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"At Least, to Do No Harm": Does the Second Restatement of Conflicts Meet the Hippocratic Standard?

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"AT LEAST, TO DO NO HARM"*: DOES THE SECOND RESTATEMENT OF CONFLICTS MEET THE HIPPOCRATIC STANDARD?

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INTRODUCTION

Professor Willis Reese, the Reporter for the *Restatement (Second) of Conflict of Laws*,[1] acknowledged that the work was "written during [a] time of turmoil"[2] in the subject. Work on the *Restatement (Second)* was started in 1951,[3] twelve years before the first United States court abandoned the "place-of-wrong" rule for choosing law in torts,[4] and completed in 1969,[5] after sixteen states,[6] the District of Columbia,[7] and

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* HIPPOCRATES, EPIDEMICS, bk. 1, ch. 11 (quoted in JOHN BARTLETT, FAMILIAR QUOTATIONS 71 (Justin Kaplan ed., 16th ed. 1992) ("As to diseases make a habit of two things—to help, or at least, to do no harm.")). Sometimes this injunction is stated in Latin as "*primum non nocere*" and translated as "above all, do no harm." *See* Richard Lowell Nygaard, *Is Prison an Appropriate Response to Crime?*, 40 ST. LOUIS U. L.J. 677, 697 (1996).

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

2. Willis L.M. Reese, *Foreword*, 72 COLUM. L. REV. 219, 219 (1972).

3. *See id.*

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

5. The *Restatement (Second)* was adopted and promulgated by the American Law Institute in 1969 and published in 1971. For current *Bluebook* purposes, *see* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 84 (16th ed. 1996), the citation date is the date of publication, although in the prior edition, it was the date of adoption. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 83 (15th ed. 1991). This change is not an improvement. In the case of the *Conflicts Restatement*, the two-year difference between promulgation and publication is significant, and the current rule is misleading.

6. *See* Armstrong v. Armstrong, 441 P.2d 699, 703 (Alaska 1968) (using matrimonial domicile instead of the place-of-wrong rule in determination of interspousal immunity); Schwartz v. Schwartz, 447 P.2d 254, 255 (Ariz. 1968) (abrogating the *lex loci delicti* rule in an interspousal tort immunity case); Reich v. Purcell, 432 P.2d 727, 730 (Cal. 1967) (en banc) (stating that the law of the place of the wrong is not necessarily applicable in all tort actions); Wartell v. Formusa, 213 N.E.2d 544, 545 (Ill. 1966) (stating that the law of the state where the alleged tortious act took place does not necessarily govern the determination of the issue); Fabricius v. Horgen, 132 N.W.2d 410, 415 (Iowa 1965) (recognizing "the most significant relationship with the occurrence and parties and important contacts as more properly controlling than 'wooden application' . . . of the strict lex loci delicti rule"); Wessling v. Paris, 417 S.W.2d 259, 261 (Ky. 1967) (applying the law of the jurisdiction with all interests except "the tortuitous place of the accident"); Kopp v. Rechtzigel, 141 N.W.2d 526, 528 (Minn. 1966) (applying the law of domicile of the parties instead of the law of jurisdiction where the tort occurred); Mitchell v. Craft, 211 So. 2d 509, 516 (Miss. 1968) (applying the law of the jurisdiction that had the most substantial relationship to the par-

Puerto Rico[8] had adopted new tort choice-of-law rules. As the *Restatement (Second)* progressed, it was apparent that a "conflicts revolution"[9] was sweeping the land. The attempt to "restate" law that was in the process of rapid change triggered suggestions to abandon the project[10] and criticisms of drafts as insufficiently reflecting the theoretical bases for the changes that were occurring in the courts.[11]

Professor Reese responded to these suggestions and criticisms by adopting the goal of doing no harm:

> In these circumstances, one obvious goal of the *Restatement Second* must be not to mislead. Care must be taken not to state rules that will prove wrong when applied to new problems, for if this were to be done with any frequency the

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ties rather than the law of the jurisdiction where the accident occurred); Kennedy v. Dixon, 439 S.W.2d 173, 184 (Mo. 1969) (en banc) (abandoning the *lex loci delicti* rule); Thompson v. Thompson, 193 A.2d 439, 441 (N.H. 1963) (stating that the law of the jurisdiction where a tort is committed controls the applicable standard of care, but does not control the issue of whether plaintiff may maintain an action); Mellk v. Sarahson, 229 A.2d 625, 626 (N.J. 1967) (stating that the *lex loci delicti* rule should not be applied mechanically); *Babcock*, 191 N.E.2d at 285 (stating that the law of the jurisdiction with the strongest interest in the resolution of the issues presented should apply); Casey v. Manson Constr. & Eng'g Co., 428 P.2d 898, 904-05 (Or. 1967) (en banc) (adopting "for tort actions the rule of most significant relationship with the occurrence and with the parties"); Griffith v. United Air Lines, Inc., 203 A.2d 796, 805 (Pa. 1964) (abandoning the *lex loci delicti* rule); Woodward v. Stewart, 243 A.2d 917, 923 (R.I. 1968) (adopting an interest-weighing approach instead of the *lex loci delicti* rule); Wilcox v. Wilcox, 133 N.W.2d 408, 416 (Wis. 1965) ("putting aside the common law of lex loci" in favor of a significant-relationship analysis).

7. *See* Williams v. Rawlings Truck Line, Inc., 357 F.2d 581, 585-86 (D.C. Cir. 1965) (applying the law of the jurisdiction with the greatest interest in the controversy).

8. *See* Widow of Fornaris v. American Sur. Co., 93 P.R.R. 28, 46 (1966) (abandoning the *lex loci delicti* rule and adopting the doctrine of dominant contacts).

9. Alfred Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960, 990 (1981) (referring to "those in the vanguard of the current conflicts revolution in the United States"); *see also* Russell J. Weintraub, *Revolution in the Choice of Law for Torts*, 51 A.B.A. J. 441, 441 (1965) ("In the past few years the tempo of change has quickened until the situation can best be described as a revolution in the choice of law for torts.").

10. *See, e.g.*, Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230, 1231-32 (1965) (stating that the Council of the American Law Institute had rejected his appeal for the appointment of a special commission to reexamine the drafts of the *Restatement (Second)* to determine whether a restatement of the subject is now desirable and if so, how the current drafts could be improved).

11. *See, e.g.*, David F. Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts, in* XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 349-50 (Kurt H. Nadelmann et al. eds., 1961) (stating that he finds the work to date "impaired by . . . 'jurisdiction-selecting rules' . . . which make a *state* the object of the choice without regard to the content of the law that is thereby chosen or its effect on the issue before the forum"); Russell J. Weintraub, *The Contracts Proposals of the Second Restatement of Conflict of Laws—A Critique*, 46 IOWA L. REV. 713, 724 (1961) ("[B]eneath the surface, this 'most significant relationship' rule [in a draft of what became § 188], like the 'center of gravity' rule on which it seems to be based, becomes a contact-counting rather than a contact-evaluating rule.").

> *Restatement* would prove to be a hindrance, rather than an aid, in the further development of the subject. Hence, as a general proposition, it is probably better to err on the side of a rule that may be too fluid and uncertain in application than to take one's chances with a precise and hard-and-fast rule that may be proved wrong in the future.[12]

Nevertheless, six sentences later, Professor Reese states that "the *Restatement Second* should state precise and definite rules in those few areas where this can be done."[13]

The tension between these two statements is apparent. How can there be a statement of "precise and definite rules" in a subject that is quickly changing? The attempt to do so makes the unwarranted assumption that the intellectual bases for the changes already observable will not in time require changes in all areas, even those that are as yet unaffected.

