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Whereof One Cannot Speak: Legal Diversity and the Limits of a Restatement of Conflict of Laws

PERRY DANE*

I.

How much can a Restatement of Conflicts say about the law of choice of law? Several papers in this Symposium have addressed that question, though usually while discussing the vague or uncertain state of choice of law today. I want to take a different tack on the subject, focusing on analytic boundaries in the structure of choice of law itself.

A legal system's impulse to tackle choice of law can take two different forms.¹ On the one hand, it might reflect a forum's effort to rise above itself, so to speak, and decide, by its own lights but from a neutral perch, which law properly applies to a given issue in a jurisdictionally complex case. This view treats choice of law as a *second-order* legal process, which is to say as a law about the division of legal authority.² On the other hand, choice of law might not arise out of a position of neutrality at all. Instead, it might be an effort by a legal system (possibly but not necessarily the forum) to work out *its own substantive doctrine* in the light of the sheer *fact* of jurisdictional complexity. This view treats choice of law as a *first-order* legal process.³ It represents not the allocation of prescriptive (legislative) jurisdiction, but its exercise.⁴

This dichotomy between a *second-order* and a *first-order* view of choice of law can be a basis for categorizing entire choice-of-law theories. Crudely put, traditional Vested Rights theory tended to see choice of law as a second-order process and at least some modernist theories tended to see it as a *first-order* problem.⁵ I want to put the distinction between *first-order* and *second-order* choice of law to a different use here, however. I want to suggest that *any* account of choice of law can include variations on *both* these impulses, embedded one inside the other in interesting and revealing ways. And I want to argue that, for both theoretical and practical reasons, untangling the two levels of analysis is important. More particularly, a restatement of choice of law, if it is done right, should be sensitive to the interplay between these stances. For it is partly through such an understanding that such a restatement could

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1. The dichotomy I am drawing is similar, but not identical, to the familiar distinction between "multilateral" and "unilateral" accounts of choice of law, which figures in some of the other articles in this Symposium. To avoid confusion, I will stick to my own description and terminology.

2. See Perry Dane, *Conflict of Laws*, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 209, 210 (Dennis Patterson ed., 1996).

3. See *id.* at 216-17, 219.

4. See *id.* at 210, 217.

5. See Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987); see also Dane, *supra* note 2 (discussing several dimensions along which choice-of-law theories differ).

embody a more sophisticated sense of the limits on what it can say about choice of law.

I could work out these abstractly put propositions in further analytic detail.⁶ For the limited purposes of this Comment, however, I want instead to go on by way of example.

One place to begin is the *Restatement of the Law of Conflict of Laws*⁷ (“*First Restatement*”) treatment of the choice of law of marriage. This topic has come to life again with the current debate over same-sex marriage. Rather than venture into that debate directly, however, I want to dissect the *Restatement*’s specific concerns.

The first rule in the *First Restatement*’s discussion of marriage—and what appears at first to be its fundamental rule—appears in section 121: “Except as stated in [sections] 131 and 132, a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with.”⁸ This looks like one of the *First Restatement*’s infamous act-territorial rules, along the same lines as, say, its basic rules for contract and tort.⁹ But what about the exceptions? The more important of the two sections referenced in section 121 is section 132:¹⁰

A marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases:

- (a) polygamous marriage,
- (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil,
- (c) marriage between persons of different races where such marriages are at the domicil regarded as odious,
- (d) marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state.¹¹

On a cursory reading, the import of this rule seems to be, that in the *First Restatement*’s *second-order* mapping of the world, prescriptive jurisdiction over marriage is split, with the place of celebration governing most issues and the domicile of the parties governing a small set of special situations, such as polygamy. A closer look, however, reveals something different. For one thing, clause (d) of section 132

6. An article in the works does just that.

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

8. *Id.* § 121.

9. *See id.* § 332 (“The law of the place of contracting determines the validity and effect of a promise with respect to” most matters); *id.* § 378 (“The law of the place of wrong determines whether a person has sustained a legal injury.”). By *act-territorial*, I mean what most commentators refer to as *territorial*. As I have noted elsewhere, however, domicile-based choice-of-law principles are also *territorial* in their way, except that rather than focusing on *where* certain acts occurred, they focus on *where* certain persons came from. *See* Dane, *supra* note 2, at 211.

10. *See infra* note 21 (briefly discussing section 131).

11. FIRST RESTATEMENT, *supra* note 7, § 132.

recognizes the power of a statute at the domicile to veto *for any reason* a marriage celebrated elsewhere. And consider this sweeping language in the comment to section 132:

The rule stated in this Section recognizes the paramount interest of the domiciliary state in the marital status. . . .

