

Leave Bad Enough Alone[†]

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I am not, to say the least, a big fan of the *Restatement (Second) of Conflict of Laws* (“*Second Restatement*”).¹ I have even less enthusiasm, though, for the prospect of a third restatement. After setting out briefly some of my misgivings about the *Second Restatement*, I will explain why I do not welcome the possibility of a new one. On a more positive note, I will then outline an approach that I believe would promote sound decisionmaking under the *Second Restatement*.

Although the *Second Restatement* covers jurisdiction, judgments, and choice of law, I assume that the case for a third restatement turns on the desirability of developing a new set of provisions on choice of law. Choice of law is the *Second Restatement*'s primary concern. Moreover, since, under current Supreme Court case law, constitutional limitations on state policymaking are much more substantial in the jurisdiction and judgments areas than in choice of law,² choice of law also would only sensibly be any new restatement's primary concern. I therefore will limit my remarks here to choice of law. Also, in light of the editors' request that the commentaries in this Symposium be brief, I will paint with a rather broad brush.

I. A VERY QUALIFIED SUCCESS

By far the most important contribution of the *Second Restatement* is that, as stated in its introduction,³ it “supersedes entirely” the *Restatement of the Law of Conflict of Laws* (“*First Restatement*”).⁴ By 1969, when the American Law Institute approved the *Second Restatement*, the *First Restatement* and its place-of-wrong, place-of-making, and other territorial rules were already sufficiently battered by academic and judicial criticisms that this official displacement hardly qualified as a bold gesture.⁵ Nonetheless, it was an important step forward, and there can be little doubt that it helped accelerate courts' movement away from the *First Restatement* to more modern approaches.

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

2. For discussion of constitutional limitations in the jurisdiction, judgments, and choice-of-law areas under current Supreme Court case law, see, respectively, KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 51-78 (1999); William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412 (1994); Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271 (1996). For the view that the Supreme Court should seriously revise its thinking about constitutional limitations on choice of law, see Gary J. Simson, *State Autonomy in Choice of Law: A Suggested Approach*, 52 S. CAL. L. REV. 61 (1978).

3. Herbert Wechsler, *Introduction* to SECOND RESTATEMENT, *supra* note 1, at vii.

4. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT].

5. See GARY J. SIMSON, ISSUES AND PERSPECTIVES IN CONFLICT OF LAWS: CASES AND MATERIALS 13-14 (3d ed. 1997).

This addition by subtraction, however, could have been accomplished just as well simply by a repeal of the *First Restatement*. The question therefore remains whether the *Second Restatement* as an affirmative decisionmaking model makes a substantial contribution to choice of law, and on that score, I have serious doubts.

The most-significant-relationship test stated as a "general principle" at the start of the *Second Restatement's* chapters on torts and contracts⁶ can be quite problematic. Judges relatively unsophisticated about choice of law or eager not to spend much time on it commonly seize on the test's list of relevant contacts and pay little or no attention to the test's admonition to consider the contacts in light of the choice-of-law policies articulated in section 6.⁷ Judges who go beyond such contact-counting and delve seriously into the realm of section 6 often find themselves hopelessly adrift. They are faced with an array of seven unprioritized factors that more or less summarize the many policies that scholars critical of the *First Restatement* and its vested-rights thinking had identified as relevant to choice of law.⁸

That's the good news about the *Second Restatement's* choice-of-law methodology. It gets a lot worse. Rather than leave judges entirely to their own devices to figure out the state of most significant relationship, the *Second Restatement* in many instances

6. SECOND RESTATEMENT, *supra* note 1, § 145 provides:

(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.

(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.

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

The statement of the most-significant-relationship test in the contracts chapter takes a very similar form. *See id.* § 188.

7. *See* William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 430-32 (2000).

8. SECOND RESTATEMENT, *supra* note 1, § 6(2) lists the following factors as "relevant to the choice of the applicable rule of law":

- (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, and
- (g) ease in the determination and application of the law to be applied.

According to comment c to § 6, "it is not suggested that the factors mentioned are listed in the order of their relative importance. Varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law."

offers them guidance in the form of more specific rules. Typically, these rules establish a presumption that one or another state furnishes the applicable law.⁹ In effect, that state is identified as the one of most significant relationship subject to reassessment based on full-scale application of the most-significant-relationship test.

