

# A PLEA FOR THE PROPER USE OF THE SECOND RESTATEMENT OF CONFLICT OF LAWS

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## INTRODUCTION

Perhaps this should be a "last" plea, for rumor has it that the Second Restatement<sup>1</sup> is on its way out, to be supplanted, naturally, by a Third Restatement.<sup>2</sup> There is no denying that most of the influential conflict-of-laws commentators have expressed grave reservations about the design and utility of the Second Restatement.<sup>3</sup> On the other hand, there is no denying that it is by far the most popular choice for the many courts that have receded from the traditional territorial methods,<sup>4</sup> codified for the most part by Joseph Beale in the original 1934 Restatement of the subject.<sup>5</sup> The reason for the Second Restatement's popularity with the judges who actually use it, the critics suggest, is that its catholicity of approach allows a court to rationalize almost any result it wishes to reach.<sup>6</sup>

This is a serious indictment if true. And it is true—but only to a point. We are a society supposedly committed to the rule of law; and rules that permit you to do as you choose are no rules at all. Or so the litany goes,

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

2. See Symposium, *Preparing for the Next Century—A New Restatement of Conflicts?*, 75 IND. L.J. 399 (2000).

3. See, e.g., ROGER CRAMTON ET AL., CONFLICT OF LAWS 300 (4th ed. 1987) (characterizing the Restatement as a "flabby, amorphous, and sterile product"); Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403-06 (2000) (describing the Second Restatement as a "kitchen-sink" concoction); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 253 (1992) ("Trying to be all things to all people, it produced mush."); Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 466, 486-89 (1991) (noting that the Second Restatement's "undirected, multifactor analysis invites post-hoc rationalizing of intuitions about the applicable law").

4. For torts cases, twenty-one states have adopted the Second Restatement; eleven states still use the traditional territorial place-of-injury approach; five states employ Professor Lefflar's "better law" approach; six use a combination of modern approaches; three use significant contacts; three use interest analysis; and three apply their own forum law. For contracts, twenty-five states have adopted the Second Restatement; ten cling to the traditional *lex loci contractus* territorial approach; five use significant contacts; two employ the "better law" approach; and ten use a combination of modern approaches. EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 10, 86 tbl.4 (3d ed. 2000 & Supp. 2001).

5. RESTATEMENT OF CONFLICT OF LAWS (1934). Joseph Beale, the distinguished Harvard law professor, was the Reporter. His three-volume treatise appeared a year later. JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935).

6. See, e.g., William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1394-1410 (1997) (discussing reasons why courts embrace the Second Restatement despite scholars' criticisms).

despite the reality of how a lot of judicial decision making actually transpires. But is the Second Restatement really that malleable, so protean as to be all things to all people? I have never thought so. Certainly, the Second Restatement is more complicated and more subtle than its predecessor, requiring judges to read and think. But used as its designer intended, it is much more precise than the criticism, as well as the manhandling by some courts, might suggest. It enables a court to quickly identify and dispose of the easy cases; and for the hard ones, it reveals the questions asked as well as the answers. And these are questions for which there is no consensus in any of the modern approaches. In my view, a court that adopts the Second Restatement as a choice-of-law methodology could do far worse.

### I. CONFLICTS LAW AND THE CHOICE-OF-LAW REVOLUTION

For the unfamiliar reader, a few words are in order to describe the problems for what has been called the "baffling" subject and "dismal swamp" of conflict of laws.<sup>7</sup> We need conflict-of-laws rules, in the first place, because the laws of the fifty states are not the same. Although they have much in common, they differ in many particulars. Nothing in the Constitution requires any two states even to *see* the same problem, much less deal with it in the same way. A conflict-of-laws case arises when the facts or circumstances of a lawsuit implicate more than one state—let us say two, for the sake of simplicity<sup>8</sup>—and the laws of those states differ with regard to how the case or critical issues should be resolved. The forum where suit is brought must then decide which of these different laws controls, either for the case as a whole or for the various issues within it.<sup>9</sup> This decision is important because it is often outcome determinative. Every court, therefore, has a special body of law—its conflict-of-laws rules, largely judge-made—that tells it how to make these choices.

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7. Cardozo thought conflict of laws was "baffling." BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 67 (1928). Dean Prosser called conflicts law "a dismal swamp, filled with quaking quagmires." William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

8. This elementary discussion will be easier to follow by considering just two states. Conflicts cases often implicate the laws of more than two states, as in products-liability cases and litigation arising out of an aircraft disaster. They can arise between a state of the United States and a foreign country. If the laws of the two states happen to be the same, of course, then there is really no conflict.

9. The territorial rules, known as "jurisdiction selecting" rules, chose the law of a single state to govern all the substantive issues in the case, regardless of the law's content. DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 9 (1965) [hereinafter *CAVERS, THE CHOICE-OF-LAW PROCESS*]. The modern

For over a hundred and fifty years, American courts used rules derived from territorial theory.<sup>10</sup> Territory—the place where certain events occurred—was everything. For cases involving property, the governing law was that of the state where the property was situated;<sup>11</sup> for torts, the law of the place where the injury occurred;<sup>12</sup> and for contracts, the law either of the place where the contract was entered into or was to be performed.<sup>13</sup> Consider a simple example:<sup>14</sup> two friends who live in Tallahassee, Florida, drive north to Atlanta to attend a concert. On the way home, just a mile short of the Florida–Georgia state line, the driver negligently runs into a tree. The passenger is injured and in due course brings suit in Florida against his friend, the driver, to recover for his injuries. Florida's standard of liability in such cases is ordinary negligence. Georgia, however, has a host-guest statute which allows a guest in a car to recover only when his host is grossly negligent. If Florida's conflicts rule for torts cases tells it to apply the law of the place of injury, then Georgia law governs, and there can be no recovery. The place-of-injury rule is quick, easy, and painless; and it makes forum shopping pointless if courts everywhere follow it faithfully. But, it is prone to produce results that make as little sense as the one in this example.

In the 1920s, the territorial rules began to come under heavy academic fire<sup>15</sup> that continued well into the 1950s, with most of the criticism centering on the areas of torts and contracts.<sup>16</sup> At roughly the same time, courts were expressing their own dissatisfaction with the traditional rules by inventing sometimes quite ingenious ways around them when they felt that the selected law led to an unjust or undesirable result.<sup>17</sup> These gathering signs of discontent erupted in revolution with the appearance of a series of articles written by Brainerd Currie in the late 1950s and early 1960s.<sup>18</sup>

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practice—known as *dépeçage*—considers a case issue-by-issue, and may apply different laws to different issues within a case. ROGER C. CRAMTON ET. AL., *CONFLICT OF LAWS* 383–84 (3d ed. 1981).

10. For a discussion of the evolution of territorial theory, see Harold P. Southerland & Jerry J. Waxman, *Florida's Approach to Choice-of-Law Problems in Tort*, 12 FLA. ST. U. L. REV. 447, 453–58 (1984).

11. RESTATEMENT OF CONFLICT OF LAWS § 215 (1934).

12. *Id.* §§ 378, 379.

13. *Id.* §§ 332, 358.

14. This hypothetical is loosely based on *Krasnosky v. Meredith*, 447 So. 2d 232 (Fla. Dist. Ct. App. 1983).

15. E.g., WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASE OF THE CONFLICT OF LAWS* 252–55 (1942); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933) [hereinafter Cavers, *A Critique*]; Ernest G. Lorenzen, *Territoriality. Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 745–46 (1924).

16. E.g., Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 775–76 (1983). The areas of torts and contracts are the ones that seem to generate the most interesting

Currie's great contribution to the discipline was called interest analysis (or sometimes governmental interest analysis).<sup>19</sup> He pointed out that the traditional territorial rules, though simple, certain, predictable, and uniform in operation, took no account of the policies underlying the laws in apparent conflict.<sup>20</sup> Laws were enacted for a purpose, he maintained, and reflected some social, economic, or administrative policy.<sup>21</sup> Using the ordinary processes of interpretation or construction, a forum court could identify the policy expressed in its own law and ask whether applying that law would further its policy.<sup>22</sup> If so, the forum was said to have an interest in the application of its law and was therefore an interested state.<sup>23</sup>

The same process was repeated for the other state. If only one state turned out to be interested, the conflict was "false" rather than real—false because while the laws themselves were in conflict, their underlying policies were not.<sup>24</sup> In one illustration, taking as variables the residence of the parties, the location of the forum, and one or more of the traditional territorial contacts, Currie demonstrated with simple permutations that ten of the fourteen possible cases a court could encounter were false conflicts.<sup>25</sup> He thought it absurd to make choice turn on the happenstance of where a tort occurred or a contract was entered into if the policy underlying that state's law would not be furthered by its application. For false conflicts, he thought the law of the only interested state should be applied.<sup>26</sup> And

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conflicts cases and about which there has always been violent disagreement. I plan to confine myself in this article to these two areas.

17. The techniques of avoidance were known as escape devices—ways of paying lip-service to a particular rule while getting around it. Chief among these techniques were *renvoi*, the substance-procedure distinction, characterization, and the public policy exception. DAVID P. CURRIE ET AL., CONFLICT OF LAWS 38–78 (6th ed. 2001) [hereinafter CURRIE ET AL., CONFLICT OF LAWS].

18. Most of Currie's articles were collected in a single volume, BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963) [hereinafter CURRIE, SELECTED ESSAYS]. The definitive exegesis of Currie's work is Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, in 215 RECUEIL DES COURS 19 (1989).

19. See, e.g., Kay, *supra* note 18, at 19.

20. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, reprinted in CURRIE, SELECTED ESSAYS, *supra* note 18, at 100–01.

21. Kay, *supra* note 18, at 169.

22. Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, reprinted in CURRIE, SELECTED ESSAYS, *supra* note 18, at 183–84.

23. *Id.* at 184.

24. Currie, *Married Women's Contracts*, *supra* note 20, at 108–09.

25. *Id.* at 83–98. Currie's analysis was loosely based on the factual scenario in the case of *Milliken v. Pratt*, 125 Mass. 374 (1878), involving conflicting laws of two states over the competency of married women to bind themselves by contract. *Id.* For further discussion of *Milliken v. Pratt*, see *infra*, note 218 and accompanying text.

26. Currie, *Methods and Objectives*, *supra* note 22, at 184.

because of misguided criticism,<sup>27</sup> it is necessary to be clear on one point: Currie did not believe that legislators had any "intent" as to the territorial reach of their enactments in the infrequent conflict-of-laws case; he believed they legislated with mainly the domestic situation in mind, that they were keenly aware that their power stopped at the state border, and that they intended to affect only their own territory, its residents, and those who acted within the state.<sup>28</sup> Currie's interest analysis was purely an objective construct, designed to focus attention on policy considerations that traditional territorial methods ignored.<sup>29</sup>

Consider how his method would work with the example given above. Florida is clearly an interested state since its domestic policy is intended to enable Florida residents, injured by the simple negligence of another, to recover damages. Georgia's policy, on the other hand, reflected in its gross negligence standard in automobile host-guest cases, is intended to prevent suits by ungrateful guests and to avoid the possibility of collusion between host and guest in the filing of false claims against the host's insurance company.<sup>30</sup> But that policy, Currie would say, is intended primarily for Georgia residents and the insurance companies who insure them. Since no Georgia residents and, *a fortiori*, no insurance companies insuring such persons are involved here, Georgia's policy would not be furthered by applying its law. The conflict is false. Florida is the only interested state, and, therefore, its law should govern. This is, of course, precisely the opposite result from that dictated by the place-of-injury rule, which in its mindless simplicity would perversely suppress Florida's policy without advancing Georgia's.

Interest analysis gave judges a rational basis for doing openly what they had previously done covertly through the artifice of escape devices. Interest analysis underlay the opinion of the New York Court of Appeals

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27. See Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393 (1980) (arguing "that Currie's principles cannot be justified as expressions of actual legislative intent regarding a statute's territorial scope").

28. Currie, *Married Women's Contracts*, *supra* note 20, at 80-85. Currie was careful to distinguish rules of conduct, which a state would always have an interest in if the conduct occurred within its borders, from so-called loss-allocating rules, those that determined how the losses resulting from accidents and injuries would be allocated among the parties. *Id.* at 60-62; Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, reprinted in CURRIE, SELECTED ESSAYS, *supra* note 18, at 701-05, 724-25.

29. A kind of crude interest analysis came into play when a forum court decided that the otherwise applicable law of another state would not be enforced because it was contrary to the strongly held public policy of the forum. See, e.g., *Lake Shore & M.S. Ry. Co. v. Teeters*, 77 N.E. 599, 601-02 (Ind. 1906).

30. See, e.g., *Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963) (discussing a similar policy within an Ontario statute).

when it rejected the place-of-injury rule outright in its watershed decision in *Babcock v. Jackson* in 1963.<sup>31</sup> Soon other courts followed suit.<sup>32</sup> The academic reactions to Currie's insights were mixed. Most thought that interest analysis worked well with false conflicts.<sup>33</sup> The main sticking point was the so-called true conflict, in which both states could claim a legitimate interest in the application of their laws. Currie declared that these cases were simply insoluble by any of the resources of conflict of laws.<sup>34</sup> Sovereign states were entitled to enact their policy predilections into law. At the sovereign level, no one could say that one policy was right and the other wrong or that one was better or wiser, any more than one could say that apples were better than oranges.

"Interests," as Currie used the term, were not subject to being weighed or quantified.<sup>35</sup> A state was either interested or it was not. No court in a democracy, he argued, had the right to sit in judgment on the legislative policies of two sovereign states and declare one inferior to the other.<sup>36</sup> Separation-of-powers values were at stake; and, in any case, courts lacked the resources to make what were essentially legislative judgments.<sup>37</sup> Currie recognized that lawsuits did, nevertheless, have to be decided. He proposed for the loggerhead true conflict that the forum simply apply its own law.<sup>38</sup> He thought it the sensible and clearly constitutional thing for a court to do; and, in this way at least, the court could be sure that it was consistently advancing the policies of its own state.<sup>39</sup> Shortly before his death in 1965, Currie significantly revised his approach to recognize the existence of what he called "apparent conflicts."<sup>40</sup> Faced with what appeared to be a true conflict, a forum court, he urged, should pause and reconsider its own

31. *Id.* *Babcock* was a classic false conflict. The Jacksons and a friend, Georgia Babcock, all New York residents, took what was to be a weekend drive through Ontario. *Id.* at 280. While in Ontario, Mr. Jackson, through simple negligence, managed to run his car off the road, and Babcock was injured. *Id.* She brought suit in New York to recover for her injuries. *Id.* New York used an ordinary negligence standard for such cases; Ontario's statute, at the time the most draconian host-guest statute in the world, simply provided that a guest in a car could not recover against her host under any circumstances. *Id.* at 285.