Clauses (a), (b), and (c) state respects in which a marriage may offend the strong policy of the domiciliary state. This statement, however, is not intended to be an exclusive enumeration and if a marriage offends a strong policy of the domicil in any other respect, such marriage will be invalid everywhere.¹²

The *First Restatement*, that is to say, does not merely contemplate that the domicile has a potential veto over a well-defined subset of issues. It recognizes in the domicile an absolute power, exercisable by statute or otherwise, to control for any reason the validity of its people's marriages celebrated anywhere. Put another way, if a marriage of a domiciliary conducted outside the domicile *is* valid, it is only by the permission of the domicile.¹³

This reading, in turn, requires a new look at section 121, which provides that, under most circumstances, "a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with."¹⁴ At first, section 121 had looked like a typical *First Restatement* rule—a *second-order*, territorially based, allocation of prescriptive jurisdiction. In truth, however, section 121 does not recognize in the place of celebration any independent power to validate marriages.¹⁵ Rather, it reflects the *first-order* substantive decision of domicile states to recognize, by their own law, most marriages performed in accordance with the law of the place of celebration.¹⁶

Why would domiciles defer so? The most obvious reason is for the sake of simplicity, predictability, and the convenience of the parties. On the whole, it is practical to let the prerequisites and formalities of marriage be handled by the place where the marriage is celebrated. In general, a domicile probably cares more that there *be* formalities than about their details.¹⁷ Moreover, most domiciles presumably

12. *Id.* § 132 cmts. a & b.

13. Whether the *First Restatement's* assignment of ultimate prescriptive jurisdiction to the domicile accurately reflected American case law at the time, or the view of other commentators, is beyond the scope of this Comment.

14. FIRST RESTATEMENT, *supra* note 7, § 121.

15. It might recognize a separate power in the place of celebration to *invalidate* a marriage, but that is a separate matter.

16. This point is stated much more clearly in Joseph Beale's treatise, which was published around the same time as the *First Restatement* he took the lead in drafting. While the *Restatement* begins with a general rule that looks act-territorial, and only raises the role of the domicile by way of an exception to that general rule, the treatise much more clearly begins by declaring that the domiciles of the husband and wife are "regarded as having the jurisdiction to establish the marriage relation." 2 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 121.2, at 667 (1935). Thus, because either state can "create or refuse to create the status of marriage . . . , the most important inquiry in the case of a disputed marriage is, therefore, 'What is the law of the domicil of the parties on this point?'" *Id.* at 668.

17. This is also reflected in the domestic marriage statutes of most states in the United

prefer to “sustain marriages, not to upset them.”¹⁸ But in the scheme of the *First Restatement*, a domicile remains free—in marriage, but not tort or contract—to exercise its own prescriptive jurisdiction whenever it cares enough to do so.

Seen in this light, some of the apparent contradictions in the *First Restatement*'s treatment of marriage dissolve. For example, section 129 provides that a marriage will not be invalid solely because “the parties to the marriage went to [another] state in order to evade the requirements of the law of their domicil.”¹⁹ But the comment to section 129, and even more definitively a comment to section 132, make clear that a statute in the domicile, such as the Uniform Marriage Evasion Act, can, either expressly or as interpreted, invalidate such marriages, not only in the domicile, but “everywhere.”²⁰ There is no real inconsistency, however, because section 129, rather than stating a broad principle freeing “evading” parties from the grip of their domicile, is merely an interpretive canon as to the meaning of the law of the domicile.

This clarification, however, also suggests a problem with the *First Restatement*'s formula. For if section 129 is only a canon for interpreting the domicile's municipal law, then what business is it of the *Restatement* to provide such a canon? Admittedly, this piece of municipal law concerns an extra-territorial event, but it is still a *first-order* piece of law: the domicile's effort to respond, from its own point of view, to the fact of territorial complexity. And because the *First Restatement* generally embodies a theory of choice of law as a *second-order* enterprise, for it to include such a *first-order* canon of construction without a warning label is misleading and overreaching.²¹

States, which typically allow the parties a wide range of options—both secular and religious—for formalizing their marriages.

18. *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949).

19. *FIRST RESTATEMENT*, *supra* note 7, § 129.

20. *Id.* § 132 cmt. e.

21. A similar problem infects section 131, the other stated exception to section 121. Section 131 provides that:

If by statute each party to a divorce granted in the state is forbidden for a certain time or during the life of the other party, to marry again, and one party goes into another state and marries, being permitted to do so by the law of that state, the marriage is valid everywhere, even in the state where the divorce was granted, unless . . . the statute which forbids the parties to marry is interpreted as being applicable to the marriage of domiciliaries in another state.

Id. § 131. This section, by its own terms, merely states a default rule for the interpretation of a statute at the domicil. *See id.* at § 131 cmt. a. But what business is it of a choice-of-law regime to interpret a statute? There is, interestingly, a genuine *second-order* rule lurking in the discussion: such disabling statutes, the *Restatement* proposes, are only effective as long as a party remains domiciled in the state that granted the divorce. *See id.* But this important idea, which does go to a matter of prescriptive jurisdiction, is buried in the *Restatement* comment. *See id.*

A more mysterious, related, provision is section 130, which denies even potential extra-territorial effect to divorce *decrees* disabling only *one* party from remarrying (as opposed to *statutes* disabling *both* parties, whose effect is recognized in section 131). *See id.* §§ 130, 131. But, as I discuss below, there is no reason for a *second-order* choice-of-law regime to care whether a legal system exercises its prescriptive jurisdiction through statutes or judicial decrees. *See infra* text accompanying note 23.