The theoretical engine driving the changes in conflicts rules was the proposition that courts should not choose law by territorial locating factors, such as place of wrong for torts,[14] or place of making for contracts.[15] Professor Cavers referred to this method of choosing law as "engaging in a blindfold test"[16] because it selected law without regard to its content. The heart of the "new"[17] conflicts thinking was that courts should instead choose law in the light of its content and purposes in such a manner as to permit maximum accommodation of the policies of the various states that have contacts with the parties and the transaction.[18]

This Article examines whether in fact the *Restatement (Second)*, as Professor Reese intended, did no harm. Over the twenty-five years since its publication, has the *Restatement (Second)* assisted and guided courts and lawyers, or impeded them? In large measure the answer to

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12. Willis L.M. Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679, 681 (1963).

13. *Id.*

14. *See* RESTATEMENT OF CONFLICT OF LAWS § 378 (1934) ("The law of the place of wrong determines whether a person has sustained a legal injury.").

15. *See id.* § 332 ("The law of the place of contracting determines the validity and effect of a promise.").

16. David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 180 (1933).

17. Cavers, *see id.*, indicates that the thinking was not so new. In the realm of ideas, the perception that something is new is likely to result from an ignorance of history. The concept that the content and purposes of a rule should determine its territorial reach has been traced back at least as far as the writing of Guy de Coquille in the sixteenth century. *See* Friedrich K. Juenger, *A Page of History*, 35 MERCER L. REV. 419, 432-33 (1984).

18. *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 281-91 (3d ed. 1986).

this question depends on the extent to which the *Restatement (Second)*'s provisions are consistent with the central concepts driving the changes in choice of law. Part I of this Article focuses on the rules for choice of law in tort and contract that are the heart of the *Restatement (Second).* Part II examines some of the "precise and definite rules" that Professor Reese was confident could be stated despite the turmoil in the field.[19] It should come as no surprise that it is here that the *Restatement (Second)* has caused the most difficulty. Part III appraises some of the positive accomplishments and strengths of the *Restatement (Second).*

Examining the impact of the *Restatement (Second)* is not an idle enterprise, for the *Restatement (Second)* has had a profound effect on the courts over the past quarter century. The latest survey of the field by Professor Symeon Symeonides lists twenty-one states as using the *Restatement (Second)* in tort cases and twenty-five as using the *Restatement (Second)* in contract cases,[20] but cautions against the assumption that all the states listed are equally committed to following the *Restatement (Second).*[21] Some states use the *Restatement (Second)* first to reject rigid territorial rules and then reshape it to facilitate the process of selecting law on the basis of content and policies.[22]

None of this should be construed as a criticism of Professor Reese, a great scholar who directed the work with intelligence and industry. Every restatement is a product of many hands—the reporter, the advisers, the Council of the American Law Institute, and the members of the Institute commenting, moving amendments, and voting on the floor of the annual meeting. It is unlikely that any restatement will emerge as the coherent expression of a single scholar's insights, and the *Restatement (Second) of Conflict of Laws*[23] certainly did not.

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19. *See supra* note 13 and accompanying text.

20. *See* Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing,* 56 MD. L. REV. 1248, 1265-66 (1997).

21. *See id.* at 1265; *see also* Travelers Indem. Co. v. Lake, 594 A.2d 38, 47 (Del. 1991) (stating that the court "need not dwell on the efficacy" of governmental interest analysis, Professor Leflar's choice-influencing considerations, and the most-significant-relationship approach of the *Restatement (Second)* because the *Restatement (Second)* "'includes most of the substance of all the modern thinking on choice of law'" (quoting Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979) (quoting ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW § 139 (1977)))); Robert A. Sedler, *Continuity, Precedent, and Choice of Law: A Reflective Response to Professor Hill,* 38 WAYNE L. REV. 1419, 1427 (1992) ("[I]n practice, all the courts that have abandoned the traditional approach to choice of law generally employ interest analysis regardless of which 'modern' approach to choice of law they are purportedly following.").

22. *See infra* Part III.A.

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

I. THE TORT AND CONTRACT RULES OF THE *RESTATEMENT (SECOND)*

A. Tort

The problem with the basic tort provisions of the *Restatement (Second)*, sections 145[24] and 146,[25] is an inconsistent mixing of territorial determinism with references to the policies underlying conflicting laws. Section 145(2) lists four territorial contacts that are "to be taken into account," and comment (e) states that "[w]hen the injury occurred in a single, clearly ascertainable state and when the conduct which caused the injury also occurred there, that state will usually be the state of the applicable law with respect to most issues involving the tort."[26] Section 146 creates a presumption that the law of the place of injury applies to actions for personal injuries and repeats with even more emphasis the statement that, when conduct and injury occur in the same state, "the local law of this state will usually be applied to determine most issues involving the tort."[27] A comment then provides an example of a situation in which the law of the place of conduct and injury will not apply.[28] The comment discusses the hypothetical case of an airplane flying between two points in the same state. The airplane's flight path takes it "for a short distance"[29] over another state

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24. Section 145 provides:

> The General Principle
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> (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:
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> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, 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.

Id. § 145.

25. Section 146 provides:

> Personal Injuries
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> 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 stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Id. § 146.

26. *Id.* § 145 cmt. e.

27. *Id.* § 146 cmt. d.

28. *Id.*

29. *Id.*

where the pilot's negligence causes a passenger to suffer "severe fright and shock."[30] All other contacts, the domicile of the plaintiff, the purchase of the ticket, the principal place of business of the airline, are in the state where the flight began and ended.[31] The comment then concludes that the state with all of these contacts "may therefore be the state of most significant relationship and, if so, it will be the state of the applicable law with respect to issues that would usually be determined by the local law of the state of conduct and injury."[32]

These statements imply that, if the defendant's conduct and plaintiff's injury are in the same state, that state's law applies except in truly extraordinary circumstances. Nothing could be more inconsistent with choosing law based on the law's content and purpose. All of the landmark cases departing from the place-of-wrong rule and decided before the *Restatement (Second)* was promulgated are cases in which the law of the place of both conduct and injury was not applied.[33] Most of these cases involved anachronistic laws of the place of injury that denied or reduced recovery, such as interspousal immunity, statutory limits on wrongful death damages, and guest statutes. Courts rejected these laws not because, as in the hypothetical case in section 146, the place of conduct and injury had some transitory contact with the parties, but because other states would experience the consequences of choosing law and the place of injury would not.

In the light of the territorial bias of sections 145 and 146, it is not surprising that many courts applying these sections "have merely counted contacts rather than engaging in an analysis of the interests and policies listed in the *Restatement*."[34] In the year of the silver anniversary of the *Restatement (Second)*'s publication, in two different cases, an Eighth Circuit judge recited exactly the same territorial formula, focusing on the fact that conduct and injury occurred in the same state.[35] Both opinions chose law before adverting to the content of the law chosen and never inquired whether any other state with a contact with the parties or the transaction had a different law.[36]

Alongside its territorial provisions, the *Restatement (Second)* contains indications that the content and purpose of law is of paramount

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30. *Id.*

31. *Id.*

32. *Id.*

33. *See supra* notes 6-8 and accompanying text.

34. Hataway v. McKinley, 830 S.W.2d 53, 58 (Tenn. 1992) (citing Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1046 (1987)).

35. *See* Scheerer v. Hardee's Food Sys., Inc., 92 F.3d 702, 708 (8th Cir. 1996) (McMillian, J.); Horn v. B.A.S.S., 92 F.3d 609, 611 (8th Cir. 1996) (McMillian, J.).