32. *E.g.*, *Wilcox v. Wilcox*, 133 N.W.2d 408, 416-17 (Wis. 1965); *McSwain v. McSwain*, 215 A.2d 677, 682-83 (Penn. 1966); *Mellik v. Sarahson*, 229 A.2d 625, 629 (N.J. 1967)

33. CURRIE ET AL., *CONFLICT OF LAWS*, *supra* note 17, at 132.

34. Currie, *Married Women's Contracts*, *supra* note 20, at 117-19.

35. *Id.* at 181-82.

36. *Id.* at 182.

37. *Id.*

38. *Id.* at 184.

39. *Id.* at 119. Currie did not use this argument, but I think it is worth noting that all state-court judges take an oath to uphold the laws of their own state.

40. Brainerd Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROBS.* 754, 757 (1963) [hereinafter Currie, *The Disinterested Third State*].

policies, as well as those of the other state, to see if taking a "more moderate and restrained" view of the one policy or the other might eliminate the conflict.<sup>41</sup>

True conflict resolution quickly became the burning issue in conflicts law, as it still is today. Currie predicted that his forum-law solution would be rejected as a "give-it-up" attitude<sup>42</sup>—and it was, both by academic commentators and by courts, who apparently regarded it as too parochial and self-serving in its preference for forum law.<sup>43</sup> Spurred by his insights, however, almost every commentator and some courts weighed in with proposals for the resolution of true conflicts. These tend to fall into two broad categories, the "rational" and the "arbitrary." In the first category, the interests of the two states are compared, weighed, or balanced in an attempt to locate the state whose contact with the parties and the litigation gives it "the greatest concern with the specific issue raised in the litigation."<sup>44</sup> This approach proved exceptionally congenial to courts, who had long been accustomed in domestic cases to weighing and balancing competing considerations of social and economic advantage. Why not apply the same approach in the infrequent conflict-of-laws case?

The arbitrary approaches, on the other hand, were favored either by those who, like Currie, were uncomfortable with weighing and balancing interests, or who simply wanted a quick and easy solution, as unbiased as possible and offering certainty, predictability, and uniformity of result. Arbitrary approaches were, therefore, more in the nature of default solutions for cases for which there was no obvious rational solution but, nevertheless, had to be decided. Currie's forum-law solution was of this ilk; another was the proposal that a court choose the law that tended to compensate injured plaintiffs or that validated contracts;<sup>45</sup> still another was to fall back on the

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41. *Id.* Currie stated that even if a state was constitutionally justified in applying its own law,

no principle dictates that a state exploit every possible conflict, or exert to the outermost limits its constitutional power. On the contrary, to assert a conflict between the interests of the forum and the foreign state is a serious matter; the mere fact that a suggested broad conception of a local interest will create conflict with that of a foreign state is a sound reason why the conception should be re-examined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose.

*Id.*

42. Currie, *Married Women's Contracts*, *supra* note 20, at 121.

43. *E.g.*, CURRIE ET AL., *CONFLICT OF LAWS*, *supra* note 17, at 146–48.

44. *Babcock*, 191 N.E.2d at 283.

45. RUSSEL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 359, 363 (3d ed. 1986) [hereinafter WEINTRAUB 3d ed.] (discussing torts); RUSSEL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 368, 438 (4th ed. 2001) [hereinafter WEINTRAUB 4th ed.] (discussing contracts).

traditional territorial rules—the place of injury, for instance, in torts cases—as a tie breaker.<sup>46</sup> Out of all of this, however, nothing resembling consensus emerged.

## II. THE DESIGN OF THE SECOND RESTATEMENT

During this period of turmoil and upheaval, the Second Restatement came into being. Its work started in the early 1950s, and after many tentative drafts it appeared in final form in 1971.<sup>47</sup> The Reporter was the distinguished Columbia Law School professor Willis L.M. Reese. The design of the torts and contracts chapters—chapter 7, “Wrongs,” and chapter 8, “Contracts”—is much the same. Both chapters are built around the concept of locating the state with “the most significant relationship” to the parties and the occurrence or transaction giving rise to a lawsuit, and then applying that state’s law.<sup>48</sup>

The importance of its design bears repeating: the heart of the Second Restatement is the “most significant relationship” concept, and identifying the state with that relationship is the point of all of the black-letter rules. Both chapters begin with a section entitled “The General Principle,” followed by a number of black-letter sections stating presumptively—for specific torts and contracts, as well as issues within these areas—the ordinarily expected result under the general principle.<sup>49</sup> These provisions, in turn, all refer extensively to the choice-influencing considerations of section 6, which is undoubtedly the single most important section in the entire document. Its principles, whether specifically referred to or not, permeate all of the black-letter rules.<sup>50</sup> Section 6 and the general principles sections are open-ended and policy oriented. The specific sections are much more dogmatic and are decidedly reminiscent of the old territorial rules in which one contact or connecting factor—the place of injury, for

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46. *E.g.*, *Neumeier v. Kuehner*, 286 N.E.2d 454, 458 (N.Y. 1972).

47. *See* GENE R. SHREVE, A CONFLICT-OF-LAWS ANTHOLOGY 155 (1997) (noting that the tentative drafts were created in the years spanning 1953–1965 and the three installments of the proposed draft were published in the three year span of 1967–1969).

48. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145(1), 188(1) (1971) (covering torts and contracts respectively).

49. *Id.* §§ 145 cmt. a, 186 cmt. a.

50. *Id.* § 145 cmt. b (“The principles stated in § 6 underlie all rules of choice of law and are used in evaluating the significance of a relationship, with respect to the particular issue, to the potentially interested states, the occurrence and the parties.”); *see also* Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 516 (1983) (describing the values stated in section 6 as a central theory of the choice-of-law provisions of the Second Restatement, and noting “all the black letter rules stem from these values”).

example—was conclusive.<sup>51</sup> The specific rules of the Second Restatement, however, are cast only in the form of presumptions, and it is vital to recognize that in every case the presumption can be rebutted by reference to the general principles sections read in the light of the choice-influencing principles of section 6.<sup>52</sup> Throughout, Reese quite explicitly rejected the vested-rights approach of Professor Beale and the 1934 Restatement.<sup>53</sup>

It seems clear that Reese was attempting to produce a document that would include elements of most of the contemporary thinking about the subject that was, and still is, in a state of drastic flux. At first impression, the Second Restatement seems to offer in true smorgasbord fashion some sort of support for just about every theory known to the subject of conflict of laws. It may have been this impression that the authors of a leading casebook had in mind when they suggested that the Second Restatement was a “flabby, amorphous, and sterile product.”<sup>54</sup> That judgment, in my opinion, is far too harsh.

Extensive comments accompany all the black-letter sections. These comments are of critical importance. Unlike those in the 1934 Restatement, which rested on the authority of the Reporter alone, the Second Restatement’s comments are official: that is, they received the endorsement of the American Law Institute.<sup>55</sup> The comments are in the nature of instructions. When read in conjunction with the black-letter law, a well-thought-out design appears, one that reveals a tightly knit and coherent organization that becomes increasingly impressive the more one studies it. The comments, in a sense, are written in a kind of code, understandable to anyone who lived with the choice-of-law revolution through the almost twenty years of the Second Restatement’s preparation. But without that background, the document can appear baffling and difficult to use.

#### A. *The Torts Provisions of the Second Restatement*

To give these observations some concrete content, consider once again the simple host-guest hypothetical discussed above.<sup>56</sup> How should a Florida forum committed to the use of the Second Restatement proceed? Since this is a torts case, the logical starting point is section 145, “The General Principle.” This section reads as follows:

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51. *Id.* § 146.

52. *See supra* note 50.

53. *Id.* ch. 7, Introductory Note, cmt. 2 (torts); ch. 8, Introductory Note, cmt. 1 (contracts).

54. CRAMTON ET AL., *supra* note 3, at 300.

55. RESTATEMENT (SECOND) OF CONFLICT OF LAWS VIII (1971).

56. *See supra* note 14 and accompanying text.

- (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.<sup>57</sup>

Herein lies the first trap for the unwary. Give any judge or lawyer a list of contacts, and the almost irresistible tendency is simply to count them to see which state has more—that state, of course, thereby becoming the state of most significant relationship. Counting contacts creates the illusion of arithmetical certainty and of objectivity, and of course at first glance it seems like a surpassingly easy way to resolve the conflict. Never mind the references to the principles of section 6, much less the extensive commentary that accompanies section 145. A number of Second Restatement decisions have taken just this approach.<sup>58</sup>

But how would counting contacts work in the Florida-Georgia conflict? Georgia is the place where the injury occurred and also the place where the injury-causing conduct occurred. Florida is the domicile (or residence) of the parties and is also the state where the relationship between them is centered. What is a court to make of a two-to-two tie? First of all, it should make nothing of it. There is no suggestion in the Second Restatement, much less a mandate, that contacts are simply to be summed as a way of identifying the state of most significant relationship. Secondly, it is here that the comments and their instructions become critical. Consider first the comment to subsection (1) of section 145. Referring to the principles of section 6, the Reporter states that the second group of section 6 principles

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57. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

58. For a discussion of these decisions, see WEINTRAUB 4th ed., *supra* note 45, at 460-64.

focuses upon the purposes, policies, aims and objectives of each of the competing local law rules urged to govern and upon the concern of the potentially interested states in having their rules applied. The factors in this second group are at times referred to as "state-interests" or as appertaining to an "interested state."<sup>59</sup>

What is the "second group" of section 6 principles and to what do the terms "state interests" and "interested state" refer? To answer these questions, it is necessary to look to section 6 and its comments. Here is the full text of section 6, entitled "Choice-of-Law Principles":

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
  - (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.<sup>60</sup>

In the comments to section 6, Reese notes with respect to subsection (1) that "[a] court will rarely find that a question of choice of law is explicitly covered by statute."<sup>61</sup> With a rationale decidedly reminiscent of Brainerd Currie's views,<sup>62</sup> Reese further notes that it is far more likely that "[l]egislatures usually legislate, and courts usually adjudicate, only with the local situation in mind. They rarely give thought to the extent to which the laws

59. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. b (1971).

60. *Id.* § 6.

61. *Id.* § 6 cmt. b. There are a few situations in which legislators have given thought to the extraterritorial application of statutes. In Florida, for example, the wrongful death statute for many years applied only to deaths occurring within the state. See FLA. STAT. ANN. § 768.01(1) (repealed 1972) ("[w]henver the death of any person in this state shall be caused by the wrongful act") (emphasis added). The statute was amended in 1972 to eliminate this restriction. See Florida Wrongful Death Act, 1972 Fla. Laws ch. 72-35, § 1 (codified at FLA. STAT. ANN. § 768.19 (West 1997) ("[w]hen the death of a person is caused by the wrongful act"). See generally ROGER CRAMTON ET AL., CONFLICT OF LAWS 180-96 (3d ed. 1981) (noting the conflicts that arise with choice-of-law provisions in statutes regarding wills and no-fault insurance, and the Uniform Commercial Code).

62. Currie, *Married Women's Contracts*, *supra* note 20, at 81-84.

they enact, and the common law rules they enunciate, should apply to out-of-state facts."<sup>63</sup> A glance at the factors of section 6(2) is enough to identify the "second group" of principles dealing with the purposes and policies of the conflicting laws. This group comprises section 6(2)(b)—"the relevant policies of the forum"—and 6(2)(c)—"the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue."<sup>64</sup>

In these two subsections, Reese incorporates Currie's interest analysis. The comments to these two subsections are highly revelatory. As to section 6(2)(b), Reese writes:

Every rule of law, whether embodied in a statute or in a common law rule, was designed to achieve one or more purposes. A court should have regard for these purposes in determining whether to apply its own rule or the rule of another state in the decision of a particular issue. If the purposes sought to be achieved by a local statute or common law rule would be furthered by its application to out-of-state facts, this is a weighty reason why such application should be made.<sup>65</sup>

And as to section 6(2)(c):

In determining a question of choice of law, the forum should give consideration not only to its own relevant policies (see Comment e) but also to the relevant policies of all other interested states. The forum should seek to reach a result that will achieve the best possible accommodation of these policies. The forum should also appraise the relative interests of the states involved in the determination of the particular issue. In general, it is fitting that the state whose interests are most deeply affected should have its local law applied.<sup>66</sup>

In a comment to section 145, he states that "[t]he purpose sought to be achieved by the relevant tort rules of the interested states, and the relation of these states to the occurrence and the parties, are important factors to be considered in determining the state of most significant relationship."<sup>67</sup> If there were really any doubt as to the meaning of the terminology of these sections, Professor Reese's post-publication commentary on the Second

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63. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (1971).

64. *Id.* § 6(2)(b)-(c).

65. *Id.* § 6(2)(b) cmt. e.

66. *Id.* § 6(2)(c) cmt. f.

67. *Id.* § 145 cmt. c.