More generally, this analysis suggests that section 132 itself (the broader rule governing marriages contrary to the law of the domicile)²² is both falsely precise and analytically muddy. Consider again, for example, clause (d), which treats as invalid “marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state.”²³ This formulation is arbitrarily narrow. If the point is to recognize the “paramount interest” and authority of the domicile, why should it matter whether the domicile exercises that authority by way of a *statute* rather than a judicial precedent or some other means?²⁴

Of course, if the drafters had replaced the word “statute” in clause (d) with “legal norm” or some other general term, that would have rendered clauses (a), (b), and (c) superfluous. But that, in turn, reveals the pernicious confusion of those formulations.

Recall the litany: “(a) polygamous marriage, (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil, (c) marriage between persons of different races where such marriages are at the domicil regarded as odious.”²⁵

Several problems are obvious here. First, if these categories do not constitute an “exclusive enumeration,”²⁶ then the *First Restatement* is unnecessarily and invidiously putting its imprimatur on three specific grounds of possible invalidity. The inclusion of clause (c) is particularly malevolent, and not only because it now appears so anachronistic.

Second, the specific terms of the three clauses are strange. Apparently, the law of the domicile will invalidate a polygamous marriage without qualification, an incestuous marriage only if it violates a “strong public policy of the domicil,” and an interracial marriage that the domicile regards as “odious.”²⁷ Moreover, while the *Restatement* comment insists that “[w]hether a marriage comes within the rules stated in clauses (a) and (b) is to be determined by the law of the domicil,”²⁸ it applies a distinct, odd and atypically sociological, standard, to clause (c):

Whether a mixed marriage is so odious as to fall within clause (c) is to be determined in view of the social customs of the domicil . . . Such a marriage, to

22. See FIRST RESTATEMENT, *supra* note 7, § 132.

23. *Id.*

24. The drafters, in specifying statutes, undoubtedly had in mind case law that allowed marriages to be invalidated on the basis of either *natural law* or *positive law*, which is to say statutes. See, e.g., *Cunningham v. Cunningham*, 99 N.E. 845, 848 (N.Y. 1912); *Van Voorhis v. Brintnall*, 86 N.Y. 18, 26 (1881); *State v. Fenn*, 92 P. 417, 418 (Wash. 1907). But while a particular legal system might choose to assign the task of interpreting *natural law* to courts and the task of enacting *positive law* to legislatures, it seems beyond the purview of *choice of law* to elevate that view into a universal principle. Moreover, since the drafters of the *First Restatement* abandoned the term *natural law*, presumably to avoid its philosophical ambiguities, it made little sense for them to retain, as a distinct category, the other half of the natural law/positive law matched set.

25. FIRST RESTATEMENT, *supra* note 7, § 132.

26. *Id.* § 132 cmt. b.

27. *Id.* § 132.

28. *Id.* § 132 cmt. c. Compare this to the *Second Restatement's* very different view. See *infra* note 41.

be odious as the word is used in this Section, must not only be prohibited by statute but must offend a deep-rooted sense of morality predominant in the state.²⁹

But what justifies these distinctions? One might imagine some arcane set of *second-order* divisions of prescriptive authority that defined, in minute detail, the scope of a domicile's power to affect various specific types of marriages entered into by its domiciliaries elsewhere. But, as noted, both clause (d) and the comments to section 132 suggest a more general, undifferentiated, and unqualified allocation of authority.³⁰ Nothing in section 132, for example, would (much as we would hate it) prevent a domicile that forbids interracial marriages from applying that law extra-territorially even if it did not reflect "a deep-rooted sense of morality predominant in the state."³¹ For that matter, the overall logic of section 132 suggests—contrary to the assumption of clause (a)—that a domicile in which polygamy was illegal could, if it so willed, choose *not* to forbid its domiciliaries from entering into a polygamous marriage elsewhere.

This discussion suggests, in turn, the deepest analytic problem with clauses (a), (b), and (c). The *First Restatement* suggests that the common thread here is that "if a marriage violates a particularly strong policy of the domicil of either party, it will be invalid" everywhere.³² But whether or not a marriage "violates a particularly strong policy of the domicil"³³ is not really the question, at least not directly. The real issue, as captured clearly only in clause (d), is whether the domicile chooses to apply a particular restriction extraterritorially. A domicile might choose to do so, even if the restriction did not rise to the level of reflecting a "particularly strong policy."³⁴ Conversely, a domicile might choose to allow its domiciliaries an escape valve even as to marriages that *did* violate its public policy.³⁵

29. FIRST RESTATEMENT, *supra* note 7, § 132 cmt. c. This cryptic and unique formulation is illuminated somewhat by the discussion in Joseph Beale's treatise:

If parties domiciled in a southern state leave the state and go to another state which permits such a union, and are there married, the marriage is nevertheless void by reason of this overwhelming policy of the domicil. If, on the other hand, parties to such a marriage are domiciled in a northern state the marriage will be held good in spite of a prohibition at the domicil. The difference lies in the differing effect on the public mind in the two sections of the country. In the south miscegenation is socially odious; in the north it is merely unwise.