36. *See Scheerer*, 92 F.3d at 708; *Horn*, 92 F.3d at 611.

importance in choice-of-law decisions. The black letter of both sections 145 and 146 refers to "the principles stated in § 6."[37] Section 6 in turn lists as "factors relevant to the choice of the applicable rule of law . . . the relevant policies of the forum . . . the relevant policies of other interested states . . . the basic policies underlying the particular field of law."[38] Moreover, immediately after section 145(2)'s listing of territorial "[c]ontacts to be taken into account," the section cautions that "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue."[39]

In a field changing as rapidly as the conflict of laws, these mixed signals caused predictable confusion. The unmistakable mandate should have been to stop sticking pins in maps and start paying attention to the content of the law chosen.

B. Contract

The major *Restatement (Second)* sections for choice of law in contract actions are sections 187[40] and 188.[41] Section 187 gives the par-

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37. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145(1), 146 (1971).

38. *Id.* § 6(2)(b), (c), (e).

39. *Id.* § 145(2).

40. Section 187 provides:

Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

Id. § 187.

41. Section 188 provides:

Law Governing in Absence of Effective Choice by the Parties

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

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

ties limited power to choose the applicable law, and in the absence of such a choice, section 188 again[42] gives mixed territorial and content-based signals.

1. Party Autonomy.—Section 187 sensibly gives the parties to a contract unlimited power to select law to govern matters of construction of the contract, but also erects a maze for them to traverse should they choose law to govern validity.[43] The reason that unlimited power to control the law applicable to construction is desirable is that in this context the choice-of-law clause is simply a device to incorporate by reference what the parties would be free to spell out at length.[44] Empowering parties to choose law to govern validity is more controversial, but section 187, depending on one's view of such matters, gives either too little or too much freedom.

The view of other countries and of most commentators is that section 187 is too restrictive, that the parties should be free to select any law to govern validity, even the law of a jurisdiction that has no contact with the parties or the transaction.[45] At the other extreme are a few holdouts who take the position that the parties should not have the power to choose law to govern validity. Instead, courts should ap-

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

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

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

Id. § 188.

42. *See supra* Part I.A.

43. *See supra* note 40.

44. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. c (1971).

45. *See* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW 202 (1996) ("Only in the United States, among the countries surveyed in this volume, is it still said that [for issues of validity] the state of the law chosen must have a substantial relationship to the parties or the transaction."); Friedrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 AM. J. COMP. L. 381, 388 (1994) (quoting with approval a Convention provision giving the parties freedom to choose any law to govern validity); *see also* U.C.C. § 4A-507(b) (1995) (stating that the parties to a wire funds transfer may choose law to govern their rights and obligations "whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction"); *id.* § 5-116(a) (stating that the law chosen to govern the liability of an obligor under a letter of credit "need not bear any relation to the transaction").

ply the law that validates, subject to whatever limitations one would otherwise place on party autonomy.[46] A rule of validation would achieve the same objectives of certainty and predictability as party autonomy.

Instead of either absolute autonomy or no power to choose law for validity, the *Restatement (Second)* provides a middle road impeded by two major obstacles. The law chosen for validity must have a substantial relationship to the parties or the transaction, or there must be some other reasonable basis for choosing that law.[47] In addition, the law chosen must not be "contrary to a fundamental policy of a state" that "has a materially greater interest than the chosen state" in determining validity, if the state with the greater interest has the most significant relationship to the parties and the transaction.[48] We are not told what "fundamental policy" means except that it must be "substantial" but "need not be as strong as would be required to justify the forum in refusing to entertain suit upon a foreign cause of action" on the ground that it is against public policy.[49] The statement that "[a]n important consideration is the extent to which the significant contacts are grouped in this state"[50] is a territorial red herring that further fouls the scent of what is "fundamental."

No wonder that courts have trouble applying section 187 in a sensible manner. *DeSantis v. Wackenhut Corp.*[51] is an example of a good court[52] lost in the maze of section 187. DeSantis worked in North Carolina, providing corporate security services to R.J. Reynolds Industries.[53] Wackenhut recruited him to manage its office in Houston, Texas.[54] The employment negotiations took place at Wackenhut's Florida headquarters.[55] At the inception of his employment in Houston, DeSantis signed a noncompetition agreement that included a clause choosing Florida law to govern its validity.[56] The Houston office provided security guards to businesses in at least thirteen Texas

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46. *See* WEINTRAUB, *supra* note 18, at 371-75.

47. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971).

48. *Id.* § 187(2)(b).

49. *Id.* § 187 cmt. g.

50. *Id.*

51. 793 S.W.2d 670 (Tex. 1990).

52. The court had previously chosen law with careful attention to the content and policies of the conflicting rules. See *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984), discussed *infra* at text accompanying notes 188-218.

53. *DeSantis*, 793 S.W.2d at 675.

54. *Id.*

55. *Id.*

56. *Id.*

counties.[57] DeSantis managed the Houston office for nearly three years and then resigned.[58] He formed a competing company and solicited business from Wackenhut's clients.[59] One Wackenhut customer signed a contract with DeSantis, and another contemplated doing so.[60] Wackenhut sued DeSantis and his company in Texas to enjoin them from violating the noncompetition agreement and to recover damages for breach.[61] The trial court granted the injunction, and the intermediate appellate court affirmed,[62] but the Supreme Court of Texas reversed.[63]

The Supreme Court of Texas, without first determining whether the noncompetition agreement was enforceable under Texas law, held that the choice-of-law clause would not be enforced because, under *Restatement (Second)* section 188(1), Texas "'has the most significant relationship to the transaction and the parties'";[64] "Texas has a materially greater interest than does Florida in determining whether the noncompetition agreement in this case is enforceable";[65] and "the law governing enforcement of noncompetition agreements is fundamental policy in Texas."[66] Only then did the court "consider whether the noncompetition agreement between DeSantis and Wackenhut [was] enforceable under Texas law."[67] The court concluded, in a rather unconvincing fashion, that the agreement was not enforceable.[68] The only reference in the opinion to Florida law is that "DeSantis appears to concede that the agreement was enforceable under Florida law."[69]

The Supreme Court of Texas thus first selects law by putting a pin in the map without regard to the content or purposes of Florida and Texas law. It is unlikely that a Florida court would agree that "Texas

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57. *Id.* at 676.
58. *Id.* at 675.
59. *Id.*
60. *Id.* at 675-76.
61. *Id.* at 676.
62. *Id.* at 676-77.
63. *Id.* at 689.
64. *Id.* at 678 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971)).
65. *Id.* at 679.
66. *Id.* at 681.
67. *Id.*
68. *Id.* at 681-84. The court found insufficient evidence that DeSantis was able to appropriate good will he had developed with customers while working for Wackenhut. *Id.* at 683-84. Moreover, Wackenhut had not demonstrated a need to protect confidential information because DeSantis could have learned of Wackenhut's customers and their needs without working for Wackenhut. *Id.* at 684. Finally, was there no showing that Wackenhut's pricing and bidding strategies were unique. *Id.* at 683-84.
69. *Id.* at 680 n.5.

has a materially greater interest than does Florida in determining whether the noncompetition agreement . . . is enforceable."[70] As a result of the decision, Texas law firms had difficulty writing "opinion letters" assuring parties to interstate and international transactions that a Texas court would enforce choice-of-law clauses or uphold the agreements under foreign law.[71] A committee of the Business Law Section of the State Bar of Texas drafted a statute providing that, in transactions worth a million dollars or more, the parties could choose the law of any reasonably connected jurisdiction to govern validity and a Texas court could not use fundamental or public policy to refuse to enforce the choice-of-law clause.[72] The draft was enacted.[73] Thus, a judicial decision purporting to follow the *Restatement (Second)*, but lacking cogency, affected vital commercial interests and resulted in legislative overkill.