Restatement should dispel it. These sections, he noted, "give[] support to the views of Professor Brainerd Currie and of those other advocates of what is popularly referred to as the 'governmental interest' approach to choice of law."<sup>68</sup>

Understanding the code, so to speak, and realizing that words like "interest" and "interested state" refer to Currie's interest analysis, we can understand how, exactly, the four contacts of section 145 are intended to interact with section 6. Reese writes:

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 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 [four] contacts with the occurrence and the parties.<sup>69</sup>

The four contacts of section 145(2), in short, are not significant in themselves. They are significant as a means of identifying the states whose relevant policies may be implicated under the principles of sections 6(2)(b) and (c). The fact that two contacts point to Georgia and two to Florida tells us simply that these two states are the only ones which *may* have an interest in the application of their laws under the interest-analysis provisions of section 6. If we now look at sections 6(2)(b) and (c), we see what we have already seen in discussing the way in which Currie's interest analysis would resolve this case. Florida is interested in the application of its law because its underlying purpose is allowing injured passengers in a car to recover from their host by an ordinary negligence standard, just as in any other case of personal injury. Georgia, however, has no interest in applying its law because none of the persons or entities its host-guest statute was designed to protect are involved in the case. If Florida has an interest and Georgia has none, it is surely obvious that Florida's interests are "most deeply affected."<sup>70</sup> Furthermore, the comments state, "[i]f the purposes sought to be achieved by a local statute or common law rule would be furthered by its application to out-of-state facts, this is a weighty reason why such application should be made."<sup>71</sup> Basically, this simple process has identified the state of most significant relationship.

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68. Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 *MERCER L. REV.* 501, 509 (1983). Professor Reese rejected as "simplistic," however, the view that interest analysis should be the only value considered in making choice-of-law determinations. *Id.* at 510-11.

69. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 145(2) cmt. c (1971).

70. *Id.* § 6(2) cmt. f.

71. *Id.* § 6(2) cmt. e.

It should be noted that the other principles of section 6 either favor, or at least do not contraindicate, the application of Florida law in a case like this. Section 6(2)(a)—“the needs of the interstate and international systems”<sup>72</sup>—is basically a warning to a forum court not to ride rough-shod over the legitimate concerns and interests of other states just because it can get away with it. A forum court can conceivably apply its own law any time its connection with the case meets the constitutional criteria of *Allstate Insurance Co. v. Hague*.<sup>73</sup> *Hague* has been the subject of a great deal of academic commentary.<sup>74</sup> Although no majority opinion emerged—Justice Brennan wrote for a plurality of four justices, Justice Stevens concurred, and three justices dissented—seven of the eight agreed on the fundamental test laid down in the plurality’s opinion: “for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”<sup>75</sup> The scantiness of Minnesota’s contacts in *Hague* makes it clear that very little connection is required for a state to constitutionally apply its own law.<sup>76</sup> This is all the more reason to take the injunction of section 6(2)(a) seriously: “In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states.”<sup>77</sup> Here, because Georgia’s interest is not implicated, it would hardly disrupt relationships between the two states were Florida to apply its own law in its own court in a suit between two Florida residents. Even

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72. *Id.* § 6(2)(a).

73. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (plurality opinion). Ralph Hague was killed in a motorcycle accident in Wisconsin, his state of residence. *Id.* at 305. Both his son, who was driving the motorcycle, and the other driver were Wisconsin residents. *Id.* Hague had an insurance policy covering three cars; the policy had been applied for and delivered in Wisconsin insuring risks centered there, and provided \$15,000 per vehicle coverage in uninsured motorist benefits. *Id.* Wisconsin did not permit the “stacking” of coverages in such cases. *Id.* at 306. Following his death, his widow relocated to Minnesota, remarried, and began the administration of his estate in a Minnesota probate court. *Id.* at 305. Minnesota law permitted “stacking.” *Id.* Both the trial court and the Minnesota Supreme Court, using Professor Leflar’s “better law” analysis, held that she was entitled to stack coverages and thus receive \$45,000 rather than \$15,000. *Id.* at 305–07.

74. *E.g.*, Symposium, *Choice-of-Law Theory After Allstate Ins. Co. v. Hague*, 10 HOFSTRA L. REV. 1 (1981).

75. *Hague*, 449 U.S. at 312–13 (plurality opinion).

76. The three contacts relied upon by the plurality in upholding the constitutionality of Minnesota’s choice of its own law were, first, Ralph Hague’s membership in the Minnesota work force. *Id.* at 313. The second was Allstate’s jurisdictional presence in Minnesota (as in every other state). *Id.* at 317–18. And the third was the fact that Hague’s widow had become a resident of Minnesota. *Id.* at 318–19. The three dissenters found these contacts with Minnesota either constitutionally irrelevant or too trivial to justify application of Minnesota law. *Id.* at 337–39 (dissenting opinion).

77. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(a) cmt. d (1971).

though Georgia was the scene of the accident,<sup>78</sup> its interest in how damages are apportioned between host and guest is nonexistent. As usual, in a torts case involving negligence, "the parties have no justified expectations to protect."<sup>79</sup> Today, the "basic policy"<sup>80</sup> underlying tort law is primarily compensation for injuries. Florida's policy is consistent with that standard.<sup>81</sup> Certainly, this simple interest analysis is a quick and easy way of determining the applicable law. If followed in similar cases, this analysis lends "certainty, predictability and uniformity of result"<sup>82</sup> to the process.

Used in this way, the Second Restatement enables a court to easily identify a case of false conflict and to dispose of it almost summarily in favor of the law of the only interested state. It was, in fact, largely cases of false conflict that moved courts in the first half of the twentieth century to resort to escape devices to avoid the inexorable operation of the territorial rules.<sup>83</sup> This was particularly true when the place of injury appeared to be essentially fortuitous.<sup>84</sup>

Having resolved the case with section 145 and the interest analysis provisions of section 6, a court need not pay attention to the specific rules for particular torts and issues in tort that follow section 145. A glance at the applicable rule, section 146, illustrates why. It is entitled "Personal Injuries," and provides as follows:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles

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78. Georgia's interest may not have been entirely lacking. Someone, presumably, had to clean up the mess; Georgia property might have been damaged; and attention by Georgia medical personnel might have been required, but this would have implicated the conduct-regulating aspect of its law, not its loss-allocating function.

79. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d) cmt. g (1971).

80. *Id.* § 6(2)(e) cmt. h.

81. FLA. STAT. ANN. § 768.19 (West 1997).

82. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(f) (1971).

83. *See, e.g., Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 526, 528 (N.Y. 1961) (holding that a Massachusetts damages cap did not apply in New York because the cap was contrary to public policy).

84. *See, e.g., Haumschild v. Cont'l Cas. Co.*, 95 N.W.2d 814, 818 (Wis. 1959) (stressing the importance of the place of domicile in a conflict-of-laws issue); *Grant v. McAuliffe*, 264 P.2d 944, 949 (Cal. 1953) (mandating that the law of the forum controls); *Levy v. Steiger*, 124 N.E. 477, 477 (Mass. 1919) (holding that the forum where the injury occurs determines whether a cause of action exists and the forum in which the action is brought determines the remedy). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) cmt. e (1971) (noting the importance of the place where the injury occurred in determining the state of most significant relationship).

stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.<sup>85</sup>

This much more specific black-letter rule is typical of almost all of those dealing with particular torts or issues in tort. These rules, recall, are simply what Reese believes the result of applying the general principle of section 145 in conjunction with section 6 would ordinarily be. The presumptions, however, are all subject to displacement if some other state has a more significant relationship to the parties and the occurrence. This will invariably be the situation in cases of false conflict where, as in the hypothetical, the state of injury has no interest in the application of its law. Reese justified the place-of-injury presumption against the attack from some quarters that he had simply reincarnated the old territorial rules under a different name on the basis of his own perception of the importance of territory in the conflict of laws.<sup>86</sup> In section 1 of the Second Restatement, he wrote:

The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution.<sup>87</sup>

And elsewhere he asserted that to ignore the significance of territoriality is

to ignore the basic reason for the existence of choice of law. Whether we like it or not, the world is composed of many states, each having its own system of law, and it is customary for persons to travel freely from state to state and to transact their business without much regard for state lines. The purpose of choice of law . . . is to provide a solution for the problems that inevitably arise. People naturally think in terms of territoriality, and so have the courts.<sup>88</sup>

Most of us understand instinctively that the laws of the various states (and foreign countries especially) vary, and this is a significant part of what makes them sovereign. We understand, therefore, that the legal consequences of our acts or omissions may vary, sometimes drastically,

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85. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971).

86. According to Professor Leflar, one of the advisers to the American Law Institute in the preparation of the torts provisions, "the old Restatement's 'place of the injury' rule hovers like a ghost over the entire chapter." Robert A. Leflar, *The Torts Provisions of the Restatement (Second)*, 72 COLUM. L. REV. 267, 269 (1972).

87. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971).

88. Reese, *supra* note 68, at 514.

depending on where we find ourselves. Additionally, we know that behind states' laws lie enforcement mechanisms based on their legitimate monopolies of force. It is almost a syllogism that a sovereign by definition has the power to make rules for its territory and that the legal consequences of events that occur in that territory are to be determined by those rules. This instinctive feeling has a firm basis in reality. Though not everyone will agree with Reese's presumptive rules, he has expressed truths that resonate deeply within people in the divided world in which we live. And as we shall shortly see, the presumptive rules have an important role to play in the resolution of true conflicts.

### B. *The Contracts Provisions of the Second Restatement*

An extended discussion of chapter 8, which deals with contracts generally, specific kinds of contracts and particular issues in contract, is not necessary because the design is quite similar to the torts provisions. Only a few qualifications are necessary. The contracts chapter has two general principles. The first, section 187, deals with cases where the parties have incorporated a choice-of-law provision in their agreement; in general, this section recognizes and gives effect to such provisions<sup>89</sup> in line with the long-standing practice in American courts.<sup>90</sup> Section 188 deals with situations where the parties have made no explicit choice—cases which would have formerly been decided either by the law of the place of contract formation or by the law of the place of its performance. Section 188 closely resembles section 145 in structure and provides as follows:

- (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 (see § 187), 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,

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89. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

90. For further discussion of these practices, see Harold P. Southerland, *Conflict of Laws in Florida: The Desirability of Extending the Second Restatement Approach to Cases in Contract*, 21 NOVA L. REV. 777, 791, 794, 812–13 (1997); see also ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS §§ 173–175 (1962) (explaining with regard to contracts in which the “governing law” is unclear, “[p]roperly and reasonably, courts of all countries and ages, with a few clearly definable exceptions, have tended to uphold the parties’ ‘validating intent’ and have thus held bargain contracts valid under any ‘proper law’”).

- (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.<sup>91</sup>

Again, the comments stress that the five contacts of section 188(2) are to be used in applying the principles of section 6 and that states with one or more of these contacts are the ones "most likely to be interested."<sup>92</sup> In other words, the same interest analysis is called for here as with section 145 in dealing with issues in tort. If only one state turns out to have an interest in the application of its law—a false conflict, in other words—then it is the state of most significant relationship.

### III. TRUE CONFLICTS AND THE SECOND RESTATEMENT

When the interest analysis provisions of sections 6(2)(b) and (c) show that the relevant policies of both states would be furthered by application of their laws, matters under the Second Restatement become much more problematic. The hallmark of these cases is that it is impossible to further the policies of one state without suppressing the policies of the other.

Two critical points should immediately be noted. First, the Second Restatement does not provide a neat and tidy rule for the solution of true conflicts.<sup>93</sup> Those who by temperament crave hard-and-fast rules for all of life's dilemmas and who would really be happier if laws ran uniformly throughout the whole United States are in for a sharp disappointment.<sup>94</sup> Second, the apparent failure of the Second Restatement to take a decisive

91. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

92. *Id.* § 188(2) cmt. e.

93. That is, beyond stating that one of the interested states must be the state of most significant relationship because there *must* be a state of most significant relationship—a circular assumption but not an unrealistic one because the case must be decided and one or the other of the conflicting laws chosen.

94. *Cf. Currie, Conflict, Crisis and Confusion, supra* note 28, at 707. Currie had little patience with those "who place a low valuation on the principle of self-determination," who "want life to be as nearly as possible what it would be if there were not a variety of different governments enacting different laws, reflecting different values," and "who are annoyed because different peoples solve their problems in different ways." *Id.*

position on true conflicts is just that—apparent. Since Currie identified the problem in the late 1950s, neither courts nor commentators have been able to come to a consensus on how these difficult problems should be resolved. Of course, decisions have been made and rationalized and reams of paper devoted to the subject in the law reviews, but the fact remains that no universally satisfactory and uniform approach has emerged from the welter of arguments and proposals. It seems pointless to fault the Second Restatement for not doing what other methods have also been unable to do.

What the Second Restatement does—and this is one of its great strengths—is guide a court quickly and easily to the point of realizing that it is dealing with a hard case. It forces a court to recognize that it is going to have to articulate what values it will choose to further at the expense of others, for conflicts is an area in which you can't have your cake and eat it too. No single choice-of-law method has ever been able to achieve all of the goals that over time various courts and commentators have identified as important to the process.<sup>95</sup> The Second Restatement, in section 6 and the accompanying comments, provides the values. It tells a court what it ought to be thinking about. But, it does not presume to tell the court what weight to give these values or which should be deemed more important than others in any particular case. Instead, it tells the court what questions it is going to have to ask and answer for itself.

There is hard-headed reality in this design. Professor Reese was careful to note in the comments that the values represented by the seven choice-influencing principles of section 6 could well point in different directions in all but the simplest case.<sup>96</sup> Nevertheless, he believed that these principles—distilled from many cases over many years—were the ones that courts had treated as important in the resolution of actual cases.<sup>97</sup> Also, he

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95. It has been variously claimed that for there to be "justice" in conflicts cases, the method for making the choice-of-law decision ought to be appropriately deferential to the sovereign status of other states, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 29, 33, 35 (1st ed. 1834); ought to be principled in the sense of being unbiased, *Neumeier v. Kuhner*, 286 N.E.2d 454, 457 (N.Y. 1972); should produce uniform results "no matter where suit is brought," CAVERS, THE CHOICE-OF-LAW PROCESS, *supra* note 9, at 22-23; should offer certainty, predictability, simplicity, and ease of use, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(f)-(g) (1971); should take account of the policies underlying conflicting rules, Currie, *Methods and Objectives*, *supra* note 22, at 183-84, as well as the degree to which the concerned states are attached to those policies, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) cmt. f (1971); should protect justified expectations, Max Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 22-23 (1944); should permit courts to choose what they think is the better of the conflicting laws, Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 271-79 (1966) [hereinafter Leflar, *Choice-Influencing Considerations*]; and should allow them to reach the result they think fair and just for the case as a whole, Cavers, *A Critique*, *supra* note 15, at 192.

96. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) cmt. c (1971).

97. Reese, *supra* note 68, at 516.

was candid in admitting that the success or failure of the Second Restatement would probably turn on the accuracy of his perception.<sup>98</sup> In declining to provide a dogmatic, cut-and-dried approach to the legitimate or true conflict, he simply recognized the inherent autonomy of courts and their tendency to decide cases pretty much as Oliver Wendell Holmes suggested many years ago when he stated, "[t]he felt necessities of the time . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed."<sup>99</sup>

How, then, should a Second Restatement court approach a case of true conflict? As I suggested earlier, I think there are two generic paths—the rational or the arbitrary. The difference between the two is essentially one of judicial temperament and outlook. For some courts, the ultimate outcome of a lawsuit is the important thing, and their tendency is to find a technically acceptable, reasoned way of choosing the law that produces the desired result.<sup>100</sup> For others, it is the manner of choosing the applicable law that is important; let that be done in an impartial and principled way and then live with whatever result the law so chosen produces.<sup>101</sup> To some extent, the Second Restatement will support either of these two broad approaches.

#### A. Rational Approaches to True Conflicts

Brainerd Currie was adamant in insisting that there was no rational way to choose between sovereign rules in genuine conflict.<sup>102</sup> He did not think courts were equipped for the task.<sup>103</sup> More importantly, he did not think that it was the role of courts in a democracy to make the essentially legislative judgment that one state's interests were somehow weightier or more important than another's.<sup>104</sup> Sovereigns, by definition, stood on a higher plane, and their interests were not subject to the sort of weighing and balancing techniques that courts used in purely domestic cases in deciding, for example, between two plausible but competing versions of a statute. He thought it particularly troubling when a forum court undertook to

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98. *Id.* at 516-17.

99. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW I* (1881).

100. This predilection is frequently referred to as "justice in the case."

101. This approach, referred to as "conflicts justice," was the approach of Professor Beale and the 1934 Restatement—first choose the governing law in a principled way and only then look to see what outcome that choice produces.

102. Currie, *Methods and Objectives*, *supra* note 22, at 181-82.

103. *Id.*

104. *Id.*

subordinate its own state's policies to those of another state<sup>105</sup>—hence he chose forum law as a tie-breaker. But he also knew that his views ran counter to what might well be called a national character trait—the deeply ingrained belief that there is always a rational way to solve any problem, no matter how thorny.<sup>106</sup>

Accordingly, no court has followed Currie in adopting a forum-law solution for true conflicts.<sup>107</sup> American courts have long been accustomed to weighing competing considerations of social and economic advantage in deciding the daily run of purely domestic cases. Why, then, should they not “weigh” the interests of the competing states in like fashion? There is warrant for this approach in comment f to section 6, which states that it is generally “fitting that the state whose interests are most deeply affected should have its local law applied.”<sup>108</sup> But how is a court to tell which state's interests are “most deeply affected”? The comments do not say and thus leave a court to its own devices with only the guidance provided by the other choice-influencing principles of section 6.

Clearly, this “most deeply affected” determination is going to require the exercise of considerable subjective judgment. The most likely possibility is that courts will use the same considerations that caused them to invoke the public-policy exception as an escape device from the otherwise applicable law under the traditional approaches. Territorial theory itself recognized that a forum could not be compelled to apply the law of another state if doing so violated its own state's “strongly held” public policy.<sup>109</sup> The problem here, however, has always been the lack of any objective or widely accepted standard for determining which policies are “strongly held” and which are not.<sup>110</sup> The reported cases show that a lot of subjective judgment went into that determination.<sup>111</sup> Yet, it is not hard to imagine that whatever considerations prompted those decisions could easily translate into making the “most deeply affected” determination.

Another possibility would borrow from Professor Baxter's comparative impairment proposal, which is the method currently in use in California.<sup>112</sup>

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105. *Id.*

106. Currie, *Married Women's Contracts*, *supra* note 20, at 121.

107. SCOLES ET AL., *supra* note 4, at 100–01.

108. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. f (1971).

109. STORY, *supra* note 95, § 25.

110. *Lilienthal v. Kaufman*, 395 P.2d 543, 548 (Or. 1964).

111. See Monrad G. Paulsen & Michael I. Sovern, “Public Policy” in the Conflict of Laws, 36 COLUM. L. REV. 969, 1016 (1956) (arguing that the public policy concept is “beguilingly easy” and allows conflict-of-laws cases to be “judged according to local fancies”).

112. See SCOLES ET AL., *supra* note 4, at 715–23 (explaining the evolution of the comparative impairment approach and California's version of the analysis). For a comprehensive examination of

This approach attempts to assess which state's domestic (or internal) policy would be more impaired if its law were not applied in the multi-state case.<sup>113</sup> There would be room, needless to say, for considerable subjectivity here, too. Either of these possibilities might form the basis for the reasoned conclusion that one state's interests are more deeply affected than another's. This is hardly the "conflicts justice" dogma of Professor Beale and the 1934 Restatement, in which impartiality, certainty, predictability, and uniformity of result were exalted over every other consideration.<sup>114</sup>

But we no longer live in 1934. Everyone knows that the importance of state lines has drastically diminished in the last century, largely because society has become infinitely more mobile with its automobiles and mass transit systems; infinitely more closely knit (at least in some respects) with the ubiquity of television, computers, the internet, and other forms of instantaneous communication; and infinitely more a single unit for the nation-wide marketing of goods and services. What does it mean today to say that a state is "sovereign"? Certainly, it means less than it meant a hundred years ago. The reach of the central government has grown beyond the imagination of those who lived in that era.<sup>115</sup> States today often appear more like municipal subdivisions within a sovereign state than sovereign states within a sovereign nation.<sup>116</sup> But there is something left. States still have a certain stature. They have a right to be idiosyncratically different; to have wise and enlightened laws or silly, antiquated, and aberrational ones; to embody in those laws their own sometimes peculiar conceptions of fairness and justice; and to differ from other states in this way. They have, in short, the right to be different so long as they remain within the bounds of whatever today's Supreme Court tells us the Constitution requires.<sup>117</sup>

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Professor Baxter's proposal, see William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

113. Baxter, *supra* note 112, at 9.

114. See Currie, *The Verdict of Quiescent Years*, 28 U. CHI. L. REV. 258 (1961), reprinted in CURRIE, *SELECTED ESSAYS*, *supra* note 18, at 613 (describing Beale's mission in life as the systematizing of conflict-of-laws rules). *Contra* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971) (subordinating impartiality, certainty, predictability, and uniformity to a list of values and considerations).

115. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 567, 568 (1973) (discussing the dramatic social and economic growth of the twentieth century and the emergence of a stronger central government to deal with problems associated with growth).

116. These societal changes were also reflected in and reinforced by the Court's opinion in *International Shoe Co. v. Washington*, 326 U.S. 310, 321 (1945), in which it repudiated for in personam jurisdictional purposes the territorial principle of *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

117. Compare, e.g., *Nat'l League of Cities v. Usery*, 426 U.S. 833, 854 (1976) (holding that the federal commerce clause power did not extend to regulating the conduct of states' governmental functions), with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554-57 (1985) (overruling

But there can be no serious doubt that it is Hamilton's vision, not Jefferson's, that continues to define life in this nation.<sup>118</sup>

What have these drastic societal changes, these altered perceptions of the sanctity of state lines, meant for true conflict resolution? First of all, they have freed judges from the constraints of the traditional territorial rules and the assumption that underlay them—namely, that the legal consequences of acts or events vested with their occurrence were forever fixed under the law of the place where they occurred.<sup>119</sup> These changes have encouraged judges, and may have even forced them, in a sense, to adopt methods of conflict resolution that make for "fairness" and "justice" or "good economic sense," at least in their own necessarily idiosyncratic conception of those abstractions.<sup>120</sup> Mechanical adherence to a set of rules that no longer reflected the reality of the twentieth-century made less and less sense; conflicts rules really had little choice but to follow changing perceptions of "fair" and "just" substantive ends. At the beginning of the twenty-first century there were almost as many different methods for conflict resolution in actual use as there were substantive conflicts to resolve.<sup>121</sup>

In the less-than-pellucid "most deeply affected" formulation, there is ample room for a Second Restatement court to reach what it considers a desirable result and then to rationalize it with such abstractions as "the needs of the interstate system," the "protection of justified expectations," or the "basic policies underlying the particular field of law."<sup>122</sup> But as a criticism of the Second Restatement, all this really says is that the Second Restatement can be manipulated to produce a desired result, just as the rigid

*Nat'l League of Cities* and thereby enforcing the reach of congressional power over the states even in areas of traditional governmental functions).

118. See 2 SAMUEL ELIOT MORISON, ET AL., *THE GROWTH OF THE AMERICAN REPUBLIC* 50-51 (6th ed. 1969) (discussing the success of Alexander Hamilton's goal of a "diversified, self-sufficing nation, ruled by the people who controlled the nation's prosperity" compared to Jefferson's dream of a "great agrarian democracy").

119. See, e.g., *Ala. Great S. R.R. v. Carroll*, 11 So. 803, 803 (Ala. 1892) (holding that the plaintiff, a resident of Alabama, could not recover in Alabama for injuries sustained in Mississippi).

120. Some well-known developments of the last century, products largely of the exponentially increased risk of living in a highly industrialized and technological society, include the movement from a no-liability-without-fault mentality to worker's compensation, Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967); the advent of strict liability in tort with RESTATEMENT (SECOND) OF TORTS § 402A (1965); and the demise of the age-old privity defense in breach-of-warranty actions in cases like *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 90 N.W.2d 873, 873-74 (Mich. 1958) and the widespread adoption by the states of the *Uniform Commercial Code*, see U.C.C. § 2-318 (1966) (Third-Party Beneficiaries of Warranties Express or Implied).

121. SCOLLES ET AL., *supra* note 4, at 86, 100-01.

122. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6(2)(a), (d), (e) (1971).

and mechanical rules of the original Restatement could<sup>123</sup>—or for that matter any of the other modern approaches. The reality is that almost any rule of law can be made to produce whatever result an ingenious and determined judge wants it to. From this perspective, the Second Restatement is no more protean in structure than its predecessor or any of its present-day competitors, and we shall have occasion shortly to consider the implications of this statement.

There is no explicit basis in the Second Restatement, however, for what is perhaps the most radical and controversial of the rational methods for resolving true conflicts—namely, Professor Robert Leflar's "better law" proposal. His method resembles the Second Restatement's enumeration of choice-influencing considerations in section 6, but reduces the number from seven to five.<sup>124</sup> It is currently in use in several states—most notably Minnesota.<sup>125</sup> The major difference, and the factor that has seized the imagination of courts and commentators, however, is the fifth one—the application of the "better rule of law." Here is Professor Leflar's own explanation of this factor:

If choice of law were purely a jurisdiction-selecting process, with courts first deciding which state's law should govern and checking afterward to see what that state's law was, this consideration would not be present. Everyone knows that this is not what courts do, nor what they should do. Judges know from the beginning between which rules of law, and not just which states, they are choosing. . . .

. . . The inclination of any reasonable court will be to prefer rules of law which make good socio-economic sense for the time when the court speaks, whether they be its own or another state's rules.

. . . The preference is objective, not subjective. It has to do with preferred law, not preferred parties.<sup>126</sup>

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123. See *supra* note 17 and accompanying text.

124. In two influential articles, Professor Leflar proposed a five-factor approach: "Predictability of Results"; "Maintenance of Interstate and International Order"; "Simplification of the Judicial Task"; "Advancement of the Forum's Governmental Interests"; and "Application of the Better Rule of Law." Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1586-88 (1966) [hereinafter Leflar, *Conflicts Law*]; Leflar, *Choice-Influencing Considerations*, *supra* note 95, at 271-79.

125. See, e.g., *Milkovich v. Saari*, 203 N.W.2d 408, 412-13 (Minn. 1973) (adopting Leflar's five-factor approach); *Blamey v. Brown*, 270 N.W.2d 884, 890-91 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980), *overruled on other grounds by West Am. Ins. Co. v. Westin, Inc.*, 337 N.W.2d 676 (Minn. 1983) (using the five-factor approach to apply Minnesota's common law, which provided a remedy, over Wisconsin's, which did not).

126. Leflar, *Conflicts Law*, *supra* note 124, at 1587-88.

Nothing, of course, can keep a court, either overtly or covertly, from making subjective value judgments about the wisdom and relative merits of policies embodied in conflicting laws. Additionally, it is hard to quarrel with the idea of good socio-economic results. But the Second Restatement does not include this consideration among its choice-influencing principles—and it should not.<sup>127</sup> Its dominant principle is the location of the state with the most significant relationship to the case, and it is hard to logically see how the substantive content of the competing laws can play a role in that determination.<sup>128</sup>

To illustrate the logical problem, consider this absurd example. Suppose by some freakish set of circumstances a conflict arose between two states over their choice of the official state bird. Mississippi has chosen the turkey vulture, and Florida the cardinal. Most people I know think the turkey vulture is a hideous-looking bird (though useful in cleaning up the carrion that litter our highways). Cardinals, on the other hand, with their gorgeous red plumage, are favorites of just about everybody. But are Florida's interests more deeply affected because most people think the cardinal is the "better" bird? This would be a little like trying to measure the color of a leaf with a micrometer. It is obviously difficult for a court to suppress its natural inclination to evaluate the content of laws in conflict; and, at any particular time in history, it is hard to deny that some laws seem to make better "socio-economic sense" than others. By today's standards, for example, any law that tends to compensate a plaintiff for negligently inflicted injuries seems "better" to most of us than one that doesn't, and any law that validates a contract seems "better" than one that doesn't. These are easy judgments to make, especially for academics. But the depth to which a state's interests are affected has to be measured by considerations other than the substantive content of its law.