2 BEALE, *supra* note 16, § 1.32.3, at 691 (footnotes omitted).

30. See FIRST RESTATEMENT, *supra* note 7, § 132(d) cmts. a-e.

31. *Id.* § 132 cmt. c. Of course, other principles, such as the norms of constitutional or international human rights law, or even natural law as understood in the forum, might trump such restrictions. But they would presumably (though not necessarily) trump them as much for marriages performed at the domicile as for those performed elsewhere. See *Loving v. Virginia*, 388 U.S. 1 (1967).

32. FIRST RESTATEMENT, *supra* note 7, § 132 cmt. a.

33. *Id.*

34. *Id.*

35. Israeli law, for example, because it makes no provision for purely secular marriage, effectively bars a wedding, in Israel, between a Jew and a non-Jew. Nevertheless, Israel recognizes civil marriages, including interfaith marriages, entered into by its domiciliaries elsewhere. See Izhak Englard, *The Relationship Between Religion and State in Israel*, in

If my argument so far stands, then Joseph Beale and his colleagues, in drafting at least the black-letter rule of section 132, should really have said, simply if tautologically, something like this:

A marriage which is against a legal norm of the state of domicile of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere if that legal norm, explicitly or as interpreted, makes the marriage void even though celebrated in another state.

Or, simpler yet, they could have begun their treatment with something like the language in Beale's own treatise:

Since the domicile of a party to the marriage has jurisdiction to establish the relation, it may create or refuse to create the status of marriage, and the most important inquiry in the case of a disputed marriage is, therefore, "What is the law of the domicile of the parties on this point?"³⁶

That the *First Restatement* did not read this way has several explanations. The most obvious, however, is that Beale and his colleagues were trying to do a few things at once. First, they were setting out the abstract, second-order principle that the states of domicile ultimately control parties' entitlement to marry. In addition, though, they were trying to report, in the concrete, how domiciles operating in the common law tradition tended to exercise that control. And, third, they were trying to discourage, without actually proscribing, such control when it became, in the words that Beale used in his treatise, "unsound," "selfish," and "exceptional."³⁷

The problem here is not that the drafters of the *First Restatement* had several goals. Every restatement has to maintain a balance between the theory and doctrine, and between the descriptive and the prescriptive.³⁸ The difficulty, however, arises out of a complication peculiar to the effort to "restate" choice of law.

Publishing a restatement of *choice of law* is an ironic act. The project of all the restatements, of torts and contracts and the rest, is partly to spur uniformity in the law.³⁹ But if the law ever truly became uniform, there would be no need for choice of law, or for a restatement thereof. The solution to the paradox is that a restatement of conflicts, even as it tries to build common ground on choice of law, must also respect the lack of common ground elsewhere. It must, to be true to its own task, assume that the other restatements will fail in their ambitions. Hence, a restatement of choice of law needs to distinguish, carefully and rigorously, between choice of law and municipal law. It can prescribe the former but not the latter.

What I have called *first-order* choice of law—a legal system's effort to work out its own substantive doctrine in the light of jurisdictional complexity—occupies a gray

JEWISH LAW IN ANCIENT AND MODERN ISRAEL 168, 180 (Haim H. Cohn ed., 1971).

36. 2 BEALE, *supra* note 16, § 121.2, at 668; *see supra* note 16.

37. 2 *id.* § 132.6, at 696-97.

38. *See* Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute: The Fairchild Lecture*, 1995 WIS. L. REV. 1, 19; Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1005 (1985).

39. *See generally* John P. Frank, *The American Law Institute, 1923-1998*, 26 HOFSTRA L. REV. 615 (1998).

zone between municipal law and *second-order* choice of law. Nevertheless, to the extent that *first-order* choice of law proceeds from the substantive concerns of particular legal systems, a restatement of choice of law needs to treat such *first-order* questions with care and humility.

By overreaching in section 132, the *First Restatement* encouraged confusion in both the short and the long term. In the short term, imagine yourself as a judge in the state of domicile. You want to defer to the best current learning on the rights-creating power of other jurisdictions. But you also want to be faithful to your own state's possibly idiosyncratic views of marriage. What do you make of section 132, and its relation to section 121?

In the long term, the *First Restatement* blunted the import of its striking claim that the domicile had ultimate prescriptive authority over the validity of a marriage. Significantly, the *First Restatement's* section on marriage is one of the few in which the drafters put aside their usual act-territorial focus and identified the domicile as the definer of rights. Moreover, they justified their analysis with a notably modern-sounding reference to the "interests" of the domicile.⁴⁰ Nevertheless, the text they wrote too easily reads as if it is only positing an "exception" to an essentially act-territorial "rule."⁴¹ And the effect of that confusion continues to influence the contemporary debate about the potential interstate recognition of same-sex marriages.⁴²

Now, it might be said, for both the short and the long term, that to encourage domiciles to give up their peculiar or onerous views of marriage is a good thing. But that brings me back to my basic point. Choice of law is about legal diversity. If there is a felt need to reduce that diversity, that should be the task of another, substantive, restatement, not this one.