In the abstract, that may sound like a fairly helpful and promising approach. The particular presumptive rules adopted, however, frequently bear a striking and rather frightful resemblance to the territorial rules that the *Second Restatement* purported to lay to rest. Indeed, it is positively stunning to see the much criticized place-of-wrong rule—the rule whose illogic spurred the first overt judicial breaks with the traditional rules¹⁰—rise from the ashes to take on the status of a presumptive rule in section after section of the chapter on torts.¹¹

The disinterment of the ostensibly “superseded” *First Restatement* rules is perhaps most starkly on display in the *Second Restatement*’s treatment of real property. The chapter on property begins with a statement of the most-significant-relationship test as “the general principle” for “property in general.”¹² The black-letter rules pertaining to real property that follow, however, make clear that the drafters did not intend for courts in deciding real property questions to puzzle over which state is the one of most significant relationship. Dispensing with presumptions, the drafters embraced in one rule after another the *First Restatement* dogma that questions of real property are the domain of the situs state.¹³

II. TWO IS ENOUGH

My misgivings about the *Second Restatement* do not end with the criticisms offered above. For present purposes, however, I see no need to pursue the matter here. Although I believe the *Second Restatement* is seriously flawed, I do not think the American Law Institute should begin work to replace it with a third.¹⁴ Whatever the

9. See, e.g., *id.* § 146 (parties’ rights and liabilities in personal injury action are determined by law of state where injury occurred unless, as to specific issue, another state has more significant relationship); *id.* § 199(2) (contract usually will be upheld with regard to formalities if it satisfies requirements of place of execution).

10. See, e.g., *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963); *Griffith v. United Air Lines, Inc.*, 203 A.2d 796 (Pa. 1964).

11. See, e.g., SECOND RESTATEMENT, *supra* note 1, § 146 (discussed *supra* note 9); *id.* § 156 (law of state where injury occurred will usually determine whether actor’s conduct was tortious); *id.* § 175 (parties’ rights and liabilities in wrongful death action are determined by law of state where injury occurred unless, as to specific issue, another state has more significant relationship).

12. See *id.* § 222.

13. See, e.g., *id.* § 223 (validity and effect of conveyance of interest in land are determined by law that courts of situs state would apply); *id.* § 236 (intestate succession to land is determined by law that courts of situs state would apply).

14. A separate question is whether the *Second Restatement* should simply be repealed, leaving a vacuum in the area as far as restatements. Although I confess I would not be heartbroken if this came to pass, I find it almost inconceivable that the American Law Institute could be persuaded to make such a move. Particularly given current space limitations, I will not attempt here to address seriously the case for a simple repeal.

shortcomings of the *Second Restatement*, I am persuaded that a third is almost certain to be worse.

My principal concern about a third restatement is that it will have more rules and they will be more rigid. The reporter for the *Second Restatement*, Willis Reese, regarded the *Second* as a transition document.¹⁵ His account of the *Second Restatement* enterprise bears directly on my concern. According to Professor Reese, Cook, Lorenzen, and others had succeeded by the early 1950s in exposing the shallowness of the *First Restatement* rules and the vested-rights philosophy informing them.¹⁶ Yet, although the “need for a complete revision” had become “apparent,”¹⁷ it was difficult to state with any specificity a new set of widely shared principles that might go into a *Second Restatement*. Conflicts scholars critical of the *First Restatement* were hardly united in their thinking on the direction that courts should follow, and the case law handed down in an era dominated by the *First Restatement* understandably did not yield more than general insights into alternative, emerging principles.¹⁸ As a result, although (at least in Reese’s view) choice of law ideally is governed by “a large number of relatively narrow rules that will be applicable only in precisely defined situations,”¹⁹ the *Second Restatement*’s drafters generally settled for rules of a more “fluid and uncertain” nature.²⁰ The “task of future Restatements,” however, would be to state “more definite and precise rules.”²¹

Perhaps Reese’s vision for a third restatement would not carry the day, but I think there is a high probability that it would. Certainly Dean Symeonides is ready to lead the charge,²² and I anticipate he would have plenty of company. Explaining the impulse behind the *First Restatement*’s “over-simplified character,” Reese wrote: “[I]t is in the nature of men to seek certainty and simplicity in the law.”²³ Reese made two good points here, one intentionally and the other not. First, in the course of prescribing legal norms, a great many people evidence an unmistakable yearning for certainty and simplicity. Such yearning is particularly transparent in the rules of the *First Restatement*, but it is also obviously at work in numerous *Second Restatement*

15. See Willis L.M. Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679 (1963) [hereinafter Reese, *Conflict of Laws*]; Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501 (1983) [hereinafter Reese, *The Second Restatement*].