It is important to recognize that Leflar's approach, in essence, robs a conflicts case of the very element that makes it a conflicts case and turns it into the equivalent of a domestic one. Once the "better law" becomes a

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127. This statement has to be qualified. In section 6, the Reporter states that "[i]t is not suggested that this list of factors is exclusive. Undoubtedly, a court will on occasion give consideration to other factors in deciding a question of choice of law." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) cmt. c (1971). A determined court could no doubt use this language as a way of introducing the "better law" factor into the choice-influencing principles of section 6.

128. In other words, how can a state's interest be more or less affected by the content of its law? In a paradigm false conflict, it is entirely possible that the state with no interest in the application of its law might have what most would consider the "better law." A state is related to a conflicts case for *a priori* reasons having nothing to do with what the content of its law on some subject happens to be. I realize, of course, that we are considering the "better law" only as a rational way of breaking a tie between interested states, but the depth of a state's interest cannot be a function of the quality of its law.

decisive consideration, there is nothing left of the sovereign prerogative of states to differ in their appraisal of societal problems. I am by temperament a plaintiff's lawyer. But I recognize the right of a state to enact or retain defendant-favoring laws. The politics of each state's government are unique and often complex. Perhaps the legislature has chosen to keep a guest statute on the books because the insurance lobby has enough power to block any effort at reform. Perhaps the retention of such a law is simply a function of inertia, or perhaps of the inability of the state supreme court and the legislature to agree on whose responsibility it is to change it.<sup>129</sup> What matters is that each state is supposed to have the sovereign power to decide for itself the legal consequences of acts or omissions that occur within its territory or that affect its citizens. In our wisdom, we may think some particular policy is silly or archaic, but as our national political structure now stands, we have to recognize the right of each state to its opinion. Otherwise, the concept of state sovereignty loses all meaning. Some judges who think they know the "better" law when they see it are likely to have little compunction in imposing their judgment willy-nilly on some less enlightened state.<sup>130</sup> Professor Leflar's method, although it operates only in a very limited number of cases, is a way of breaking down the diversity in the substantive rules of the fifty states and making "good" laws run more uniformly throughout the nation. This may have merit as a substantive law revision project, but using the "better law" as a way of resolving conflicts problems invites the making of some very one-sided and subjective value judgments. It should be remembered that in many cases there may be considerable differences of opinion over which law is "better"—i.e., ways of handling medical malpractice cases, whether to cap non-economic damages in tort cases, or whether to make the owner of an automobile vicariously liable for its negligent operation by another person.

My own intuition is that a court purporting to reason its way to the state whose interests are most deeply affected will be primarily influenced by the end result. If a judge thinks she knows what the outcome of a case should be, she can find a way to make the interests of the state with the law more favorable to that outcome seem most deeply affected. Result-oriented decision-making can easily shade into perceptions of which law is "better," simply because the better law will tend to produce the result that seems

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129. See, e.g., *Alvis v. Ribar*, 421 N.E.2d 886, 887-98 (Ill. 1981) (replacing the contributory negligence doctrine with comparative negligence and summarizing the lengthy debate between the court and legislature over whose job it was to change the law).

130. I have elsewhere discussed with approval the refusal of the New York Court of Appeals to do just this in one of the more wrenching and controversial of recent cases. *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679, 688-89 (N.Y. 1985). Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451, 493-501 (2000).

“right.” Basic trends in the law develop over time in response to societal changes. In the area of contracts, there are reasons that the Rule of Validation has dominated conflicts decision-making.<sup>131</sup> Businesspeople have grown accustomed to concluding important deals in places utterly unrelated to the deal itself. If two New Yorkers enter into a contract to be performed in New York, why on earth should it matter that they were vacationing in the Bahamas when their negotiations ripened into a contract? Would it make sense down the road to determine their contractual obligations and duties under Bahamian law? There is sense in the presumption that contracting parties intend to enter into valid arrangements, not invalid ones. In the area of torts, consider the impact of the automobile. In 1900, death by automobile was zero; by 1920, the number of people killed in car accidents every year was approaching roughly 40,000—a number that has remained almost constant ever since.<sup>132</sup> There are needs, measured by human life and suffering, that make explicable the explosion of drastic, compensation-oriented changes that have occurred in tort law during the past century.<sup>133</sup>

Yet, which of these modern trends to adopt and when remains a prerogative of each individual state. Knowing what enlightened states have done cannot logically define the “most deeply affected” concept, for this would be, as Brainerd Currie so eloquently put it:

[T]his is a subliminal statement of a proposition that cannot with comfort be stated baldly. Baldly stated, the proposition is: In a domestic case, a judge has little choice but to apply the law of his state, no matter how silly or misguided he may think it is or how

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131. See, e.g., EHRENZWEIG, *supra* note 90, at 353 (reasoning that the Rule of Validation, choosing the law that enforces the contract, provides predictability in business transactions); GEORGE WILFRED STUMBERG, *CONFLICT OF LAWS* 239 (3d ed. 1963) (pointing out the purpose of carrying out the contracting parties' intent, which promotes convenience in business affairs, is served by applying the law that upholds the contract).

132. For an estimate of what just forty years (1944–1984) of death by automobiles has cost the nation, see Harold P. Southerland, *A Screaming Comes Across the Sky—Tort Choice-of-Law Doctrine in Florida under the Second Restatement of Conflicts*, 40 *MERCER L. REV.* 781, 788 n.27 (noting 1,787,600 persons in that forty-year period were killed at a cost of almost two trillion dollars). All of this death, personal injury, and property damage was of course dropped into the lap of the legal system to develop some sort of rational cost-accounting.

133. See LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 59–61 (1985) (attributing the twentieth century revolution of tort law to factors such as the increase in insurance and the development of workers' compensation programs, which reduced the uncertainty of recovery and provided a “general expectation of compensation”); Southerland, *supra* note 132, at 788–90 & nn.28–36 (discussing the compensation imperative evidenced through legal developments such as workers' compensation laws; strict liability and comparative negligence in tort law; no-fault insurance; wrongful death statutes; and the elimination of host-guest statutes); see also *supra* note 120 and accompanying text.

regrettable the results it produces. In a conflicts case, on the other hand, there is such a great deal of looseness in the joints of the apparatus and such a lack of any clear mandate as to how to proceed that there is available to the judge for the taking a freedom that he should employ with a will, in order to frustrate, in this limited but satisfying area of opportunity, all that is archaic and foolish in the law.

I think it is clear that we cannot accept any conflict-of-laws method that proceeds on such premises. . . . It is simply not the business of courts to substitute their judgment for that of the legislature. . . . In a conflict-of-laws case a court should have just that degree of freedom to escape the compulsion of a disagreeable law that it has in a purely domestic case, and no more.<sup>134</sup>

Professor Reese obviously disagreed with Currie on this point because he adopted a standard—the state of most significant relationship—that on its face compels comparison, some form of weighing and balancing of interests. In a true conflict, both states by definition are interested states; but, by some calculus, one of them must somehow be determined to be *more* interested than the other. This opens the door for any court to implement its own vision of what this formulation should mean. Unless one accepts the desirability of near uniformity of policies throughout the nation in areas like torts and contracts, rational solutions to true conflicts invite the near-unfettered exercise of judicial discretion to reach whatever result seems best. “Certainty, predictability and uniformity of result”<sup>135</sup> are bound to suffer in an ad hoc approach such as this. There are certainly plenty of judges for whom, temperamentally, reaching the “right” result will always be more important than how it is reached.

### *B. The Arbitrary Approach to True Conflicts*

The problems behind rational attempts to resolve true conflicts discussed above should make clear why some judges and courts eschew this approach for an arbitrary one. By the term “arbitrary,” I mean making decisions based on some agreed-upon standard external to the case itself—in the nature of a default rule or fallback position, in other words.

The choice between rational and arbitrary is far from academic. This choice is illustrated in one of the most interesting and instructive experiments ever carried out in the history of conflict of laws. In 1963, the New York Court of Appeals rejected the place-of-the-wrong rule in its

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134. Currie, *Married Women's Contracts*, *supra* note 20, at 105–06 (footnotes omitted).

135. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(f) (1971).

decision in *Babcock v. Jackson*.<sup>136</sup> The precise rationale of *Babcock* still provokes debate; the question that the case did not fully answer and that lingered in its wake was what, exactly, the court was replacing the old territorial rule with. "Controlling effect," the court said, should be given "to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."<sup>137</sup> But what gave a state "the greatest concern"? In *Babcock*, it appeared to be a none-too-precisely delineated coupling of Currie's interest analysis with a mélange of relationships and contacts.<sup>138</sup> It was this question that the court grappled with in a series of host-guest cases that followed in quick succession,<sup>139</sup> ending with the adoption of the so-called *Neumeier* rules in 1972.<sup>140</sup>

Each of these cases involved a conflict between New York's ordinary negligence standard and the host-guest statutes of other states, and with the exception of *Neumeier* itself, all were false conflicts. In *Tooker v. Lopez*, the fourth of the five cases, a sharply divided court abandoned all talk of "center of gravity" or "grouping of contacts,"<sup>141</sup> and adopted the method of pure interest analysis.<sup>142</sup> For this purpose, the only relevant considerations

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136. *Babcock v. Jackson*, 191 N.E.2d 279, 285 (N.Y. 1963).

137. *Id.* at 283. Note the similarity to the "most significant relationship" formulation of the Second Restatement. See *supra* note 48 and accompanying text.

138. Among the concepts referred to were "center of gravity" and "grouping of contacts." *Babcock*, 191 N.E.2d at 282. "Contacts" included the facts that the three parties involved were friends and all from New York, that the projected trip had been planned there and was to be a short one, that the car was registered and insured in New York, and that the trip began and was to have ended in New York. *Id.* at 284.

139. In *Dym v. Gordon*, 209 N.E.2d 792 (N.Y. 1965), two New Yorkers became friends while in Colorado for a six-week summer session. Gordon's negligence caused a two-car collision with a Kansas resident in which Dym was injured. *Id.* at 793. In a 4-to-3 decision, the court applied Colorado law, noting that the stay in Colorado was an extended one, that the host-guest relationship was formed in Colorado, and that the trip began and was to have ended in Colorado. *Id.* at 794-97. More critically, the court was led to attribute a third purpose to Colorado's guest statute—that of prioritizing the host's assets for the benefit of the Kansas driver of the second car. *Id.* at 794. The court later concluded that it was mistaken in attributing this "purpose" to the Colorado guest statute and overruled *Dym*. *Macey v. Rozbicki*, 221 N.E.2d 380, 385-86 (N.Y. 1966). *Macey* involved two New York sisters, one of whom was vacationing for the summer in Ontario. *Id.* at 381. During a ten-day visit, the second sister was injured in a two-car collision caused by her sister's negligence. *Id.* The court decided 5-to-1 to apply New York law in the ensuing lawsuit brought in New York. *Id.*

140. *Neumeier v. Kuehner*, 286 N.E.2d 454, 458 (N.Y. 1972).

141. *Tooker v. Lopez*, 249 N.E.2d 394, 400 n.2 (N.Y. 1969).

142. *Id.* at 395. Two New Yorkers, Marcia Lopez and Catharina Tooker, both four-year students at Michigan State University, were killed in a one-car accident caused by Lopez's negligence. *Id.* Susan Silk, a Michigan resident, was also injured in the crash. *Id.* The car, owned by Lopez's father, was registered and insured in New York. *Id.* Tooker's parents brought a wrongful death suit in New York against Lopez's parents. *Id.*

were the domicile of the parties and the place where the automobile was registered and insured.<sup>143</sup>

At this point, a curious thing happened. Chief Judge Fuld, though concurring in the court's 4-to-3 majority opinion, wrote separately to express his view that the court's decisions since *Babcock* had lacked consistency, that the time had come for the court "to endeavor to minimize what some have characterized as an *ad hoc* case-by-case approach by laying down guidelines,"<sup>144</sup> and that enough experience had accumulated to enable the court to lay down "a few rules of general applicability, promising a fair level of predictability."<sup>145</sup> He then proposed three rules: first, if the parties were from the same state, that state's law governed no matter where the accident happened; second, if the parties were from different states with different laws and each claimed that her own state's law governed, then the applicable law was the law of the place of injury; and third, if the parties were from different states with different laws and each claimed that the other's law governed, the applicable law, though less categorically, would again be that of the place of injury.<sup>146</sup> In short, false conflicts were to be resolved by the law of the parties' common domicile and true conflicts by the arbitrary application of the law of the place of injury. These rules would soon become well known as the *Neumeier* rules when, three years later, the court adopted them as rules of decision for New York.<sup>147</sup> They are still the rules in New York, and they have since been generalized to tort cases beyond the host-guest ones for which they were designed.<sup>148</sup>

During this ten-year experiment, the New York Court of Appeals not only revealed deep divisions within itself over conflicts cases,<sup>149</sup> but it was also the object of considerable criticism by academics and practitioners on two grounds in particular: that the court's decisions were biased in favor of

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143. *Id.* at 400.

144. *Id.* at 403 (Fuld, C.J., concurring).

145. *Id.*

146. *Id.* at 404.

147. *Neumeier*, 286 N.E.2d at 456-58. In *Neumeier*, Kuehner, the host-driver, was a New York resident; Neumeier, the guest, was an Ontario resident. *Id.* at 455. They were both killed in a grade-crossing accident in Ontario, allegedly resulting from Kuehner's negligence. *Id.* Neumeier's spouse brought a wrongful death action in New York against Kuehner's spouse. *Id.* This was the "unprovided-for" case for which Judge Fuld's third rule was designed. The Ontario plaintiff claimed the benefit of New York's ordinary negligence standard; the New York host claimed the benefit of Ontario's guest statute. *Id.* The purposes of neither state's law would have been served by its application. The court split 6-to-1 in deciding to apply Ontario law. *Id.* at 455-58.

148. See *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679, 686-87 (N.Y. 1985) (applying the *Neumeier* rule while noting that this case is a factual reversal of *Babcock*, the first *Neumeier* case in which New York is the forum-locus rather than the parties' common domicile).