I am not suggesting that the *First Restatement* should just have left matters with an unparsed black-letter rule stating that the validity of a marriage is left to the law of

40. I do not warrant that they meant the same thing by "interests" as modernist authors do.

41. The *Second Restatement* gels this more limited view of the domicile's role by directing the forum, not simply to construe and defer to the domicile's will regarding the validity of a marriage, as the *First Restatement* does, but to subject that will to an objective test of legitimacy and intensity. Compare RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 cmt. k (1971) [hereinafter SECOND RESTATEMENT] ("The forum will apply its own legal principles in determining whether a given policy is a strong one within the meaning of the present rule"), with FIRST RESTATEMENT, *supra* note 7, § 132(d) (requiring deference to any statute of the domicile that makes a marriage of domiciliaries "void even though celebrated in another state"), and *id.* § 132 cmt. c ("Whether a marriage comes within the rules stated in clauses (a) and (b) is to be determined by the law of the domicil . . .").

The *Second Restatement's* black-letter rule reads as follows:

- (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.
- (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

SECOND RESTATEMENT, *supra*, § 283.

42. I should emphasize that I have no ideological agenda in making this point.

the domicile. To fail to note that, most of the time, domiciles do recognize marriages valid under the law of the place of celebration would have been deceptive. In particular, any treatment of the subject must record the sheer fact that most states, in their *first-order* legal ordering, do not apply the full range of their local rules of decision to marriages of their domiciliaries performed elsewhere. The trick, however, is to distinguish, both between *first-order* and *second-order* choice-of-law rules, and between factual generalization and analytic prescription. And the challenge is to weave such distinctions into the otherwise directive, quasi-statutory, language of the *Restatement*.⁴³

II.

I have worked at length unpacking the *First Restatement's* discussion of marriage, but not because its errors are incurably damning. To the contrary, the bits of confusion I have examined are relatively simple to pierce and the deeper immanent logic of the *Restatement's* analysis is relatively easy to uncover. That is one reason the example is so interesting and revealing.

To see a more acute analytic muddle at work, consider, for example, the *Second Restatement's* treatment of choice-of-law clauses in contracts. Choice-of-law clauses purport to require that a given jurisdiction's body of law apply to a contract. They become difficult and controversial when their application would avoid what would otherwise be a mandatory, unwaivable, restriction on the contract. Interestingly, the division of opinion about the enforceability of choice-of-law clauses does not track the general split between "traditional" and "modernist" choice of law. Both Joseph Beale—the great traditionalist—and Brainerd Currie—the radical modernist—believed that choice-of-law clauses violated the sovereign prerogative of the legal system whose law would otherwise apply.⁴⁴ The *Second Restatement*, however, following in a line of more eclectic treatments of the subject, urged forums

43. In this respect, the drafters of the *First Restatement* might have profitably cribbed their text from (gasp!) *Corpus Juris*:

The general rule is that the validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be held valid everywhere, and conversely if invalid by the *lex loci contractus*, it will be held invalid wherever the question may arise. An exception to the general rule, however, is ordinarily made in the case of marriages repugnant to the public policy of the domicile of the parties, in respect of polygamy, incest, or miscegenation, or otherwise contrary to its positive laws.

38 C.J. *Marriage* § 3, at 1276-77 (1925) (footnotes omitted), quoted in *Ng Suey Hi v. Weedon*, 21 F.2d 801, 801-02 (9th Cir. 1927).

44. See 2 BEALE, *supra* note 16, § 332.2, at 1079-80; BRAINERD CURRIE, *Conflict, Crisis and Confusion in New York*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 690, 732-33 (1963); BRAINERD CURRIE, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS, *supra*, at 77, 103 [hereinafter CURRIE, *Married Women's Contracts*].

to show substantial deference to choice-of-law clauses, at least unless “application of the law of the chosen state would be contrary to a fundamental policy” of the state whose law would otherwise apply.⁴⁵

For present purposes, I am less interested in the exact contours of the *Second Restatement*'s rule than in its general rationale for enforcing choice-of-law clauses. That rationale appears in an official comment:

Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations.⁴⁶

The problem with this reasoning is obvious.⁴⁷ When the *Second Restatement* purports to describe the “prime objectives”⁴⁸ of contract law, to which “contract law” is it referring? Different systems and theories of contract law weigh party autonomy and the protection of expectations to different degrees and in different ways against other values. Moreover, the source of the controversy here is that one of the parties is invoking a choice-of-law clause to avoid a rule of law—such as capacity or consideration or the statute of frauds—that, in the legal system whose law would by hypothesis otherwise govern the contract, generally overrides the stated expectations of the parties.⁴⁹

So which “contract law” is the *Second Restatement* talking about? I see four possibilities. First, the *Restatement* might be invoking a truly trans-jurisdictional body of law such as constitutional law, public international law, or even natural law. But that seems doubtful.

Second, the *Restatement* might be looking to the state whose legal norm would otherwise apply, claiming that even that state would, absent its own “fundamental

45. SECOND RESTATEMENT, *supra* note 41, § 187(2)(b). The *Second Restatement*'s rule contains other qualifications not relevant to my discussion here.