In addition to determining what limits to impose, another problem with permitting parties to choose law to govern validity is that frequently the contract will select law that invalidates. The *Restatement (Second)* sensibly provides that when this occurs the choice should be regarded as a mistake and the law should be chosen under the "most-significant-relationship" test.[74] Many courts, however, have taken the parties at their word and applied the invalidating law.[75] For example, in *Peugeot Motors of America, Inc. v. Eastern Auto Distributors*,[76] the United States Court of Appeals for the Fourth Circuit validated the nonrenewal provisions of a distributorship contract. In order to do so, however, the court had to avoid applying New York's Franchise Motor Vehicle Dealer Act, although the distributorship agreement chose New York law.[77] The court accomplished its feat by holding that the New York franchise law did not apply because the dealer was not doing business in New York and that under New York common law, which therefore applied, the nonrenewal provision of the agree-

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70. *Id.* at 679.

71. *See* MAURICE ROSENBERG ET AL., CONFLICT OF LAWS 594 (10th ed. 1996).

72. *See id.*

73. *See* TEX. BUS. & COM. CODE ANN. § 35.51(a), (b) (West Supp. 1977).

74. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (1971) (referring to the test of § 188).

75. *See* WEINTRAUB, *supra* note 18, at 371 n.30 (citing cases in which law chosen by contracting party is invalidating but is applied by the court); *see also* Punzi v. Shaker Adver. Agency, Inc., 601 So. 2d 599, 600 (Fla. Dist. Ct. App. 1992) (applying chosen law to invalidate noncompetition agreement); Connecticut Nat'l Bank v. Kommit, 577 N.E.2d 639, 641 (Mass. App. 1991) (applying law chosen in credit card agreement to invalidate gambling debt if it can be shown on remand that creditor should have known of nature of debt).

76. 892 F.2d 355 (4th Cir. 1989).

77. *Id.* at 357-58.

ment was valid.[78] Thus, the court used *renvoi*,[79] looking to the whole law of New York, including the territorial limits in its franchise law,[80] to avoid reaching the result that the courts of the chosen state would have reached in a purely domestic case. The *Restatement (Second)*, however, abjures *renvoi* in this context, stating that "[i]n the absence of a contrary indication of intention, the [parties'] reference is to the local law of the state of the chosen law."[81]

Choice-of-law clauses in arbitration agreements are particularly likely to trigger unintended consequences. If the law of the chosen state limits the powers of arbitrators or the scope of arbitration, dispute settlement is likely to take a prolonged detour to litigate the interaction of the parties' agreement to arbitrate, their choice-of-law clause, and the arbitration law of the chosen state. For example, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[82] clients of a securities dealer had signed an agreement proffered by the dealer that submitted all disputes to arbitration "in accordance with the rules of the National Association of Securities Dealers (NASD)"[83] and had chosen New York law to govern.[84] NASD rules permitted arbitrators to assess punitive damages, but under New York law only courts could do so.[85] It took a trip up to the Supreme Court of the United States to decide whether the arbitrators' award of punitive damages was foreclosed by the agreement. The Court upheld the award on the ground that the choice-of-law clause "might include only New York's substantive rights and obligations, and not the State's allocation of power between alternative tribunals."[86] The Court also invoked "the common-law rule . . . that a court should construe ambiguous language against the interest of the party that drafted it."[87]

Six years to the day before *Mastrobuono*, the Supreme Court had decided *Volt Information Sciences, Inc. v. Board of Trustees*.[88] In *Volt*, Stanford University had entered into a construction contract with Volt.[89] The contract contained a provision agreeing to arbitrate all disputes and a clause choosing "the law of the place where the Project

78. *Id.* at 358.
79. See *infra* Part III.B. for a discussion of *renvoi* and the *Restatement (Second)*.
80. *Peugeot Motors*, 892 F.2d at 358.
81. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(3) (1971).
82. 514 U.S. 52 (1995).
83. *Id.* at 59.
84. *Id.*
85. *Id.*
86. *Id.* at 60.
87. *Id.* at 62.
88. 489 U.S. 468 (1989).
89. *Id.* at 470.

is located,"[90] which was California. Volt demanded arbitration of a dispute, and Stanford responded by suing Volt for fraud and breach of contract.[91] Stanford also sought indemnity from two other companies with whom it did not have arbitration agreements.[92] California law permitted a court to stay arbitration in a case of this kind involving parties to an arbitration agreement and other litigants who have not agreed to arbitrate.[93] The California courts interpreted the arbitration agreement to include the California rule on staying arbitration and denied Volt's motion to compel arbitration.[94] The Supreme Court affirmed.[95]

In *Mastrobuono*, the Court distinguished *Volt* on the basis of a different interpretation of the interaction between the arbitration and choice-of-law clauses.[96] The *Mastrobuono* opinion pointed out that in *Volt* the Supreme Court deferred to an interpretation of the agreement by a California state court, while in *Mastrobuono* the Court was reviewing a federal court's interpretation, "and our interpretation accords with that of the only decision-maker arguably entitled to deference—the arbitrator."[97] Justice Thomas dissented in *Mastrobuono* on the ground that "the choice-of-law provision here cannot reasonably be distinguished from the one in *Volt*."[98]

To add to the confusion, under New York law, whether a claim is barred by passage of time is an issue for the courts, not arbitrators.[99] The United States Court of Appeals for the Second Circuit has held that, if an agreement contains both an arbitration clause and a clause choosing New York law, the issue of timeliness is for the arbitrators.[100] The Second Circuit has also held that a recent contrary opinion from the New York Court of Appeals[101] was not persuasive because it relied on the Seventh Circuit's decision in *Mastrobuono*,[102] which was re-

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90. *Id.*

91. *Id.* at 470-71.

92. *Id.* at 471.

93. *Id.*

94. *Id.* at 471-73.

95. *Id.* at 473.

96. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 58 (1995) ("[I]f contracting parties agree to *include* claims for punitive damages . . . their agreement will be enforced according to its terms.").

97. *Id.* at 60.

98. *Id.* at 64 (Thomas, J., dissenting).

99. *See In re* Smith Barney, Harris Upham & Co. v. Luckie, 647 N.E.2d 1308, 1313 (N.Y. 1995).

100. *See* PaineWebber, Inc. v. Bybyk, 81 F.3d 1193, 1196 (2d Cir. 1996).

101. *See Luckie*, 647 N.E.2d at 1308.

102. Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713 (7th Cir. 1994), *rev'd*, 514 U.S. 52 (1995).

versed by the United States Supreme Court.[103] The Second Circuit made its decision despite *Mastrobuono*'s distinction of *Volt* on the ground that in *Volt* the Supreme Court had deferred to a state court's interpretation of the agreement.[104]

Incidentally, *Mastrobuono* is contrary to the *Restatement (Second).* Section 218 provides that the rights created by an arbitration agreement are governed by the law selected by the parties under section 187,[105] and this includes "the powers and duties of the arbitrators."[106] *Mastrobuono* does not cite section 218.

Thus, by giving the parties power to choose law to determine validity, but then placing cryptic limits on this power, the *Restatement (Second)* raises as many questions as it purports to answer. If parties are to have limited autonomy, they would be better served by a rule that validates under any law the parties might have chosen, subject to the same limitations that a court or legislature would place on the parties' power to choose. Professor Reese rejected a rule of validation on the ground that a state might have a strong interest in invalidating contracts it considers "socially undesirable."[107] Professor Reese's reason is not convincing. A rule of validation can except contracts violating important forum policies, just as section 187 contains this exception to party autonomy.[108] Professor Reese further contends that "[a] rule of validation would . . . be impossible to apply in the . . . situation where a party claims that he has been relieved of his contractual obligation through the operation of a particular provision in the contract [because] if the court validates the provision it must perforce

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103. *See Bybyk*, 81 F.3d at 1200.

104. *See supra* note 97 and accompanying text.

105. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 218 (1971).

106. *Id.* § 218 cmt. c.