149. Perhaps the most bitter splits occurred in *Tooker*, 249 N.E.2d 394, and in *Miller v. Miller*, 237 N.E.2d 877 (N.Y. 1968). See *infra* note 152.

ensuring compensation for New York plaintiffs and that its *ad hoc* approach made for too much uncertainty and unpredictability for litigants and the practicing bar.<sup>150</sup> It was of this period that Maurice Rosenberg famously remarked, “[a] New York lawyer with a guest statute case has more need of an ouija board . . . than a copy of Shepard’s citations.”<sup>151</sup>

In his *Neumeier* majority opinion, Chief Judge Fuld succinctly explained why he thought an arbitrary approach was necessary for true conflict resolution. He said:

[I]t is frequently difficult to discover the purposes or policies underlying the relevant local law rules of the respective jurisdictions involved. It is even more difficult, assuming that these purposes or policies are found to conflict, to determine on some principled basis which should be given effect at the expense of others.<sup>152</sup>

Considering that almost ten years of sometimes bitter and divisive experience underlay this passage, its implications are well worth pondering.

150. See WEINTRAUB 4th ed., *supra* note 45, at 398–99 (recognizing “that the time had come to inject a measure of predictability into New York conflicts doctrine”); see also Donald T. Trautman, *Rule or Reason in Choice of Law: A comment on Neumeier*, 1 VT. L. REV. 1 (1976) (criticizing the rules proposed by Judge Fuld in *Neumeier*).

151. Maurice Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 460 (1967).

152. *Neumeier*, 286 N.E.2d at 457. Judge Fuld’s three rules, two of them devoted to split-domicile true conflicts, may strike some as curious since the court never faced a true conflict until *Neumeier*. But in *Miller*, the court came about as close as possible to having to face the implications of the pure interest analysis approach which it was about to adopt in *Tooker*. *Miller*, 237 N.E.2d 877. *Miller* involved two brothers engaged in a Maine business, one a resident of New York, the other a resident of Maine. *Id.* at 878. While the New York *Miller* was visiting his brother in Maine, he was killed in a single-car accident caused by his brother’s negligence. *Id.* At the time of the accident, Maine limited recovery in wrongful death actions to \$20,000, while New York placed no limitation on recovery. *Id.* Here was a classic true conflict, but during the pendency of the litigation two events occurred that turned the case into a simple false conflict. First, Maine repealed its limitation on wrongful death damages; second, the Maine *Miller* moved permanently to New York. *Id.* Hence, because of these post-accident occurrences, the case became a common-domicile one in which there was no longer any conflict between the laws of the two states. *Id.* Even so, the court split 4-to-3 in applying New York law. *Id.* at 890. Judge Breitel, dissenting, was sharp in his criticism of the majority’s approach. He said:

[I]t is jurisprudentially significant that parties’ rights be determined by the law or system of rules which they most probably believed would control their relationship. In this respect, the application of the proper law of the tort exercises an influence in “promoting an unconscious acceptance of legality and legal order.” . . . To this extent, the law of the place of the wrong assumes significance, albeit not that which it had under older territorial thinking involving a mechanical, rigid and unacceptable approach, but to the degree that the place of the wrong may reflect the conscious understanding and choice of persistent localized activity of the parties.

*Id.* at 886–87 (dissenting opinion).

First, Judge Fuld suggests that interest analysis itself can be problematic because the policies and purposes of laws are not always self-evident or easily discoverable.<sup>153</sup>

Second, none of the rational approaches to true conflict resolution provide a sufficiently "principled basis" for decision; in their subjectivity, they invite result-oriented, biased decision-making. It is easy to infer that, like Currie, Judge Fuld had been unable to find a rational basis for stating that the legitimate interests of one state should yield to those of another. Finally, bearing in mind the phrase "principled basis," it seems Fuld meant to suggest that at least for some judges and courts, the values of fairness, impartiality, certainty, predictability, and uniformity of result are important. All of these, of course, are among the chief rule-of-law values that theoretically underpin our legal system. Why the place of the wrong as a default solution? After the sharp and unfriendly criticism of biased decision-making, both from within and without the court, Currie's forum-law solution had to be seen as too parochial and self-serving, too inherently biased in favor of forum law and forum residents. But, there are other reasons for using the place of the wrong. Even Currie recognized in his ground-breaking study of torts cases<sup>154</sup> that the place where injury occurred could always claim some interest in the application of its law. Someone always has to clean up the "blood on the ground" after an accident. This task naturally falls to officials in the state of injury; medical care at the scene may be necessary, and there is always the possibility that local medical creditors might go unpaid if the plaintiff cannot recover. These so-called interests have never struck me as particularly compelling—especially in cases where the facts show that there are no unpaid medical creditors—but there is no gainsaying that these considerations have figured in a

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153. There is some truth to this, but I think it is a bit of an overstatement stemming largely from the court's *faux pas* in *Dym v. Gordon*, 209 N.E.2d 792 (N.Y. 1965). The court's conclusion that Colorado's guest statute served the purpose of prioritizing recovery as between guest and the non-negligent driver of the second car was found, upon reflection, in *Tooker* to be simply wrong. *Tooker*, 249 N.E.2d at 397. Judge Fuld might have added, though, that it is always possible for either an imaginative judge or advocate to invent or attribute policies to a law that either do or do not call for the law's application. In this sense, interest analysis can be a concept susceptible to manipulation depending on how one wants the case to come out, although the fault would not be with the method itself but with those who so manipulate it. Professor Reese shared this view, stating that:

[A] reading of recent opinions leads to the almost inevitable conclusion that courts which purport to take a 'governmental interest' approach frequently engage in a judicial masquerade. In actual practice, they decide first upon the particular rule they wish to apply and then attribute policies to that rule that call for its application.

Reese, *supra* note 68, at 511.

154. Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958), reprinted in CURRIE, *SELECTED ESSAYS*, *supra* note 18, at 150-52.

number of cases.<sup>155</sup> A little more germane is the fact that the law of the state of injury has always been regarded as a constitutional solution,<sup>156</sup> and deferring to that law certainly pays appropriate deference to the sovereign law-making prerogatives of that state.<sup>157</sup>

Finally, defaulting to the law of the place of injury is the least biased of any of the possibilities. Currie's proposal, as noted, obviously favors forum law and, some say, forum residents as well, although in reverse true conflicts this would hardly be the case.<sup>158</sup> Professor Weintraub recommends breaking ties in favor of the law that tends to compensate for injuries on the ground that compensation represents the modern trend in tort law.<sup>159</sup> He is right about the trend, but the solution is hardly neutral, especially from a defendant's standpoint. Much the same can be said of Professor Sedler's "common policy" proposal,<sup>160</sup> which is hardly neutral either, since there would be no conflict in the first place if one of the states had not deliberately chosen to carve out an exception to the common policy. Accidents are usually random events; they aren't planned, and to let choice turn on the happenstance of where one occurs—literally on the flip of a coin—seems the fairest way of resolving a problem for which, at least *arguendo*, there is no rational solution.

Given the close professional relationship that existed between Judge Fuld and Professor Reese,<sup>161</sup> it is not surprising that there are marked similarities between the opinions of the New York Court of Appeals and the design of the Second Restatement. It seems very likely that the views of

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155. Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1959), reprinted in CURRIE, *SELECTED ESSAYS*, *supra* note 18, at 366-70; see also Carroll v. Lanza, 349 U.S. 408, 413 (1955) (explaining a state's compelling interest in the problems of medical care and possible dependents); *Milkovich*, 203 N.W.2d at 417 (recognizing that "medical costs are likely to be incurred with a consequent governmental interest that injured persons not be denied recovery on the basis of doctrines foreign to Minnesota").

156. See *Nevada v. Hall*, 440 U.S. 410, 426 (1979) (holding that nothing in the Constitution authorizes or mandates the Court to frustrate California's interest in adjudication of a Nevada injury).

157. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(a) & cmt. d (1971).

158. See *Boy Scouts of America, Inc.*, 480 N.E.2d at 687-89 (applying the law of the domicile, New Jersey, as opposed to the law of the forum in which the tortious act occurred. New York, because of a lack of forum contacts); *Hertz Corp. v. Piccolo*, 453 So. 2d 12, 13-14 (Fla. 1984) (applying a Louisiana direct action statute to a case brought in Florida when the accident occurred in Louisiana).

159. See WEINTRAUB 3d ed., *supra* note 45, at 359.

160. See Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 235-36 (1977). Professor Sedler intends his "common policy" solution for the "unprovided-for" case. *Id.* Even so, it is only an intriguing possibility, not unrelated to the Second Restatement's "basic policies" principle. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(e) (1971).

161. The mutually reinforcing dialogue between Chief Judge Fuld and Professor Reese is well known. See Willis L.M. Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 549-66 (1971).

each influenced the other. Who influenced whom is not important, but it is important to note not only the marked similarity between *Babcock's* "greatest concern"<sup>162</sup> language and the "most significant relationship" formula of the Second Restatement,<sup>163</sup> but also the significance that each attached to the place of injury.<sup>164</sup> Almost all of the specific sections dealing with torts and issues in tort start with the presumption that the law of the state of injury determines the rights and liabilities of the parties, subject, of course, to displacement if another state has a more significant relationship under the principles of section 6.<sup>165</sup> If, after relating the contacts of section 145 to the interest analysis principles of section 6, a court finds that it is faced with a genuine clash of policies, the simple thing for it to do if it values an arbitrary solution is to use the appropriate specific section, which would usually result in application of the law of the place of injury. If the court cannot satisfy itself with the interest analysis provisions of section 6 that the conflict is false,<sup>166</sup> then the case will probably not be one where it is easy to say that another state has a *more* significant relationship to the parties and the occurrence than the state of injury.

The same observations apply to cases in contract, but with an important reservation. The specific sections dealing with particular kinds of contracts and issues in contract are much more varied in their presumptive solutions than are the torts provisions. Although the general principle of section 188 is "applicable to all contracts and to all issues in contract,"<sup>167</sup> Reese believed it was possible "on the basis of existing knowledge, to lay down more precise rules for determining the state of the applicable law. . . . It seems clear that the best way to bring precision into the field is by attempting to state special rules for particular contracts and for particular issues."<sup>168</sup> He also thought that existing experience showed that a "particular contact plays an especially important role in the determination of

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162. *Babcock*, 191 N.E.2d at 283.

163. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145(1), 188(1) (1971).

164. See e.g., *Tooker*, 249 N.E.2d at 404 (laying out the *Neumeier* rules which depend on place of injury).

165. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146-174 (1971).

166. In incorporating Brainerd Currie's interest analysis in section 6(2)(b)-(c), Professor Reese, I believe, meant to include Currie's final position—namely, that a court faced with an apparent true conflict should reconsider the states' policies to see if a moderate and restrained interpretation of one or the other might eliminate the conflict. Currie made his position clear in *Currie, The Disinterested Third State*, *supra* note 40, at 757. This article appeared in 1963, and section 6 of the Second Restatement was included only towards the end of the drafting process, which was substantially completed in 1969. See SHREVE, *supra* note 47, at 155 (noting that Part III of the proposed draft was completed in 1969). The Reporter would obviously have been familiar with what would prove to be Brainerd Currie's last synopsis of his method.

167. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 186 cmt. a (1971).

168. *Id.*

the state of the applicable law."<sup>169</sup> As with torts, any of these presumptions can be overridden if some other state has a more significant relationship to the parties and the transaction, under the principles of section 188 and section 6. Each presumption simply reflects the Reporter's view of the result that would usually follow from using section 188 and section 6.

Using the presumptions of the specific sections as an arbitrary solution to true conflicts—both for torts and contracts—further the values expressed in section 6(2)(f)—certainty, predictability and uniformity of result<sup>170</sup>—and in section 6(2)(g)—ease in the determination and application of the law to be applied.<sup>171</sup> These values seldom receive much attention in literature, but any practicing lawyer can testify to their importance. A court's subjective rationalizations can leave lawyers in doubt about the relevant law; hamper their ability to advise their clients and negotiate effectively; and force almost every case of any complexity to be litigated and carried (if the parties can afford it) to the highest court of a state or, in rare cases, to the Supreme Court.<sup>172</sup>

#### IV. REALITY AND THE SECOND RESTATEMENT: AN ILLUSTRATIVE CASE

Most of this article has been concerned with theory and abstractions, hardly the stuff of bedtime reading. Here, I would like to give the foregoing generalizations concrete form by illustrating how the Second Restatement might work with one of the more controversial cases in the literature: *Lilienthal v. Kaufman*, decided by the Oregon Supreme Court in 1964.<sup>173</sup>

*Lilienthal* was a contracts case that involved California and Oregon. These states, like all others, shared a common policy of veneration for the institution of contract and for protecting the security of transactions. But, there was a wrinkle in Oregon's commitment to this common policy. It chose by statute to make an exception for the protection of a class of persons known as "spendthrifts," defined as a person "who, by excessive

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169. *Id.* ch. 8, tit. B, Introductory Note. Here are a few examples to illustrate the variety of presumptions: for contracts involving transfers of interests in land, the state where the land is situated, *id.* §§ 189, 190; for the sale of a chattel, the state where the seller is to deliver, *id.* § 191; for life insurance contracts, the state where the insured was domiciled at the time the policy was applied for, *id.* § 192; for fire, surety, or casualty insurance, the state where the parties understood the principal location of the insured risk to be, *id.* § 193; for the repayment of money lent, the state where the contract requires repayment, *id.* § 195; and for the rendition of services, the state where the services are to be rendered, *id.* § 196.

170. *Id.* § 6(2)(f).

171. *Id.* § 6(2)(g).

172. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

173. *Lilienthal v. Kaufman*, 395 P.2d 543 (Or. 1964).

drinking, idleness, gaming or debauchery of any kind, shall spend or lessen his estate so as to expose . . . himself or his family, to want or suffering, or to cause the county to be charged for the expense of the support of himself and his family."<sup>174</sup> Spendthrifts, as anyone who has been married to one knows, are capable of doing enormous damage, both to themselves and to their families. The statute established a formal judicial procedure for the adjudication of individuals as spendthrifts and for the appointment of guardians for them; it empowered the guardian to void any contracts the spendthrift might enter into, except those for necessities.<sup>175</sup>

In 1953, Leonard Kaufman was adjudicated a spendthrift under this statute and a guardian was appointed for him.<sup>176</sup> Kaufman was apparently obsessed with binoculars and entered into a joint venture with a fellow Oregonian, Milton Olshen, to import and sell them.<sup>177</sup> Olshen advanced funds for the venture, and sued when Kaufman attempted to repay the loan with a bad check.<sup>178</sup> He claimed to have had no actual notice or knowledge of Kaufman's spendthrift status.<sup>179</sup> The Oregon Supreme Court held that the guardian had the right to void the contract and denied recovery.<sup>180</sup>

Undeterred, probably even encouraged, Kaufman went further afield, this time to California, where he persuaded Philip Lilienthal, a California resident, to finance a similar venture.<sup>181</sup> Kaufman executed and delivered two promissory notes in California in exchange for cash advances, repayment to be made in California.<sup>182</sup> When the notes were presented for payment, Kaufman refused, and his guardian voided the agreement.<sup>183</sup> Lilienthal brought suit in Oregon to recover on the notes.<sup>184</sup> He argued that under Oregon's conflicts rule—at the time, the territorial place-of-making and place-of-performance rule—California law governed.<sup>185</sup> California was the place where the notes were executed, where the loan was made, and

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174. OR. REV. STAT. § 126.005. Section 126.005 and the protectionary statute, OR. REV. STAT. § 126.335, were repealed by 1961 Or. Laws, ch. 344, § 109, but were in effect at the time of the transaction. The language of section 126.005 is found in *Olshen v. Kaufman*, 385 P.2d 161, 163 (Or. 1963).

175. See OR. REV. STAT. § 126.280 (as amended by 1961 Or. Laws, ch. 344, § 37) (altering the statute so that it read "voidable by the guardian of the estate for the ward"). The statutory history is recounted in *Olshen*, 385 P.2d at 163.

176. *Olshen*, 385 P.2d at 163.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Lilienthal*, 395 P.2d at 543.

182. *Id.* at 543-44.

183. *Id.*

184. *Id.* at 543.

185. *Id.* at 544.

where repayment was to be made.<sup>186</sup> California law made no provision for the protection of spendthrifts, treating them like any other contracting party.<sup>187</sup> Like Olshen, Lilienthal claimed to have had no notice or knowledge of Kaufman's spendthrift status.<sup>188</sup>

In a majority opinion by Justice Deneke, the Oregon Supreme Court applied Oregon law, upheld the spendthrift defense, and denied recovery.<sup>189</sup> The opinion has been much criticized,<sup>190</sup> but I have always regarded it as one of the finest examples of a conscientious court wrestling forthrightly with a singularly difficult problem. Justice Deneke conceded that under almost every known method for resolving contracts conflicts, California law would govern.<sup>191</sup> He declined to invoke the public policy exception in one of the more concise and cogent criticisms ever of that principle.<sup>192</sup> Instead, he subjected the policies underlying the conflicting laws of Oregon and California to full and impartial analysis, found them in irreconcilable conflict, and stated forthrightly that he could find no rational basis for holding that the policies of one state should be advanced at the expense of the other.<sup>193</sup> In such cases, Justice Deneke thought it was a forum court's duty to apply forum law: "Courts are instruments of state policy. The Oregon Legislature has adopted a policy to avoid possible hardship to an Oregon family of a spendthrift and to avoid possible expenditure of Oregon public funds. . . . In litigation Oregon courts are the appropriate instrument to enforce this policy."<sup>194</sup> The opinion is Brainerd Currie's interest analysis in its purest form, including his forum-law solution for true conflicts.

But now the interesting question: how might the case have been dealt with had the court been committed to today's Second Restatement approach? I want to preface the discussion of this question with a few general remarks about the judicial decision-making process. No one knows exactly why judges and courts decide cases as they do. On the surface it's

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186. *Id.*

187. *Id.*

188. *Id.* at 543-44. According to independent investigation, Lilienthal claimed that he had made routine credit checks which failed to disclose that Kaufman was a spendthrift. *Id.*

189. *Id.* at 549.

190. See, e.g., CAVERS, CHOICE-OF-LAW PROCESS, *supra* note 9, at 189-92; Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1597 (1978) (noting that the "plaintiff in *Lilienthal* would certainly not have made the loan if he had thought that it might be held unenforceable"). But see Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 323 (1990) (reasoning that the application of California's law would render Oregon's statute unenforceable).

191. *Lilienthal*, 395 P.2d at 546.

192. *Id.* at 548.

193. *Id.* at 549. Indeed, who among us is wise enough to say that protecting spendthrifts and their families is more or less important than validating contracts? It is quintessentially a legislative judgment.

194. *Id.*

the syllogism—the statement of a rule, the application of the rule to the facts, and the drawing of what appears to be the one-and-only, inexorable conclusion. QED. Holmes warned many years ago that while opinions are cast in the language of logic, values—conscious and subconscious—hidden from view, had more to do with outcomes than logic. He thought the actual determinants were more likely to be intuitions of public policy, moral and political beliefs, prejudices, and class and community beliefs.<sup>195</sup> These were powerful insights, and they are justly famous. But do many people pay attention to them today? Has Holmes become a prophet without honor in his own land?

The ever-proliferating law review literature is largely devoted to theory, as if it were rope with which to tie the hands of all whose concern is law and legal systems. The curricula of law schools continues unchanged, treating law as if it were a science existing in a vacuum—literally a law unto itself—with ever-fatter case books devoted to accounts of how the legal system has dealt with societal problems. Rarely do they deal with how these problems arose in the first place, much less the complex psychology and sociology of human behavior that made them possible. Prescriptions for how others should live, not attempts at understanding how and why they actually do live, continue to characterize conventional law school teaching.<sup>196</sup> Some of us are prone to believe that the legal system structures society; but it is much more likely to be the other way around.<sup>197</sup>

Yet insights from other disciplines are in short supply and, at least in my experience, are often treated with derision. Does legal education understand how closely allied it is with the vested interests of a business-oriented, capitalistic society and the perpetuation of values built around money, power, prestige, and greed—values that have meant prosperity both for business and the legal profession?<sup>198</sup> Do we understand that law itself is mainly a business and only marginally a noble profession dedicated to helping people in trouble, to liberty and justice for all, regardless of ability

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195. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465–66 (1897) (stating that decisions are made because of the “practice of the community or of a class . . . because of some attitude . . . upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions”).

196. *But cf.* Jeffrey Rosen, *The Social Police*, THE NEW YORKER, Oct. 20–27, 1997, at 170 (introducing a new movement of legal study that concentrates on the ways social norms and law can influence each other).

197. See, e.g., JAMES WILLARD HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY 1–27 (Da Capo ed. 1972) (1960); LAWRENCE M. FRIEDMAN & STEWART MACAULAY, LAW AND THE BEHAVIORAL SCIENCES 577–828 (2d ed. 1977).

198. See, e.g., RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 185–226 (1999).

to pay?<sup>199</sup> Our society today is awash in "rights," but the majority of people lack the knowledge and resources to enforce them. It is no coincidence that the benefits of this increasingly complex, sophisticated, theoretical science we call law are available primarily to those who are "haves" already, with the aim, naturally, of enabling them to keep what they've already got or add to it.<sup>200</sup> Is it, for most law schools and most law students, just a matter of which side the bread is buttered on?<sup>201</sup>

The foregoing exordium has a point. No two people are alike. No two judges are alike. Each of us is the product of all that we have lived through and experienced, and our visions have been warped in consequence. Our conceptions of what is fair, just, and right vary dramatically. Almost all judges have fairness and justice in mind as they decide cases; but these uncontroversial concepts are meaningless abstractions until they are given concrete content in cases. That content varies from one judge to another: how radical these variations are can be seen in the majority and dissenting opinions of any number of well-known cases.<sup>202</sup>

No system of rules yet devised has succeeded in producing lock-step decision making by courts. In this respect, I think the Second Restatement has a touch of genius decidedly lacking in its predecessor. It is clear and straightforward through the process of evaluating the relevant policies of the forum, and of other potentially interested states, in sections 6(2)(b) and (c). If the conflict is true, then the best the Second Restatement can do is suggest considerations that have been important through the years in the choice-of-law process and that judges should bear in mind when deciding the case before them. The Second Restatement cannot require a court to

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199. See generally SLOAN BASHINSKY, *THE HIGH LEGAL ROAD: A NEW APPROACH TO LEGAL PROBLEMS* (1990) (suggesting alternative solutions to legal problems that focus on spirituality and philosophical reflection).

200. See, e.g., Marc Galanter, *Why the "Haves" Come out Ahead: Speculation on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 95 (1974).

201. POSNER, *supra* note 198, at 281-95.

202. Compare, e.g., Judge Frank Easterbrook's textualist majority opinion in *United States v. Marshall*, 908 F.2d 1312, 1319-20 (7th Cir. 1990) (holding that the phrase "mixture or substance" in relation to LSD includes weight both of the drug itself and its carrier medium for sentencing purposes), with Judge Posner's dissent, *id.* at 1331 (stating "the statutory expression 'substance or mixture' . . . excludes the carrier medium"). *Marshall* was affirmed in *Chapman v. United States*, 500 U.S. 453, 456 (1991). Judges, needless to say, are not free to implement their own conceptions of "justice" in every case; they have been socialized by and are beholden to the legal system of which they are a part and are therefore constrained by system values—chiefly, effectuating the intent of the legislature in construing statutes; *stare decisis* and its related concerns for impartiality, certainty, predictability, and uniformity of result; and a sense of professional craftsmanship that makes them want to write opinions that are persuasive to their audience. See Samuel Mermin, *The Study of Jurisprudence—A Letter to a Hostile Student*, 49 *MICH. L. REV.* 39, 46-52 (1950) (explaining that a judge is influenced by elements of "ethics," "values," and "private truth").

venerate rule-of-law values such as certainty, predictability, and uniformity of result above all else. It cannot tell a court that a fair and impartial way of first choosing the governing law is more important than the outcome that the law produces in a given case. It cannot compel a court with the constitutional power to apply its own law—as with Minnesota in the *Hague* case and several others<sup>203</sup>—to defer to the law of some other state whose interests are more deeply affected. It cannot keep a court determined to do so from advancing its own state's interests at the expense of another's. And it certainly does not attempt to state categorically that in certain cases, one state's interests are clearly more deeply affected than another's. Wisely, the Second Restatement leaves these difficult decisions to the courts that have to make and live with them.

So, yes, in a sense, the Second Restatement is protean enough to support a variety of approaches to true conflict resolution. But in this it does no more than mirror the reality described above: the reality that courts are made up of judges of all political and jurisprudential stripes; that each court will have to decide for itself which values it will choose to further at the expense of others. The 1934 Restatement came about as close as humanly possible to adamant answers for all of these issues. It insisted on a fair and impartial way of first choosing the governing law, and then leaving the chips thereafter to fall where they may. Its systematic set of rules provided easy, instantaneous, and unvarying answers for almost every problem that could arise. And yet the 1934 Restatement failed, essentially because it made no allowance for the idiosyncratic nature of the human beings who had to use it. It robbed the decision-making process of all discretion save that of its inventor. Anyone with an appreciation for the vagaries of human nature might have predicted its fate. In the Second Restatement, the Reporter did not make the same mistake.

In *Lilienthal*, a glance at the five contacts of section 188 shows immediately that Oregon and California are the only states potentially interested in the application of their laws under the principles of section 6. Oregon's spendthrift statute was intended to protect Oregon spendthrifts and their families and to avoid the necessity of supporting them at taxpayer expense. Clearly this policy would be furthered by the application of Oregon law since Kaufman is an Oregon spendthrift.<sup>204</sup> California, on the other hand, treats spendthrifts like anybody else, and is interested in seeing that contracts made between its residents and others—particularly contracts

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203. See, e.g., *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1978), *aff'd*, 449 U.S. 302 (1981); *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973); *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980).

204. *Lilienthal*, 395 P.2d at 543-48.

made in California—are enforced.<sup>205</sup> Lilienthal, a California resident, plainly falls within the scope of this policy. The court knows at once that it is dealing with a hard case. Would Currie's final suggestion help—that the forum reconsider its policies and those of the other state to see if a more moderate and restrained interpretation of the one or the other would eliminate the conflict? It is possible that an Oregon court might decide that its spendthrift policy was intended only for Oregonians, not for cases involving contracts with out-of-state residents—a policy fit only for domestic consumption. The statute offers little warrant for this sort of restrained interpretation. Certainly a straightforward reading of its provisions suggests that as long as an Oregon spendthrift is involved, the statute ought to apply.<sup>206</sup> It would be presumptuous of the court to read the California statute as applying only to domestic cases, contracts made between Californians.

Is there any basis for concluding that one state's interests are more deeply affected than the other's? Superficially, the answer would appear to be no. If California's policy of protecting the security of transactions is upheld, Oregon's policy of protecting spendthrifts will be utterly frustrated, and of course the other way around. It might make sense, as one respected commentator has suggested,<sup>207</sup> to view the case in the following light: Oregon, relative to its population, has only a few spendthrifts to protect whereas California deals on a daily basis with thousands of contracts. If California law is applied, the damage to Oregon's domestic policy will be disproportionately greater than the damage to California's if one California

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205. The court gave equal weight to the importance of California's interests:

California's most direct interest in this transaction is having its citizen creditor paid. As previously noted, California's policy is that any creditor, in California or otherwise, should be paid even though the debtor is a spendthrift. California probably has another, although more intangible, interest involved. It is presumably to every state's benefit to have the reputation of being a jurisdiction in which contracts can be made and performance be promised with the certain knowledge that such contracts will be enforced.

*Id.* at 549.