Section 187(2) concerns issues that the parties could not have resolved by an “explicit provision in their agreement directed to that issue,” which is to say to issues involving mandatory, otherwise unwaivable, rules. *Id.* § 187(2). Section 187(1) concerns the applicability of choice-of-law clauses to issues that the parties could have resolved by an explicit provision, which is to say to issues involving merely supplementary or gap-filling norms of contract law. *See id.* § 187(1). Under those circumstances, it urges deference to the choice of the parties without any of the qualifications contained in section 187(2). *See id.* My discussion here focuses on the problem raised by section 187(2).

46. *Id.* § 187 cmt. e.

47. I put aside here the objection that “certainty and predictability,” as such, would be equally served without enforcing the parties’ choice of law, if the prevailing choice-of-law rule on which law would apply were sufficiently clear and specific.

48. *Id.*

49. *See supra* note 45.

policy"⁵⁰ to the contrary, choose to respect the parties' choice-of-law clause. Enforcement of the choice-of-law clause would thus rest on the self-effacement of the state whose law would otherwise apply, analogous to the domicile's deference in questions of marriage to the law of the place of celebration as described in the *First Restatement*.⁵¹ For the analogy to work, however, the *Second Restatement* would also have to recognize a power in the state whose law would otherwise apply *not* to allow binding effect to the choice-of-law clause. The hitch is that the *Second Restatement* specifically provides that, in determining whether a policy is "fundamental," the forum should look to "its own legal principles."⁵² That is to say, even if the state whose law would otherwise apply would not enforce the choice-of-law clause, a forum guided by the *Second Restatement* might.

This leaves the possibility that the values and "objectives" that the *Second Restatement* invokes are, in some form, part of the law of the forum. Indeed, this does appear to be what the *Second Restatement* drafters had in mind, as suggested, for example, by their effort to rebut the objection that enforcing choice-of-law clauses "would be tantamount to making legislators"⁵³ of the parties:

There is nothing to prevent the forum from employing a choice-of-law rule which provides that, subject to stated exceptions, the law of the state chosen by the parties shall be applied to determine the validity of a contract and the rights created thereby. The law of the state chosen by the parties is applied, not because the parties themselves are legislators, but simply because this is the result demanded by the choice-of-law rule of the forum.⁵⁴

But "the choice-of-law rule of the forum" can mean two different things. The *Second Restatement* might be arguing that its view of choice-of-law clauses deserves to be embedded in the forum's *second-order* account of the law of choice of law. Or it might be looking to the forum's *first-order* account of contract law in jurisdictionally complex cases. Unfortunately, the *Second Restatement's* discussion is opaque as to which of these interpretations it has in mind. Moreover, both options have their difficulties. As a *second-order* value of the forum, a duty to enforce the will of the parties as a "prime objective[] of contract law"⁵⁵ is too partisan, at least without considerably more elaborate argument.⁵⁶ As a *first-order value*, such a duty—for the reasons I gave in my discussion of marriage—is just not the business of a restatement of conflicts, at least when it speaks in its most peremptory voice.⁵⁷

Again, I do not deny that *first-order* choice-of-law norms are matters of legitimate interest to any account of choice of law. Such norms, as I have emphasized, do

50. SECOND RESTATEMENT, *supra* note 41, § 187(2)(b).

51. FIRST RESTATEMENT, *supra* note 7, § 121.

52. SECOND RESTATEMENT, *supra* note 41, § 187 cmt. g.

53. *Id.* § 187 cmt. e.

54. *Id.*

55. *Id.*

56. I can imagine, for example, an appeal to legal pluralism and nonstate legal ordering. But the *Second Restatement* explicitly rejected that sort of conceptual apparatus. *See id.*

57. I do not mean to suggest that there are no good arguments for the enforcement of choice-of-law clauses. I actually believe that there are several such arguments that avoid the pitfalls I have described, but they are beyond the scope of this Comment.

occupy a gray zone between *second-order* analysis and pure municipal law. The *Second Restatement* could, for example, usefully have discussed how different views of contract law can suggest different views of the enforceability of choice-of-law clauses. It might even have gently suggested that, to the extent that choice-of-law clauses arise in situations of geographical complexity, a legal system—whether the forum or the state whose law would otherwise apply—might see fit to revise or relax the ordinary assumptions its contract law brings to bear in purely domestic cases. But this would have required conclusions far more contingent than the drafters of the *Second Restatement* were interested in pronouncing. Instead, the *Second Restatement* engaged in a sleight of hand, dressing up *first-order* contract law values with the prestige of *second-order* argumentation. It disrespected the very diversity of substantive legal views that requires the existence of law in the first place.

Some might say that I am picking nits here. The *Second Restatement* is not a statute. A forum that placed less substantive value than the *Second Restatement* does on enforcing the expressed will of parties to a contract, even in jurisdictionally complex cases, could just reject the *Second Restatement's* rule on enforcing choice-of-law clauses, whether it read that rule as *first-order*, *second-order*, or fifth-dimensional. But this objection neglects the *Restatement's* normative position in the legal culture, and its obligation of discursive integrity. It is not nitpicking to imagine a forum seeking guidance on the larger legal community's modern views of that forum's interjurisdictional responsibilities,⁵⁸ but also wanting to stick to its own restrictive or paternalistic guns on the substance of contract law, including contract law in jurisdictionally complex situations. When a judge in such a jurisdiction reads, for example, that "the demands of certainty, predictability and convenience dictate that, subject to some limitations, the parties should have power to choose the applicable law,"⁵⁹ what is she to think?