107. *See* Reese, *supra* note 12, at 698. Professor Larry Kramer states that the assumption that the choice of an invalidating law was inadvertent is not always warranted either because the parties may not have intended to include the invalidated substantive provision or because the part invalidated may be an oral modification. *See* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 332 (1990). This is not cogent because reformation is available to correct drafting errors. *See, e.g.*, Goode v. Riley, 28 N.E. 228, 229 (Mass. 1891) (refusing to rescind a transaction and modifying a property title because of mutual mistake). Whether an oral modification should be enforced depends on whether one party did not intend to be bound by the modification and whether this intention can be imposed on the other party under proper standards of interpretation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 201 (1979) (holding a contract enforceable against a party who had reason to know the meaning attached by the first party). Even the Uniform Commercial Code empowers the parties to exclude oral modifications, but enforces oral "waiver[s]" that are relied upon. *See* U.C.C. § 2-209(2), (4), (5) (1994) (declaring that a party waiving an executory portion of a contract may retract the waiver "unless the retraction would be unjust in view of a material change of position in reliance on the waiver").

108. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).

hold the obligation ineffective."[109] This argument confuses enforcing the parties' agreement with imposing an "obligation" contrary to the agreement.

2. Most Significant Relationship.—Section 188 states that the law governing in the absence of party choice is that of the state with "the most significant relationship to the transaction and the parties."[110] Again, there are mixed signals, some suggesting that territorial contacts are important in themselves and some emphasizing the importance of knowing content and purpose before choosing law. Section 188(2) provides a list of five territorial contacts "to be taken into account."[111] The most unrepentantly territorial section is 188(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 [for some specific kinds of contracts dealt with in subsequent sections]."[112]

Professor Cavers criticized a 1960 draft of the *Restatement (Second)*'s contracts provisions[113] as "impaired by . . . 'jurisdiction-selecting rules,' that is, rules which make a *state* the object of the choice without regard to the content of the law that is thereby chosen or its effect on the issue before the forum."[114] Perhaps this criticism resulted in the insertion of the word "usually" in section 188(3);[115] it was not in the 1960 draft.[116]

Professor Cavers also noted:

> Happily . . . Restatement Second uses, at a number of points, concepts of such elasticity as to permit a forum following it to select the jurisdiction to provide the governing law with a view to the content of the competing laws actually involved in that choice and the results they would work in the case before it.[117]

This same "elasticity" is found in the final product. There are again cross references to section 6[118] with its focus on the content and pur-

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109. Reese, *supra* note 12, at 698.

110. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971).

111. *Id.* § 188(2).

112. *Id.* § 188(3).

113. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (Tentative Draft No. 6, 1960) [hereinafter 1960 Draft].

114. Cavers, *supra* note 11, at 350 (footnote omitted).

115. *See supra* note 41.

116. *See* 1960 Draft, *supra* note 113, § 332b(a) (referring to "the place of contracting" instead of "the place of negotiating the contract").

117. Cavers, *supra* note 11, at 350.

118. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1), (2) (1971).

pose of law.[119] After section 188(2) lists five contacts "to be taken into account," it cautions that they "are to be evaluated according to their relative importance with respect to the particular issue."[120]

In the absence of choice of law by the parties, a simple presumption of validity would have been preferable to section 188's confused mixture of territorial and policy-oriented directions.[121] In the comments to section 188, there is a brief reference to the importance of validation,[122] and the Reporter's Note to section 188 cites as "a suggested alternative formulation" a proposal to adopt a rule of validation.[123] Only in the section addressed to the issue of usury does the *Restatement (Second)* use as its compass an express rule of validation.[124]

II. PRECISE RULES

As Professor Reese predicted, the *Restatement (Second)* does state "precise and definite rules" in areas that the restaters thought sufficiently settled by established doctrine.[125] Such confidence in the face of an ongoing conflicts revolution was remarkable and ultimately proved to be foolhardy.

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119. *See supra* note 38 and accompanying text.

120. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971).

121. *See* Seubert Excavators, Inc. v. Anderson Logging Co., 889 P.2d 82, 85-86 (Idaho 1995) (applying § 188 and choosing Idaho law to validate an indemnity agreement between general contractor and subcontractor because "it defies logic to believe the parties would include an indemnification provision which they did not intend to be fully binding on them").

122. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. b (1971) (stating that the parties' "expectations should not be disappointed by application of the local law rule of a state which would strike down the contract or a provision thereof unless the value of protecting the expectations of the parties is substantially outweighed in the particular case by the interest of the state with the invalidating rule").

123. *Id.* § 188 Reporter's Note at 586, *citing* Russell J. Weintraub, *Choice of Law in Contract*, 54 IOWA L. REV. 399 (1968). The "alternative formulation" referred to is as follows:

> A contract is valid if valid under the domestic law of any state having a contact with the parties or with the transaction sufficient to make that state's validating policies relevant, unless some other state would advance its own policies by invalidating the contract and one or more [of five factors] suggest that the conflict between the domestic laws of the two states should be resolved in favor of invalidity . . . .

Weintraub, *supra*, at 430.

124. The *Restatement (Second)* section 203 provides:

> The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971).

125. *See supra* note 13 and accompanying text.

A. *Procedure*

Many of the *Restatement (Second)*'s "definite rules" are in the chapter on "Procedure."[126] In the context of the conflict of laws, the procedural label is shorthand for "apply the law of the forum."[127] If the same focus on content and policy that sparked the conflicts revolution in other areas is applied to "procedure," a court will apply forum law without full conflicts analysis only in limited circumstances. The occasion for direct resort to the local rule in multistate cases will be one in which the trouble of finding and applying a foreign rule is not justified because the rule is not likely to affect the choice of forum.[128] Below I discuss some of the *Restatement Second*'s "procedural" rules that, under this standard, would have to be reclassified as "substantive."

1. Statutes of Limitations.—Perhaps the most bizarre sections in the *Restatement (Second)*'s Procedure chapter are sections 142[129] and 143,[130] dealing with statutes of limitations. Section 143 provides a limited exception to application of forum limitations when the foreign statute "bars the right and not merely the remedy."[131] A limitation bars the right when the right is statutory and "the limitation provision was directed to the right 'so specifically as to warrant saying that it qualified the right.'"[132]

Treating time limitations as procedural is undesirable because they are too important and too likely to affect the choice of forum for

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126. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 6 (1971).

127. *Id.* Introductory Note at 350 (stating that "the forum will apply its own local law to matters of procedure").

128. *See* Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 344 (1932).

129. Section 142 provides:

> Statute of Limitations of Forum
>
> (1) An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state.
>
> (2) An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state, except as stated in § 143.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971).

130. Section 143 provides:

> Foreign Statute of Limitations Barring the Right
>
> An action will not be entertained in another state if it is barred in the state of the otherwise applicable law by a statute of limitations which bars the right and not merely the remedy.

Id. § 143.

131. *Id.*

132. *Id.* § 143 cmt. c (quoting Davis v. Mills, 194 U.S. 451, 454 (1904)).

a court to select them without full-scale, choice-of-law analysis. Determining and applying foreign limitations is no more difficult than determining and applying any other foreign rule, such as one of tort or contract, that is admittedly "substantive" for conflicts purposes.