206. An interesting question is why Lilienthal did not sue Kaufman in California; he could, in all probability, have obtained personal jurisdiction over Kaufman under California's liberal long-arm statute. Concurring specially, Justice O'Connell said that in order to distinguish the *Olshen* case on this ground:

[I]t would be necessary to assume that although the legislature intended to protect the interest of the spendthrift, his family and county when local creditors were harmed, the same protection was not intended where the transaction adversely affected foreign creditors. I see no basis for making that assumption. There is no reason to believe that our legislature intended to protect California creditors to a greater extent than our own.

*Id.* at 550.

207. See Kramer, *supra* note 190, at 323.

contract out of thousands is denied enforcement. This thinking reflects Professor Baxter's comparative impairment analysis,<sup>208</sup> and suggests that Oregon's interests would be more impaired, hence more deeply affected, than California's if California law were applied.

A more interesting question is whether the Second Restatement's most deeply affected formulation can support the route the court actually took—that of applying forum law—when a court believes, as Justice Deneke did, that “[t]he interests of neither jurisdiction are clearly more important than those of the other.”<sup>209</sup> There is no denying that Currie's solution has received exceedingly short shrift at the hands of courts and commentators.<sup>210</sup> A few jurisdictions use a forum-law solution but do so whenever the forum can claim any interest whatsoever in the application of its own law.<sup>211</sup> That approach seems unduly biased and self-serving; just because a forum has sufficient contacts to make application of its own law constitutional under the quite liberal *Hague* standard<sup>212</sup> cannot invariably mean that its interests are more deeply affected than those of some other state.<sup>213</sup> But Justice Deneke was right in perceiving that there was no rational way of weighing or evaluating the interests of Oregon and California with a view that one was more important than the other, at least without reverting to a subjective assessment of the content of the respective laws—a “better law” kind of analysis. But I do think a court respectful of its own sovereignty and that of the other state, when faced with a true legal dogfall<sup>214</sup> like this one, has a sworn constitutional obligation to put the interests of its own state first and uphold its own policies and laws. Courts are, as Justice Deneke stated, “instruments of state policy.”<sup>215</sup> It seems perfectly appropriate in cases of irreconcilable conflict for a forum court to defer to its own legislature's judgment (or to precedent if common law rules are involved) and simply say that in such cases the interests of the forum are more deeply affected.

Temperament, predisposition, Weltanschauung—call it what you like, but it is obvious that the outlook of judges and courts—their likes, dislikes, prejudices, intuitions, and moral and political values—are critical to the

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208. See Baxter, *supra* note 112 and accompanying text; *Bernhard v. Harrah's Club*, 546 P.2d 719, 723–24 (Cal. 1976) (applying Baxter's comparative impairment analysis).

209. *Lilienthal*, 395 P.2d at 549.

210. See *supra* Part I.

211. SCOLLES ET AL., *supra* note 4, at 100–01 (Kentucky, Michigan, and Nevada tort cases).

212. See *supra* notes 73–76 and accompanying text.

213. See Currie, *The Disinterested Third State*, *supra* notes 40 & 41 and accompanying text.

214. This happy phrase is from Chief Judge Alan Schwartz's dissenting opinion in *Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290, 303 n.11 (Fla. 3d Dist. Ct. App. 1983) (dissenting opinion).

215. *Lilienthal*, 395 P.2d at 549.

way that choice-of-law cases, like all others, are decided.<sup>216</sup> Why has the institution of contract been such a cherished value for most of this nation's history, reaching at one point the stature of constitutional right?<sup>217</sup> In the casebook staple *Milliken v. Pratt*, why did the Massachusetts Supreme Judicial Court attach more importance to validating an interstate contract than to protecting its own resident, who by Massachusetts law, was disabled from entering into the contract in the first place?<sup>218</sup> Fundamentally, the business of the United States has always been business. Our whole economic system is predicated on the ability of people freely to contract with one another with the assurance that their agreements will be enforced by a court if necessary.

Consider how simple it would have been for a court with a different temperament to have reached the opposite result in *Lilienthal* using the Second Restatement. If security of transactions had been uppermost as a value in the court's mind, California's interest in the integrity of the contractual process would surely have seemed weightier than Oregon's interest in extending a rather dubious sort of protection to a handful of people known as spendthrifts. This view would have been strengthened by Oregon's strong commitment to the protection of the contractual process, a policy shared in common with California and the rest of the states. The conclusion that California's interests were more deeply affected than Oregon's would have found strong support in some of the other principles of section 6. Section 6(2)(a)—the needs of the interstate system—with its emphasis on harmonious relations between the states certainly argues in favor of upholding agreements between their residents; Justice Deneke candidly recognized that one of Oregon's commercial interests in the case was to "encourage citizens of other states to conduct business with Oregonians."<sup>219</sup> A reputation for not honoring agreements would discourage commercial intercourse and might cause out-of-state residents to avoid dealing with Oregonians.<sup>220</sup> In the comments to section 188, Reese stated flatly that, "[p]rotection of the justified expectations of the parties is the basic policy underlying the field of contracts"<sup>221</sup> and that "this factor is

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216. See Holmes, *supra* note 195 and accompanying text.

217. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

218. *Milliken v. Pratt*, 125 Mass. 374 (1878). Sarah Pratt, a Massachusetts resident, had executed a surety agreement with a Maine merchant guaranteeing her husband's indebtedness, even though what was left of Massachusetts' married women's property acts disabled her from making such agreements. *Id.* at 376. The Massachusetts Supreme Judicial Court nevertheless held the contract valid and forced her to pay her husband's indebtedness. *Id.* at 383.

219. *Lilienthal*, 395 P.2d at 549.

220. *Id.*

221. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. b (1971).

of considerable importance with respect to issues involving the validity of a contract."<sup>222</sup> Protecting justified expectations, in turn, strongly suggests that California's interests are more deeply affected than Oregon's, and therefore, California law should apply. These values are rationally related to the values of "certainty, predictability and uniformity of result," as well.<sup>223</sup> It would be an easy approach stemming basically from the value judgment that the enforcement of interstate agreements is a value of considerable weight and importance, thus illustrating the content of the phrase "most deeply affected."<sup>224</sup>

A court whose dominant philosophy is one of rule-of-law values—impartiality, consistency, certainty, predictability, uniformity of result, and ease in the determination of the applicable law—might approach the case differently. It, too, would first ascertain through interest analysis under sections 6(2)(b) and (c) that it was dealing with a true conflict. The court would then turn in rote-like fashion to the applicable specific rule, in this case section 195, which provides in pertinent part that "[t]he validity of a contract for the repayment of money lent and the rights created thereby are determined . . . by the local law of the state where the contract requires that repayment be made . . . ."<sup>225</sup> In the comments to this section, the Reporter states:

Several factors serve to explain the importance attributed by the rule to the place where the contract requires that repayment be made. Repayment is the ultimate aim and objective of the contract, and the place where the contract requires that repayment be made will naturally loom large in the minds of the parties. Indeed, it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where repayment is to be made would be applied to determine many of the issues arising under the contract. The rule also furthers the choice-of-law values of certainty, predictability and uniformity of result and, since the state where the contract requires that repayment be made will be readily ascertainable, of ease in the determination of the applicable law.<sup>226</sup>

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222. *Id.*

223. *Id.*

224. *Id.* § 6 cmt. f.

225. *Id.* § 195. This is subject, of course, to the usual qualification of displacement if some other state has a more significant relationship under the principles of section 6.

226. *Id.* §195 cmt. b.

The application of the specific black-letter rule of section 195 would of course call for the application of California law. I quote the Reporter at length to illustrate the usefulness of the thoughtful comments that accompany all of the black-letter rules and to stress again their importance in understanding the design of the Second Restatement. And it is probably worth noting, too, that though not part of the Second Restatement's rules, leading commentators and many courts have proposed using the Rule of Validation—which calls for the upholding of contractual agreements on the reasonable assumption that parties intend to enter into a valid and binding arrangement, not an invalid one—to resolve contract conflicts cases.<sup>227</sup> So it would appear that the Second Restatement is capable of supporting just about any point of view that a court might wish to take in approaching a conflicts case like *Lilienthal*. Does this mean that it is a “flabby, amorphous, and sterile”<sup>228</sup> product or rather a carefully designed and well-thought-out document that makes allowance for the reality of judicial decision-making and for the different mentalities that the courts which use it are likely to favor? The latter is plainly the case. The 1934 Restatement was designed for automatons with no tolerance for the exercise of discretion in judging. It made no allowance for the widely varied temperamental values that characterize the human beings who are judges. The Second Restatement, without sacrificing rules, principles, and points of view based on a wealth of experience, takes this reality into account; it is suggestive rather than insistent and sufficiently open to diverse points of view as to be of real utility to judges who take the time to understand its structure.

Regrettably, there are courts that never get further into the document than the four contacts of section 145 or the five of section 188. There are courts that talk in terms of counting these contacts; that refer to the contacts as “significant relationships”; that are not above manufacturing other factors; and that, with no particular warrant, weight some more heavily than others.<sup>229</sup> There are courts that seem to have an instinctive distrust of interest analysis, and the concepts of true and false conflicts are utterly lost upon them.<sup>230</sup> Recall that one of Judge Fuld's criticisms of interest analysis was the difficulty of determining the policies underlying the conflicting laws.<sup>231</sup> Yet, this is a function performed by judges all the time when

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227. See, e.g., *supra* note 131 and accompanying text.

228. CRAMTON ET AL., *supra* note 3, at 300.

229. See, e.g., *Celotex Corp. v. Meehan*, 523 So. 2d 141, 143 (Fla. 1988).

230. See, e.g., *Tyson v. Great Atlantic & Pacific Tea Co.*, 812 F. Supp. 63, 65 (E.D. Pa. 1993).

231. This criticism seems to stem from the court's mistaken attribution of a third policy underlying guest statutes in *Dym v. Gordon*, 209 N.E.2d 792, 794 (N.Y. 1965). Currie recognized, however, that the task of identifying and articulating the social, economic, and administrative policies

dealing with their own state's statutes. Usually the text of the statute itself makes its policy and purpose clear. This may be an easier endeavor when a court is attributing policies to its own laws than when it is looking at the law of a distant state. But with computers it is an easy matter today to look at a foreign statute's history and any cases that may have construed it; an authoritative statement of the purpose of a statute isn't a rare thing to find in judicial opinions. Failing that, I think an interest analysis court is entitled to ask itself what a reasonable legislature would have intended the language to accomplish and rule in favor of the common sense answer to that question. There is no duty on a court to conduct a detailed and time-consuming evaluation of obscure sources of legislative history. Of course, there will always be courts and advocates who manufacture "interests" out of whole cloth, inventing and then attributing policies to a statute that either calls for its application or not, depending on how they want the case to come out.<sup>232</sup> Needless to say, this is not the fault of interest analysis, but of those who choose to abuse it. Finally, there is no question that some courts, under the guise of assessing interests, take the content of the competing laws into account in order to choose the one that tends to produce the desired result—a covert use of the "better law" concept. For all of this, the Second Restatement is not to blame. It is more malleable than its predecessor, reflecting the reality of diverse judicial temperaments and the fact that the entire subject of conflict of laws continues in flux with nothing approaching universal agreement on the resolution of some very complex cases.

### CONCLUSION

If the Second Restatement is as bad as some of its critics maintain, then it will no doubt go the way of the original Restatement, replaced by a Third that may or may not cure what is perceived to be a wishy-washy document, that fails to provide unambiguous answers for every problem that may arise. It is easy to sense the academic touch in all of this, for the vocation of many law professors is the search for a philosopher's stone that will bind the world with rules of their devising and create that state of certainty that Holmes called "illusion."<sup>233</sup>

One of our proudest boasts is that we are a government of laws, not human beings. But bear in mind, human beings made our laws, and human beings interpret, implement, and enforce them. If the proper study of

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embodied in rules of law could be problematic. Currie, *Survival of Actions*, *supra* note 154, at 171-72; Currie, *The Verdict of Quiescent Years*, *supra* note 114, at 591-92.

232. See, e.g., Reese, *supra* note 68, at 511; Laycock, *supra* note 3, at 286.

233. Holmes, *supra* note 195, at 466.

mankind is man, then it seems that the proper study of our legal system is not precepts, prescriptions, and principles exclusively, but rather the human beings whose business it is to write and implement the laws. A large part of legal education is learning why things are the way they are and why others have said they ought to be that way. Just to learn that is a feat in itself. As our form of government becomes increasingly complex, there are more and more of those lessons to learn. Yet, what we learn seldom includes much consideration of how things ought to be; there isn't time for it, and there aren't many "ought" issues on bar examinations.<sup>234</sup> Money, power, status, and prestige continue to drive us as a nation. As long as these are the preeminent values of society—now neatly packaged for exportation on an increasingly global scale—change is unlikely, and pressing issues—our staggering prison population, population growth, exploitation of the environment, and unequal treatment for people who are theoretically equal—will continue to be "addressed," but not dealt with.<sup>235</sup>

These concerns are only tangentially related to the Second Restatement, but not to those who use it. A great many knowledgeable people, scholars mostly, regard it as a dismal failure and due for massive overhaul. I choose to end, however, with the remark of J.H.C. Morris, chief editor of five editions of *Dicey's Conflict of Laws*, who called the Second Restatement the "most impressive, comprehensive and valuable work on the conflict of laws that has ever been produced in any country, in any language, at any time."<sup>236</sup>

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234. Mermin, *supra* note 202, at 47 (defining the "ought" as "an element which closely resembles the kind of thing involved in your 'private truth'").

235. See GARY ZUKAV, *THE SEAT OF THE SOUL* 19–32 (Fireside ed. 1990) (1989) (theorizing that human beings should focus on evolving into a society that values others more than themselves); ANTHONY O'HEAR, *AFTER PROGRESS: FINDING THE OLD WAY FORWARD* 157–251 (1999) (arguing that enlightenment in today's world is found in humility, not religion, philosophy, art, psychology, or politics).

236. J.H.C. Morris, *Law and Reason Triumphant or How Not to Review a Restatement*, 21 AM. J. COMP. L. 322, 330 (1973) (reviewing *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* (1971)).