III.

I have devoted this Comment so far to examples from the *First* and *Second Restatements*. That focus invites the argument, I suppose, that what I have to say, and the analytic stance I have taken, would be of little relevance to at least some visions of a possible third restatement.

Notice how, already, in discussing the *Second Restatement's* contract rule, I suggested that the rule might reflect the *Second Restatement's* view of the *first-order* stance of the *forum*. This possibility necessarily implies a modernist take on choice of law, in which the forum gives up the relative neutrality required by the traditional approach of the *First Restatement*.⁶⁰ And in at least some variations of the modernist view, much of my language of "first-order" and "second-order" legal processes, and

58. See, e.g., *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148 (Cal. 1992); *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 646 N.E.2d 741 (Mass. 1995); *Schulke Radio Prods., Ltd. v. Midwestern Broad. Co.*, 453 N.E.2d 683 (Ohio 1983).

59. SECOND RESTATEMENT, *supra* note 41, § 187 cmt. e (emphasis added).

60. Recall that the *First Restatement's* treatment of marriage looked to the *first-order* views, not of the forum, but of the domicile—which is to say the state with prescriptive authority under the forum's *second-order* rule of choice of law. See *supra* text accompanying notes 15-16.

its invocation of neutrality, "interjurisdictional responsibilities," "rights-creating power," "allocation of prescriptive jurisdiction," and the like, might seem passé or incoherent.

This is not the place to revisit the debate between traditional and modernist perspectives on choice of law.⁶¹ I will say, however, that the cautionary tales I have been telling become even *more* relevant if we adopt a new restatement deeply influenced by some variation on modernist choice-of-law theory. For if the basic assumption of modernist choice of law is that all or most of the enterprise is really what I have called a "*first-order* legal process,"⁶² then it would behoove a restatement that took that assumption seriously to know whereof it should not speak.⁶³

Consider, for example, the "interest analysis" of Brainerd Currie. Briefly put, Currie's theory treated the "interests" of states as the prime variable in choice of law.⁶⁴ And he argued that, once a forum determined it had an interest in a case, it should apply its own rules of decision, even if another state also had an interest of its own.⁶⁵ Currie's choice-of-law theory is open to serious external, jurisprudential, challenge. But the most important *internal* critique is that Currie constantly made unsupported and arbitrary generalizations about the nature and scope of the state "interests" that he plugged into this choice-of-law methodology.⁶⁶ Moreover, he never let on whether those generalizations reflected empirical obtuseness or unarticulated and undefended normative assumptions.⁶⁷

61. I have in earlier writings described and defended my own variation on the assumptions of traditional choice of law. See Dane, *supra* note 2; Dane, *supra* note 5.

62. Dane, *supra* note 2; see also WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 20-46 (1942).

63. Cf. LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* § 6.54, at 189 (C.K. Ogden ed. & trans., 1922) ("[H]e who understands [my propositions] finally recognizes them as senseless, when he has climbed out through them, on them, over them. (He must so to speak throw away the ladder, after he has climbed up on it.) He must surmount these propositions; then he sees the world rightly. Whereof one cannot speak, thereof one must be silent.")

64. CURRIE, *Married Women's Contracts*, *supra* note 44, at 85, 117-18; BRAINERD CURRIE, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, *supra* note 44, at 128, 143-46.

65. See CURRIE, *Married Women's Contracts*, *supra* note 44, at 119. ("The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law . . . simply because a court should never apply any other law except when there is a good reason for doing so."). In later iterations of his views, Currie did explain that, in determining whether it had an overriding reason to apply its own law in a situation of "true conflict," a forum should strive for a "moderate and restrained interpretation" of its own interests. Brainerd Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROBS.* 754, 759 (1963).

66. See generally Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 *MICH. L. REV.* 392 (1980); Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 *AM. J. COMP. L.* 1 (1984).

67. See Brilmayer, *supra* note 66, at 402; see also Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 *OHIO ST. L.J.* 459, 476-77 (1985) ("Interest analysis generates the above foundational problems because it tries to do two inconsistent things with the same conceptual test: to describe what states *do* want and to prescribe what states *may* want. The first objective is descriptive, and the second is normative.") (emphasis

In a deep sense, Currie ignored the fundamental point I have been arguing in this Comment: choice of law exists because of legal diversity, and a discourse in choice of law needs to be careful and precise about how it seeks to mediate or transcend that diversity. Currie could, of course, have made normative, *second-order* arguments. But that would have contradicted his basic jurisprudential stance. He could have made arguments grounded in transjurisdictional law. But that would have appealed to him even less. Or, since he was writing law review articles rather than drafting a restatement, he could have legitimately made honestly prescriptive *first-order* arguments. But that would have required either a nuanced adaptation to the diversity of self-imaginings present in different actual legal systems, or affirmative substantive arguments about the implications of jurisdictional complexity that were sufficiently general and compelling to transcend that diversity without erasing it.⁶⁸ Currie did not pursue any of these paths.