The reasons that the choice-of-law analysis of statutes of limitations should not be short-circuited by a "procedural" label was stated in an opinion by Judge, later Justice, Harlan, fourteen years before the *Restatement (Second)* was promulgated. In *Bournias v. Atlantic Maritime Co.*,[133] Judge Harlan felt compelled by precedent to apply the common law rules later encapsulated in sections 142 and 143, but referred sympathetically to adverse academic criticism of those rules.[134] He began by noting the practical reasons for treating some issues as procedural for conflicts purposes.[135] Judge Harlan then noted that these reasons for procedural treatment did not fit statutes of limitations, stating that treatment of limitations as procedural "has been criticized as inconsistent with the [reasons for a procedural classification] since the foreign statute, unlike evidentiary and procedural details, is generally readily discovered and applied, and a difference in periods of limitation would often be expected to influence the choice of forum."[136]

In addition, before the *Restatement (Second)* was promulgated, dissatisfaction with the procedural treatment of limitations went beyond academic criticism and dictum. Three courts had already insisted that the new methods of conflicts analysis, which focused on the content and purposes of laws, should be applied to selecting the appropriate limitations period.[137] Only after more than twenty courts swam against the *Restatement (Second)*'s current, applying the new conflicts analysis to statutes of limitations, did the American Law Institute take

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133. 220 F.2d 152 (2d Cir. 1955).

134. *Id.* at 156-57.

135. *Id.* at 154.

136. *Id.*

137. *See* Gianni v. Fort Wayne Air Serv., Inc., 342 F.2d 621, 621 (7th Cir. 1965) (holding "that for the reasons stated in the Watts case, the Indiana statute of limitations should have been applied" (citing Watts v. Pioneer Corn Co., 342 F.2d 617, 620 (7th Cir. 1965) (stating that the law of the state that has "a more significant relationship" or a state's "sufficiently substantial interest" in the action governs where there is a choice-of-law question))); Gore v. Debaryshe, 278 F. Supp. 883, 884 (W.D. Ky. 1968) (stating that "the law of the state where the injury occurred determines the rights of the parties unless some other state has a more significant relationship with the occurrence and the parties as to the [statute of limitations] issue"); Paris v. General Elec. Co., 282 N.Y.S.2d 348, 353 (App. Div. 1967) (applying New York's longer statute of limitations over Massachusetts's, the location of the injury, "in pursuance of the advances made with respect to State concern and center of interest"), *aff'd mem.*, 290 N.Y.S.2d 1015 (App. Div. 1968).

the unusual step of adopting a revision of sections 142 and 143 that more closely reflected proper substantive treatment of the issue.[138]

I say "more closely" because the new section 142 gives far more preference to forum law than any other *Restatement (Second)* rule applying the principles of section 6. When the forum's limitations period is shorter than that of the other state with which the parties and the occurrence are connected, section 142(1) applies forum law. One problem with 142(1) is that it does not distinguish situations in which the forum merely wishes to rid itself of what it considers an untimely suit and has no objection to its being tried elsewhere, from cases in which the forum wishes to protect the defendant by applying its limitations to bar suit anywhere. Section 142(1) also does not take account of the possibility that the forum may consider the policies underlying its shorter limitations insufficiently applicable to bar a suit at the forum that is timely under another state's law.[139]

The new version of section 142(2) is even more troublesome because it is heavily weighted in favor of the forum's longer statute of limitations, thus producing a decision on the merits. Any clash between forum and foreign interests is resolved in favor of the forum. This approach contradicts what a comment to the new section says is the burden of the many cases subjecting limitations to choice-of-law analysis:

> They stand for the proposition that an action will not be maintained if it is barred by the statute of limitations of the state which, with respect to the issue of limitations, is the

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138. Sections 142 and 143 were revised and consolidated to become the new section 142:

> Statute of Limitations
>
> Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:
>
> (1) The forum will apply its own statute of limitations barring the claim.
>
> (2) The forum will apply its own statute of limitations permitting the claim unless:
>
> (a) maintenance of the claim would serve no substantial interest of the forum; and
>
> (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS Revisions § 142 (1988); *see also id.* Reporter's Note at 131 (citing twenty-two cases).

139. *See* FDIC v. Nordbrock, 102 F.3d 335, 339 (8th Cir. 1996) (holding that Illinois's longer statute of limitations applies although the forum's statute would bar the action against the forum defendant); Ledesma v. Jack Stewart Produce, Inc., 816 F.2d 482, 486 (9th Cir. 1987) (permitting a California resident to sue Arizona and Oklahoma residents in California when limitations had expired under California law but not under Arizona or Oklahoma law).

state of most significant relationship to the occurrence and the parties under the principles stated in § 6.[140]

Thus, the *Restatement (Second)* did "prove to be a hindrance, rather than an aid"[141] in applying policy-oriented analysis to statutes of limitations, and the 1988 revision still has not gotten it right.

2. Quantification of Damages.—In discussing choice of law for damages, it is helpful to distinguish between "heads" of damages and standards for quantifying recovery under those heads. Heads of damages are the categories under which recovery is available to the plaintiff. Examples are lost wages, medical expenses, pain and suffering, and punitive damages. On the other hand, standards for quantifying recovery determine whether an award under these heads is reasonable—for example, whether an award of $500,000 for pain and suffering is excessive.

The *Restatement (Second)* wisely treats heads of damages as substantive and chooses the law applicable to them under the principles of section 6.[142] This reflects the long-established rule,[143] from which courts have made only aberrant departures, usually to avoid a territorial choice-of-law rule that they were about to abandon.[144] The *Restatement (Second)*, however, treats quantification of damages as procedural.[145] This too accords with the established rule.[146] The es-

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140. RESTATEMENT (SECOND) OF CONFLICT OF LAWS Revisions § 142 cmt. e (1988).

141. Reese, *supra* note 12, at 681.

142. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 178 (1971) (referring to § 175 for determining damages for wrongful death); *id.* § 171 (referring to § 145 for determining damages for other torts).

143. *See* Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904) ("[W]e may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught.").

144. *See, e.g.*, Kilberg v. Northeast Airlines, Inc., 172 N.E.2d 526, 529 (N.Y. 1961) (avoiding limitation on damages under the law of the place of fatal injury by stating that damages for wrongful death are "procedural or remedial" and also stating that the limitation violates the public policy of the forum state); *see also* Babcock v. Jackson, 191 N.E.2d 279, 285 (N.Y. 1963) (abandoning the place-of-wrong rule for torts where "its application may lead to unjust and anomalous results").

145. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 171 cmt. f (1971) ("The forum will follow its own local practices in determining whether the damages awarded by a jury are excessive.").

146. *See* 1 DICEY & MORRIS ON THE CONFLICT OF LAWS 183 (Lawrence Collins et al. eds., 12th ed. 1993) ("A distinction must be drawn between remoteness and heads of damage, which are questions of substance governed by the *lex causae*, and measure or quantification of damages, which is a question of procedure governed by the *lex fori*." (footnote omitted)).

tablished rule is monstrous. Quantification of damages is the bottom line. Everything else is mere prologue. Allowing United States juries to assess what they think are proper damages for injuries abroad, even when foreign law otherwise applies, is the major reason why the United States is a magnet forum for the afflicted of the world.[147]

At long last a beam of sanity has pierced this darkness. In a conflict between federal circuits, some federal courts have held that *Erie Railroad Co. v. Tompkins*[148] requires evaluating jury verdicts under the standards of the state whose law applies to heads of damages,[149] but the Seventh Circuit has disagreed.[150] Now the United States Supreme Court has resolved the controversy, holding that *Erie* requires federal courts sitting in diversity to apply "the law that gives rise to the claim for relief"[151] when determining whether damages are excessive. This rule is not binding on the states,[152] but it states clearly that quantification of damages is too important to be treated as procedural for conflicts purposes. This may presage a salutary change of attitude in state courts, but if reform occurs, it will be without assistance from the *Restatement (Second).*

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147. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981) (listing "jury trials" as one of the reasons why United States courts are attractive to foreign plaintiffs); Smith Kline & French Lab. Ltd. v. Bloch, [1983] 1 W.L.R. 730, 734 (C.A. 1982) (Lord Denning, M.R.) (stating that United States juries "are prone to award fabulous damages").

