* itself; thus sections 187, 193, and 203 have garnered widespread approval among courts that otherwise remain in the thrall of the *lex loci* rules.<sup>83</sup> What to make of these “true rules” is a separate normative question. Should they be guaranteed a spot in a third restatement, or not? A purely descriptive study, of course, can never answer such a question. Regardless of the answer, however, drafters of a future restatement should at least know of the existence of all colorable candidates for “true rule” status.

### C. Implications for the Third Restatement

What does the new scholarship portend for the timing and content of a third restatement? Certainly it has produced results that the drafters of such a document would be foolish to ignore. One strategy would be to consider the lessons learned and attempt to tailor the *Second Restatement* in light of them. Thus, a third restatement might include much more explicit commentary on how the most significant relationship inquiry should be conducted. The comments might steer courts more toward the policy-centered approach originally intended by the drafters of section 6 and away from the scattershot center-of-gravity approach used in cases like *Black*.<sup>84</sup>

Another possibility would be to eliminate many of the territorial presumptions that generated so much academic criticism during the drafting of the *Second Restatement*. The actual practice of contemporary *Second Restatement* courts suggests that they are useless anyway. A final possibility would be to highlight the few specific sections

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81. *See id.* § 196.

82. Borchers's citation study shows a few other sections that receive disproportionate numbers of citations, but they do not evidence true rules in the same sense as the cited examples. *See Borchers, supra* note 3, at 1242-46. Several do not contain rules at all, but are simply grouping-of-contacts sections for particular types of claims. *See, e.g.,* SECOND RESTATEMENT, *supra* note 1, § 148 (fraud and misrepresentation); *id.* § 175 (wrongful death). Others simply direct the court to sections 6 and 145 or 188. *See id.* § 171 (measure of damages for torts), *id.* § 207 (measure of damages for contracts).

Borchers did not include the sections on property or procedure in the citation study, but a preliminary tabulation shows that a few of those sections also are cited disproportionately. *See Borchers, supra* note 3, at 1242-44; SECOND RESTATEMENT, *supra* note 1, §§ 142, 143 (statute of limitations; pre- and post-1988 revision versions both cited more than all other procedure sections); *id.* § 132 (property exempt from execution; no kidding); *id.* § 136 (notice and proof of foreign law); *id.* § 139 (evidentiary privilege). Very likely some component of citation frequency is simply a function of the difficulty of the issue or the frequency with which it comes up, but some of the frequently cited sections such as 142 and 139, may contain true rules. If section 139 turns out to be one, that would be an interesting result since it is a substantivist rule (choose the law of the state that would not privilege the evidence), and its substantive preference is consistent with the trend in evidence law to construe privileges narrowly.

83. *See Richman & Riley, supra* note 44, at 1210, 1213-16, 1224 n.193 (noting a tendency of many *First Restatement* courts to ignore the *lex loci* in order to enforce choice-of-law clauses, validate contracts against the defense of usury, and apply the law of the place where the parties expected the risk to be in life and casualty insurance cases).

84. 656 N.E.2d 1352 (Ohio Ct. App. 1995).

that have garnered nearly universal approval from *Second Restatement* adherents as well as other modern and traditionalist courts. Such an empirically tailored third restatement would incorporate the results of the conflicts revolution and also the practical insights gained from thirty years of decisions applying the *Second Restatement*. At least in terms of its ability to predict the courts' actual behavior, it would be a significant improvement.

Nevertheless it would also be shortsighted to begin drafting now. We have relatively few of the new empirical studies, yet they show the possibility for transforming the debate on many of the classically unresolvable choice-of-law conundrums. If a few such studies can have such remarkable implications, what would be the result of a sustained period of empirical studies by a multitude of choice-of-law scholars? That possibility suggests an answer to the question of the timing of a third restatement. It is time to start working on the project, but not yet time to start producing tentative drafts.

First the ALI or the Conflicts Section of the AALS should form a study group to undertake a series of empirical studies over a sustained period—say, four or five years—to formulate and test a series of hypotheses that have the potential to alter the dialogue as much as the few existing studies have done already. This work is ideally suited to the Section. While judges and lawyers have made and continue to make important theoretical contributions to the development of choice of law, few have the time, training, or resources to conduct systematic empirical research. If the section could accomplish that *descriptive* task, the ALI would be in a position to begin drafting an empirically based third restatement. The goal should be the one that conflicts realists set at the beginning of the choice-of-law revolution—a set of *prescriptions* that seeks to guide rather than compel the courts' decisions and that allows the courts to produce honest opinions. These in turn would help the lower courts and the bar make informed predictions, and provide a principled and sustainable solution to the anarchy that has followed the conflicts revolution.

#### V. SOME HYPOTHESES WORTH INVESTIGATION

Such a program, of course, would require a set of hypotheses worth testing by empirical study. While others are probably better situated to suggest candidates,<sup>85</sup> I offer these simply in hopes of getting the ball rolling:

1. *Party Autonomy*: With what frequency do courts uphold choice-of-law and forum-selection clauses? Does the frequency of validation of choice-of-law clauses depend upon whether the clause selects forum or foreign law? What about when the clause opts for the law of a foreign country? Is the tendency to uphold forum-selection and choice-of-law clauses the same in consumer transactions as in transactions between more sophisticated parties? Are there predictable patterns that prompt the courts to invalidate these clauses on "public policy" grounds?

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85. The usual suspects (whom we may be able to round up) would be Symeon Symeonides because of his familiarity with decisional tendencies over the last decade, and Pat Borchers because he seems to have a grasp of statistical research methods that far exceeds our own.

2. *Substantivism*: Are there particular results that courts seek regardless of their announced choice-of-law methodology? Can they be predicted by the standard markers of “better law” (e.g., non-obsolescence, harmony with basic policies underlying the general area of law, adherence of a majority of courts, approval of the scholars in the substantive area)?

3. *Rules-Versus-Approach Dichotomy*: Much of the contemporary debate on choice-of-law methodology centers on the rules-versus-approach dichotomy. Three recent rulish formulations deserve study:

a. Dean Symeonides suggests that consensus among courts and scholars could be reached on at least a few tort choice-of-law rules:

(i) apply the law of the parties common domicile in loss-distribution conflicts; (ii) apply the law of the place where both the conduct and injury have occurred in conduct-regulation conflicts; and (iii) allow punitive damages if such damages are imposed by the law of any two of the following places: the place of conduct, place of injury, or the defendant’s domicile. Consensus among the scholars may be beyond hope, but we could test whether these rules please the courts.<sup>86</sup>

b. Professor Kramer has suggested a series of canons of construction for true conflicts that could also be tested for their ability to predict judicial behavior:

(i) if there is a conflict between two states’ laws and failure to apply one would render it practically ineffective, that law should be applied; (ii) in a conflict between a substantive policy and a procedural policy, the law reflecting the substantive policy should prevail (unless the forum’s procedural interest is so strong that it should dismiss on forum non conveniens grounds); (iii) for contracts without a choice-of-law clause, true conflicts should be resolved by applying the law that validates the contract; (iv) where one of two conflicting laws is obsolete, the other should be applied; and (v) where two laws conflict, but the parties actually and reasonably relied on one of them, that law should be applied.<sup>87</sup>

c. At least three rule-oriented regimes have generated some support outside the scholarly community: What is the predictive capacity of the rules of the Louisiana Codification, the ALI’s Complex Litigation Project, and the decision of the Court of Appeals of New York in *Neumeier v. Kuehner*?<sup>88</sup>

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

87. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990).

88. 286 N.E.2d 454 (N.Y. 1972).