To understand Currie's problem more precisely, consider that he did have *second-order* views of a sort, at least if we relax my earlier assumption that *second-order* choice of law is forum-neutral. In a sense, Currie's most abstract and general propositions, such as "a court should never apply any other law [than its own] except when there is a good reason for doing so,"⁶⁹ while not forum-neutral, did (as much as a Legal Realist account could) allocate prescriptive authority—to the forum. In this sense, every theory of choice of law, however modernist, must have at least a thin frame of *second-order* analysis. Currie's quandary, however, was that his account did not, and he did not want it to, invite a more genuinely robust *second-order* inquiry into the meaning of "good reason."

Interestingly, Currie himself was skeptical of the possibility or utility of a restatement of choice of law. When he did venture to suggest restatement-like formulations of his views, they were pithy and skeletal, without any effort to hone in particular areas of substantive legal doctrine.⁷⁰ Here, Currie showed real insight.

in original). Some commentators have pointed out that Currie's descriptive/normative confusion reflects a fallacy built into certain expressions of Legal Realism. *See, e.g.,* Lea Brilmayer, *Wobble, or the Death of Error*, 59 S. CAL. L. REV. 363, 388 (1986).

68. By "general and compelling," I do not mean irrefutable; that would be setting the bar far too high. A good deal of legal scholarship, after all, is normative, and we don't expect it all to irrefutably demolish the premises of existing law. But I am trying to capture the peculiar and difficult balance that a normative *first-order* choice-of-law argument would have to maintain. On the one hand, it could not ground itself in an account of how prescriptive jurisdiction is divided, or else it would be a *second-order* argument, not a *first-order* argument. On the other hand, it could not *just* rely on the standard arguments about the ends and means of contract law, tort law, family law, and the like, that are the tools of the rest of legal scholarship, or else it would no longer be a choice-of-law argument premised on the fact of legal diversity.

69. CURRIE, *Married Women's Contracts*, *supra* note 44, at 119.

70. Currie's first such effort appeared in a 1959 article, and is worth quoting in full:

1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.

2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of

Indeed, the lesson of his drafting exercises is a bracing one that others should take to heart: a restatement grounded in certain variations of modernist choice of law, if it were faithful to its own assumptions, would need to be very short.

That brings me, finally, to the suggestion of some participants in this Symposium that the next restatement of choice of law, if there is to be one, should be forthrightly *substantive*. Again, this is not the place to debate the virtues of a *substantive* law of choice of law. I do wonder, however, how a *substantive* restatement of choice of law can do its work while still respecting the legal diversity that calls for choice of law in the first place.

Substantive arguments can, as I suggested earlier, be grounded in genuinely transjurisdictional bodies of substantive law. But such resort to higher law is, in some sense, not really doing choice of law at all. It is also conceivable that substantive arguments could be grounded in a rigorous, if controversial, account of the scope of prescriptive authority. Such an account might, for example, posit that the prescriptive reach of any substantive norm of a legal system (beyond purely domestic cases) is proportional to the justness, measured somehow, of that norm. But this sort of argument is clearly not what many supporters of a *substantive* approach to choice of law have in mind. They want to move beyond *second-order* and *jurisdiction-selecting* rules entirely, and embrace instead a search for particular substantive justice in multistate cases.⁷¹

But what sort of restatement would this approach require? It could, to be sure, be essentially descriptive. But that does not seem worth the effort. Or, finally, such a restatement could, I think, project one of the following two stances, or something between:

the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.

3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.

4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.

5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.

BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS, *supra* note 44, at 177, 183-84. He revised his formulation, taking into account his evolving views, first in Brainerd Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1242 (1963), and then in a statement prepared for Willis Reese's and Maurice Rosenberg's conflict-of-laws casebook. WILLIS L.M. REESE & MAURICE ROSENBERG, *CASES AND MATERIALS ON CONFLICT OF LAWS* 487-88 (9th ed. 1990).

71. See, e.g., Friedrich K. Juenger, *A Third Restatement of Conflict of Laws?*, 75 IND. L.J. 403, 415-16 (2000).

- (1) Dear America: We do not believe that any purported, robust, *second-order* account of the division of prescriptive jurisdiction can (with a few exceptions?) satisfactorily decide choice-of-law questions. Rather, we believe that the answers to most choice-of-law questions should arise out of the imperative to do substantive justice in the special situation of multistate cases. We will spend the next several hundred pages setting forth substantive rules of tort law, contract law, family law, and so on, in contexts of jurisdictional complexity. If these rules do not reflect your own substantive views or priorities, including views and priorities you have taken from the Restatements of Contracts, Torts, and the like, we urge you to put aside those other views and priorities.
- (2) Dear America: We do not believe that any purported, robust, *second-order* account of the division of prescriptive jurisdiction can (with a few exceptions?) satisfactorily decide choice-of-law questions. Rather, we believe that the answers to most choice-of-law questions should arise out of the imperative to do substantive justice in the special situation of multistate cases. We will spend the next few pages giving you an outline of what we mean, and how it might work. We leave the rest to the unfolding development of the many diverse legal systems in this country and world.

The first of these ideal types would look more like a conventional restatement. But the second would, under these circumstances, be more honest and responsible, and more attuned to the irony of the enterprise.