16. See Reese, *Conflict of Laws*, *supra* note 15, at 679-80.

17. *Id.* at 680.

18. See *id.* at 680-81.

19. *Id.* at 681.

20. *Id.*

21. *Id.* at 699; see also Reese, *The Second Restatement*, *supra* note 15, at 517-19. For criticism of the *Second Restatement* project virtually from start to finish, see Professor Ehrenzweig’s thoughtful and lively series of articles on the subject—for example, Albert A. Ehrenzweig, *American Conflicts Law in Its Historical Perspective: Should the Restatement Be “Continued”?*, 103 U. PA. L. REV. 133 (1954); Albert A. Ehrenzweig, *Restitution in the Conflict of Laws: Law and Reason Versus the Restatement Second*, 36 N.Y.U. L. REV. 1298 (1961); Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230 (1965).

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

23. Reese, *Conflict of Laws*, *supra* note 15, at 680.

rules. If the past is any guide, there is good reason to expect this yearning to play a major role in the drafting of a third restatement.

Second, as Reese inadvertently acknowledged by his reference to the “nature of men”²⁴—a reference no doubt intended to be understood in a gender-neutral way—the drafting of the first two *Restatements* was a distinctly male exercise. In each instance, those selected to serve as the reporter or associate reporter or as one of the dozen or so advisers were all men.²⁵ Presumably the American Law Institute would be sure not to follow this pattern today. However, particularly given the relative numbers of men and women currently doing conflicts scholarship, it would be quite surprising if the drafting of a third restatement did not remain very much in male hands. If so, and if feminists are right that men tend to be more rule-oriented than women, less concerned about preserving flexibility and attention to context,²⁶ it seems especially likely that the third restatement’s drafters will demonstrate the affinity for certainty and simplicity that Reese ascribed to “the nature of men.”

In part I am troubled by the prospect of a third restatement with “more definite and precise rules” because I anticipate that the particular rules adopted simply will not be very good. Reese expressed confidence that sound, relatively narrow rules would evolve out of more judicial experience with the new thinking in choice of law.²⁷ However, if the set of rules forged by the New York Court of Appeals in *Neumeier v. Kuehner*²⁸ and *Schultz v. Boy Scouts of America, Inc.*²⁹ are a fair guide as to the type of precedent-conscious rules that a new restatement would incorporate, Reese’s confidence seems ill-founded.³⁰ Even aside from its undue attention to territorial factors, this distinctive judicial effort at rulemaking is highly problematic, and it is no wonder that other courts have not rushed to devise rules of their own.³¹ Ultimately,

24. *Id.* (emphasis added).

25. See SECOND RESTATEMENT, *supra* note 1, at v (listing reporter, associate reporter, and 15 advisers); FIRST RESTATEMENT, *supra* note 4, at iii (listing reporter and 11 advisers). Anyone skeptical about whether the absence of women affected the drafting of the *Restatements* need look no further than the heading for Topic 3 of the *Second Restatement’s* chapter on domicile (ch. 2), which quite remarkably groups together “Married Women, Infants, Incompetents.”

26. See, e.g., Carol Gilligan, *Moral Orientation and Moral Development*, in WOMEN AND MORAL THEORY 19 (Eva Feder Kittay & Diana T. Meyers eds., 1987); NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* 2-3, 36-37 (1984); SARA RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* 93-97 (1989).

27. See Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 323-25 (1972); Reese, *Conflict of Laws*, *supra* note 15, at 681, 699.

28. 286 N.E.2d 454 (N.Y. 1972).

29. 480 N.E.2d 679 (N.Y. 1985).

30. Reese, however, would probably disagree. Writing the year before the New York Court of Appeals’ decision in *Neumeier*, Reese commented that the rules that Chief Judge Fuld had proposed in his concurring opinion in *Tooker v. Lopez*, 249 N.E.2d 394 (N.Y. 1969)—rules that a majority of the Court of Appeals would soon adopt in *Neumeier*—were “the sort of rules at which the courts should aim.” Willis L.M. Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 562 (1971).

31. For detailed criticism of the rules, see Gary J. Simson, *The Neumeier-Schultz Rules: How Logical a “Next Stage in the Evolution of the Law” After Babcock?*, 56 ALB. L. REV. 913 (1993).

I think Reese had a faith in the logical evolution of the common law that I do not share. At bottom, I am far more skeptical about any enterprise that reasons strongly from what courts *are* doing to what they *should* be doing.