148. 304 U.S. 64, 78 (1938) (holding that when state law is the source of the governing rule, a federal court must apply the state common law rule and not create one of its own); *see also* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (stating that the *Erie* mandate includes state choice-of-law rules).

149. *See* Raucci v. Town of Rotterdam, 902 F.2d 1050, 1058-59 (2d Cir. 1990) (ordering a new trial subject to remittitur of a wrongful death award in excess of the award amount permitted in New York state courts); Martell v. Boardwalk Enters., Inc., 748 F.2d 740, 750 (2d Cir. 1984) ("In determining whether an award is so excessive as to shock the judicial conscience, we look . . . to other jury awards condoned by the courts of the state whose substantive law governs the rights of the parties."); Hysell v. Iowa Pub. Serv. Co., 559 F.2d 468, 472 (8th Cir. 1977) ("Because this is a diversity case, we must take care that the damage award does not exceed that which could be sustained were the case before the highest court of the state whose substantive law gives rise to the claim.").

150. *See* Cash v. Beltmann N. Am. Co., 900 F.2d 109, 111 n.3 (7th Cir. 1990) (looking not only to forum-state decisions, but also to decisions from other circuits on the proper ratio between punitive damages and a defendant's net worth); *In re* Air Crash Disaster Near Chicago, 803 F.2d 304, 318 n.12 (7th Cir. 1986) ("In the case of a tort damages award in a routine diversity case, a federal court examining analogous awards is not necessarily limited to cases decided by the courts of the state whose law governs the diversity action.").

151. Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2224-25 n.22 (1996).

152. A state's traditional procedural characterization of a conflicts issue, though arguably wrong under modern choice-of-law analysis, is unlikely to be declared unconstitutional. *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717, 729 (1988) (holding that Kansas may characterize time limitations as procedural and permit recovery that would be time-barred in the states whose laws apply to substantive issues).

3. Privileged Communications.—The *Restatement (Second)* places the subject of privileged communications in its Procedure chapter and, in section 139,[153] states a rule that is forum centered with regard to exclusion and even more weighted in favor of applying the forum's rule of admission. The *Restatement (Second)*'s rule permits the forum to exclude evidence not privileged under the law of the state that has the most significant relationship with the communication if admission "would be contrary to the strong public policy of the forum."[154] On the other hand, the forum may admit evidence privileged under the law of the state that has the most significant relationship with the communication "unless there is some special reason why the forum policy favoring admission should not be given effect."[155]

Invocation of the forum's public policy to exclude evidence even when "the state of the forum has no relationship to the transaction"[156] is likely to affect the outcome. If the forum would dismiss the case without prejudice to suit elsewhere, use of public policy would be less obnoxious than under section 139(1), which clearly contemplates proceeding with the suit.[157]

Even more undesirable is section 139(2), which, unless a "special reason" to exclude exists, admits evidence under forum law that would be excluded in the state of most significant relationship to the communication.[158] Even the Federal Rules of Evidence defer to state law on privileged communications.[159]

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153. Section 139 provides:

> Privileged Communications
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> (1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.
>
> (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1971). Section 139 was revised in 1988, but the rules quoted above were not changed. The only significant change was the addition of a new comment concerning depositions. *Id.* Revisions § 139 cmt. f (1988).

154. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(1) (1971).

155. *Id.* § 139(2).

156. *Id.* § 139 cmt. c.

157. *Id.*

158. *Id.* § 139(2).

159. *See* FED. R. EVID. 510 ("[I]n civil actions . . . with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law.").

Section 139 works best when a court, as in *Ford Motor Co. v. Leggat*,[160] applies its provisions selectively. In *Leggat*, a Texan was killed in Texas when a Ford Bronco, which he had purchased in Texas, rolled over.[161] At issue was whether the court would admit the report of Ford's principal in-house attorney to the company's Policy and Strategy Committee.[162] The report was privileged under the law of Michigan, where it was communicated at Ford's headquarters, but Texas had a narrower corporate attorney-client privilege, under which it was doubtful that the report could be privileged and therefore excluded.[163] The court focused on the exception in section 139(2), finding "special reasons why Texas should defer to the broader attorney-client privilege of Michigan."[164]

The court noted that the *Restatement (Second)* "identifies four factors to consider when determining admissibility: number and nature of contacts of the forum with the parties or transaction, materiality of the evidence, kind of privilege, and fairness to the parties."[165] Nevertheless, the court focused only on the kind of privilege, finding that the attorney-client privilege, old and well-established, though, as this case reveals, differing in scope from state to state, should be protected "by the law of the state with the most significant relationship to the communication."[166]

If the court had also focused on the other three factors in section 139 comment (d), it might have come to a different, and less desirable, conclusion. The first factor, "the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved,"[167] points to admissibility under Texas law to facilitate recovery for Texas blood spilled on a Texas highway because of an allegedly defective vehicle purchased in Texas. The second factor, "materiality of the evidence,"[168] also points to admission. The fourth factor, "fairness to the parties,"[169] gives mixed signals. Ford may have relied on the broad Michigan form of the corporate attor-

160. 904 S.W.2d 643 (Tex. 1995).

161. *Id.* at 645. The case does not state that Leggat was a Texan or that the vehicle was purchased in Texas. This information was supplied by counsel for plaintiff. Telephone Interview with J. Hadley Edgar, Of Counsel, Law Offices of Frank L. Anson, P.C., Dallas, Tex. (Sept. 20, 1996).

162. *Leggat*, 904 S.W.2d at 645.

163. *Id.* at 646.

164. *Id.* at 647.

165. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 cmt. d (1971)).

166. *Id.*

167. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 cmt. d (1971).

168. *Id.*

169. *Id.*

ney-client privilege,[170] but the privilege was asserted by a party, and under the *Restatement (Second)*, this weighs in favor of admissibility.[171]

The court chose the right law for determining admissibility of the attorney-client communication, but would have had an easier time doing so without an obligation to justify itself under the *Restatement (Second)*.

B. Substance: Realty

Among the *Restatement (Second)*'s "precise and definite"[172] substantive rules, none is more specific than those relating to real estate, and nowhere in the *Restatement (Second)* is there a more confused mixture of territorial rules and policy-oriented analysis. Almost every choice-of-law issue affecting realty is referred to the law of the situs.[173] This is true despite the fact that commentators had demonstrated before the *Restatement (Second)* was promulgated that the situs rule for real estate is one of the most dysfunctional of all the territorial rules,[174] and that the *situs qua situs* has no interest in having its law applied unless the issue involves use of the land in a manner forbidden by the situs.[175]

The restaters were obviously uneasy about the situs rule. The comments mix nonsense with antidotes for the nonsense. We are told that the law of the situs applies to determine the capacity to make a conveyance even though the parties are domiciled elsewhere.[176] The reason is that applying the law of the common domicile, which "[i]t

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170. The *Restatement (Second)* states that "[t]he forum will be more inclined to give effect to a privilege if it was probably relied upon by the parties." *Id.*

171. *See id.* (stating that if "the privilege belongs to a person who is not a party to the action . . . the forum will be more inclined to recognize the privilege and to exclude the evidence than it would be in a situation where the privilege is claimed by a person who is a party to the action").

172. *See supra* note 13 and accompanying text.

173. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 (1971) (validity and effect of conveyance); *id.* § 226 (transfer of an interest in land by operation of law); *id.* § 228 (interests created by a mortgage); *id.* § 234 (effect of marriage on interest in land acquired during coverture); *id.* § 235 (existence and extent of equitable interests); *id.* § 236 (intestate succession); *id.* § 239 (validity and effect of a will); *id.* § 241 (interest of surviving spouse). The reference in these sections is to "the law that would be applied by the courts of the situs," but the statement immediately following notes that, "[t]hese courts would usually apply their own local law in determining such questions." *Id.* §§ 223(2), 226(2), 228(2), 234(2), 235(2), 236(2), 239(2), 241(2).