Beyond my concern about the particular rules that the drafters of a third restatement would be likely to enshrine, I am simply troubled by any project that seeks to govern choice of law by rules rather than an approach. Given space limitations, this is not the place for me to elaborate upon my position in the rules-or-approach debate that has raged among conflicts scholars in recent years.³² For present purposes, suffice it to say that I do not believe that the benefits of greater consistency and less judicial subjectivity promised by choice-of-law rules justify the costs exacted in terms of sensitivity to context and fairness in individual cases. The *Second Restatement* is already much too rule-oriented for my taste, and I see a third restatement as heading further down a road best avoided to begin with.

III. A PROPOSED APPROACH

Undoubtedly one reason why I am not more receptive to choice-of-law rules is that I have in mind a particular approach that promises to deliver benefits of the sort anticipated from rules without exacting similar costs. By the same token, one reason why I am not more willing to take my chances on a third restatement is that the *Second* allows considerable room for the operation of this approach. Although I believe that this approach, which I set forth in a prior article,³³ is preferable to restatement-type rules, I also think it can serve a useful function as an ingredient of the *Second Restatement* methodology. As I will discuss in Part IV, the *Second Restatement's* most-significant-relationship test can reasonably be interpreted to authorize application of my approach, and courts that rely on the *Second Restatement* would do well to so interpret the test. A major reservation that I have about a third restatement and its likely quest for "more definite and precise rules" is that the most-significant-relationship test and the possibilities that it offers for applying my proposed approach might well disappear.

Since I spelled out my approach and its logical underpinnings in detail when I first proposed it, I will only highlight its principal features here. It consists of three basic steps:

1. Ascertain whether any state has a greater interest in determining the outcome of the case at hand than the forum state.
2. If so, make the choice(s) of law that a court sitting in the foreign state and applying that state's conflicts law would make.
3. If not, apply forum law with regard to each issue in the case unless:
 - a. The foreign elements in the case bring into play a policy that would not

32. For a sense of the range of views in that debate, see Reese, *supra* note 27; Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 208-16 (1977); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 6-23 (1989).

33. See Gary J. Simson, *Plotting the Next "Revolution" in Choice of Law: A Proposed Approach*, 24 CORNELL INT'L L.J. 279 (1991).

- be materially implicated if the case were confined in its elements to the forum state;
- b. Such policy militates strongly in favor of a choice of nonforum law; *and*
 - c. The policy preference expressed in the forum state's internal law is not so strong as to belie the possibility that the forum state's lawmakers could intend it to yield to another policy in a multistate case.³⁴

Basically, Step 1 asks the court to identify the jurisdiction that should have authority to determine the outcome of the case. Steps 2 and 3 tell the court how to give effect to its Step 1 choice of jurisdiction.

Step 1 is based on a policy of maximizing long-term enforcement of the forum state's interests, and it seeks to effectuate that policy by enforcing a forum-state interest unless another state has a greater interest. Like Brainerd Currie's highly influential "governmental interest analysis" approach,³⁵ Step 1 focuses on state interests. It departs very significantly from Currie's approach, however, in the *type* of interests that it regards as relevant. While the Currie approach seeks to ascertain states' interests in applying the policies behind their internal laws,³⁶ Step 1 examines states' interests in determining the outcome of the case. Moreover, while the Currie approach determines the existence of a state interest by whether application of an internal-law policy would benefit the residents of the lawmaking state,³⁷ Step 1 does so by whether the outcome would affect the welfare of the state's residents.

The advantages of the Step 1 definition of interests over the Currie definition are two-fold. First, it adopts a much more inclusive and realistic view of the state interests actually at issue in conflicts cases. States may have an interest in applying not only their own internal laws but also (for reasons such as protecting expectations) other states' internal laws. By the same token, they may have an interest in applying their internal laws not only to benefit local residents but also (for reasons of fairness and morality) to disadvantage them. Implicitly, Step 1 encompasses this full range of potential interests.

Second, the Step 1 definition calls for a judicial inquiry that is much more manageable and concrete. While the Currie approach asks courts to identify the policies that prompted adoption of the conflicting internal laws, Step 1 focuses their attention on the considerably less elusive question of whether the outcome of the case will affect a state's residents.³⁸

34. *See id.* at 279. My approach takes as a given the view, reflected in governing Supreme Court precedent, that the Full Faith and Credit Clause is not a substantial limitation on choice of law. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); Shreve, *supra* note 2, at 275. If the Court were to adopt the much stronger conception of full faith and credit that I proposed in Simson, *supra* note 2, at 66-80, my approach would have to be slightly revised. *See Simson, supra* note 31, at 928 n.56.

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

36. *See id.* at 183-84.

37. *See id.* at 85-87.

38. At times a court committed to investigating all possible effects on residents might find this question quite onerous to answer. A forceful argument can be made, however, that a court should be guided strongly, and perhaps exclusively, by the effects on the parties before the court. *See Simson, supra* note 33, at 284-87. Under this thinking, a court with rare exception

Step 2 deals with the situation in which the Step 1 choice of jurisdiction points to a foreign state as the selected jurisdiction. It calls on the court to respect the foreign state's decisionmaking authority by applying that state's choice-of-law methodology as if it were sitting in that state.

Step 3 addresses the situation in which Step 1 points to the forum state as the selected jurisdiction. It features a presumption in favor of forum law, based on the view that the natural advantages of applying forum law are always sufficiently great to warrant choosing forum law absent a strong justification for doing otherwise. Step 3 also specifies three conditions that, if all met, would constitute such a justification.

The Step 3 conditions seek to identify multistate contexts in which the forum state would strike a different policy balance than the one reflected by forum law. The foreign elements in a conflicts case may implicate a policy that would not be materially implicated if the case had no out-of-state elements. If one assumes that lawmakers focus on intrastate situations in formulating local law, then such a policy presumably did not play an important part in the formulation of forum law. If that policy militates strongly in favor of choosing foreign law in a particular case, and if the policy preference reflected in forum law is not so strong as to belie the possibility that the state's lawmakers could intend it to yield to another policy in a multistate case, Step 3 recognizes that a court would sensibly choose nonforum law.

Finally, in considering the Step 3 conditions, courts would do well to pay special attention to two policies: protecting justified expectations; and serving the needs of the interstate and international systems. These policies appear to be much more likely than any others to overcome the Step 3 presumption in favor of forum law. On the other hand, a court considering the Step 3 conditions should pay no attention to whether nonforum law appears in some sense to be "better" than forum law. As I indicated in setting out my approach and recently explained in greater detail, attention in choice of law to a better-law factor raises serious and, in my view, insuperable policy and constitutional difficulties.³⁹

IV. WORKING WITHIN THE SYSTEM

As indicated at the start of Part III, I believe that courts that rely on the *Second Restatement* would improve the quality of their decisions by using my approach in applying the most-significant-relationship test. The considerations that my approach takes into account fit comfortably within the section 6 list of factors relevant to choice of law. Indeed, for me, unlike Professors Juenger and Weinberg,⁴⁰ that list's omission

should be able to identify the selected jurisdiction under Step 1 simply by looking to the parties' states of residence. Thus, in general: if a plaintiff and defendant reside in the same state, the court would identify that state as the selected jurisdiction; if one resides in the forum state and the other elsewhere, the forum state would be the selected jurisdiction; and if they reside in different foreign states, both of those states would be selected jurisdictions. For discussion of how a court should deal with this latter situation of two selected jurisdictions, see *id.* at 289. As to how my approach should be applied in a case with more than two parties, see *id.* at 284 n.14.

39. See *id.* at 296-97; Gary J. Simson, *Resisting the Allure of Better Rule of Law*, 52 ARK. L. REV. 141 (1999).

40. See Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 415-16

of a better-law factor was a wise decision and presents no problem at all. Concededly, my approach gives a structure and organization to the section 6 factors that the *Second Restatement* does not itself provide. However, it is not apparent why that renders my approach and the most-significant-relationship test at all incompatible.

I also suggest that courts that look to the *Second Restatement* would do well to focus on the most-significant-relationship test rather than the more specific rules intended to guide the determination of which state is the one of most significant relationship. In a recent article, Patrick Borchers empirically showed that courts purporting to follow the *Second Restatement* commonly apply the most-significant-relationship test even when more particularized tort and contract rules are in point.⁴¹ Unlike Dean Borchers,⁴² I am delighted to see this pattern emerge, and I encourage courts to accentuate it. Applied in the manner that I have proposed, the most-significant-relationship test offers much brighter prospects for conflicts justice than either the *Second Restatement's* more specific rules or the even narrower rules that a third restatement is apt to bring.

(2000); Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475, 497-501 (2000).

41. See Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1240-46 (1997).

42. See *id.* at 1246-47.