174. *See* Moffatt Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095, 1105 (1965).

175. *See* Russell J. Weintraub, *An Inquiry into the Utility of "Situs" As a Concept in Conflicts Analysis*, 52 CORNELL L. REV. 1, 11 (1966).

176. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 cmt. b (1971).

could be argued . . . has the dominant interest . . . would complicate the task of title searchers and of other persons concerned with [the] land."[177] Then, in the first illustration following this statement, we are told that in a divorce proceeding the common domicile of husband and wife should apply its own law, which is contrary to that of the situs, and entitles a wife to an order requiring the husband to deed her his interest in the land.[178] The illustration explains that "the [situs] recording system would not be affected if the [divorce] court were to apply [its own local law] . . . because the transfer would not be effective against third persons until the transfer . . . had been recorded in [the situs] in accordance with the [situs] requirements."[179]

Other examples of this Jekyll-and-Hyde approach abound in the *Restatement (Second)* sections on real estate. Section 236 states that intestate succession will be determined by the whole law of the situs, with the expectation that courts there will apply their own law.[180] Then, in the only comment to this section, the silliness of this rule is immediately revealed:

> There may in the given case be other states which have an even greater interest in this question, such as would probably be true of a state where the decedent and all of his heirs were domiciled. . . .
>
> If, under the practice of the situs, the persons who are entitled to succeed upon intestacy to interests in local land are conclusively determined as against all others by a court decree in the administration proceedings or otherwise, there is no reason so far as title searchers and other third persons are concerned why intestate succession should not on occasion follow the local law of another state.[181]

Section 242 applies the whole law of the situs, including its conflicts rules, to the rights of a surviving spouse to take against the will of the deceased spouse, and again the expectation is that the law of the situs will apply.[182] Once more the comments cast doubt on the wisdom of the black letter law: "On the other hand, these [situs] courts might apply the forced share rules of the state of the spouses' common domicil if it were [to] appear that the deceased spouse had bought land in the situs in an attempt to avoid application of the rules

177. *Id.*
178. *Id.* cmt. i, illus. 1.
179. *Id.*
180. *Id.* § 236.
181. *Id.* § 236 cmt. a.
182. *Id.* § 242.

of the common domicil."[183] Even if situs courts did not have enough sense to do this, one would hope that courts at the marital domicile with personal jurisdiction over all interested parties[184] would repudiate section 242 and apply their own law to protect the surviving spouse against disinheritance.

Since the publication of the *Restatement (Second)*, a few courts have applied a consequences-based analysis to conflicts involving realty, and rejected situs law.[185] That the least functional of all the territorial rules, situs of realty, remains predominant in the United States,[186] is due in large part to the stultifying influence of the *Restatement (Second)*.

III. STRENGTHS

A. *Escape from Territorial Rules*

In one of his extremely useful annual surveys of choice-of-law cases, Professor Symeonides observes that "[s]ome states use the Restatement Second solely as an escape from a traditional choice-of-law rule."[187] Using the prestige of the American Law Institute and the *Restatement (Second)* to justify basic change and guided by counsel who understand how the content and purposes of a law affect its applica-

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183. *Id.* § 242 cmt. c.

184. *See id.* § 55 (stating that a court may "order a person, who is subject to its judicial jurisdiction, to do, or not to do, an act in the state, although the carrying out of the decree may affect a thing in another state"); *id.* § 55 illus. 1 (stating that a court may order conveyance of land in another state).

185. *See, e.g.*, Wendelken v. Superior Court, 671 P.2d 896, 898-901 (Ariz. 1983) (en banc) (holding that the law of common domicile, not Mexican situs, should be applied to determine compensation owed to an injured guest); Sarbacher v. McNamara, 564 A.2d 701, 707-08 (D.C. 1989) (applying law of D.C. domicile, not Florida situs, to determine whether husband's estate is entitled to contribution from wife's estate toward payment of mortgage); Rudow v. Fogel, 426 N.E.2d 155, 160-61 (Mass. App. Ct. 1981) (holding that the law of New York domicile of parties rather than of Massachusetts situs should be applied to determine whether there is a constructive trust in realty); *In re* Estate of Janney, 446 A.2d 1265, 1266-67 (Pa. 1982) (applying law of testatrix's Pennsylvania domicile rather than of New Jersey situs to validate will when chief devisee is an attesting witness); Dority v. Dority, 645 P.2d 56, 59 (Utah 1982) (affirming a judgment that applied the law of husband's domicile at time of divorce rather than situs law in determining wife's interest in realty owned by the spouses as tenants by the entireties).

186. Many other legal systems do not refer to situs law when choosing the law applicable to the estate of a deceased person, but instead apply the same law to succession of both personal property and realty. Some of these countries apply the law of the decedent's domicile and some the law of the decedent's nationality. *See* Georges A.L. Droz, *Commentary on the Questionnaire on Succession in Private International Law*, *in* 2 PROCEEDINGS OF THE SIXTEENTH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 19-51 (1990); Hans Van Loon, *Update of the Commentary on Succession in Private International Law*, *in id.* at 107-19.

187. Symeon C. Symeonides, *Choice of Law in the American Courts in 1995: A Year in Review*, 44 AM. J. COMP. L. 181, 194 (1996).

tion to multistate occurrences, these courts have produced models of modern conflicts methodology. An example is the opinion of the Supreme Court of Texas in *Duncan v. Cessna Aircraft Co.*[188] A Texan taking flying lessons was killed by an airplane crash in New Mexico.[189] His widow brought suit in federal court in Texas against the estate of the instructor pilot and the pilot's employer.[190] The instructor was domiciled in New Mexico, and his employer was a New Mexico corporation.[191] The widow settled her suit and executed a release of the employer, the estate of the instructor, and "'any other corporations or persons.'"[192] The student's widow then sued Cessna, the aircraft's manufacturer, claiming that design and manufacturing defects caused the crash to be fatal.[193] Cessna pleaded the release as a defense.[194] Under New Mexico law, the general wording, "any other corporations," was sufficient to release Cessna,[195] but under Texas law it was not.[196] The court held that Texas law applied and that Cessna was not released from liability to the widow.[197]

To reach this result, the court used the general framework of the *Restatement (Second)*, but molded the *Restatement (Second)* to produce a form of interest analysis. The court noted that, before engaging in choice-of-law analysis, "we must first determine whether there is a difference between the rules of Texas and New Mexico on [the release] issue."[198] After determining that the laws of the two states did conflict, the court stated that it would choose the applicable law by "use of the most significant relationship approach in accordance with the general principles stated in § 6."[199] This focus on section 6 gave precedence to the substantive policies underlying the conflicting laws.[200]

The court then listed the contacts of the parties and the transactions with New Mexico, Texas, and Kansas, where Cessna was incorporated and the airplane was designed and manufactured.[201] The court then stated that "[t]he beginning point for evaluating these contacts is

188. 665 S.W.2d 414 (Tex. 1984).
189. *Id.* at 418.
190. *Id.*
191. *Id.* at 421.
192. *Id.* at 418 (emphasis omitted).
193. *Id.*
194. *Id.*
195. *Id.* at 420.
196. *Id.* at 419-20.
197. *Id.*
198. *Id.* at 419.
199. *Id.* at 421.
200. *See supra* note 38 and accompanying text.
201. *Duncan*, 665 S.W.2d at 421.

the identification of the policies or 'governmental interests,' if any, of each state in the application of its rule."[202] The court concluded that this was a "'false conflict'"[203] because only Texas policies underlying its release rule would be affected by the choice of law.[204] En route, the court stated that it "decline[d] to adopt"[205] section 170(1) of the *Restatement (Second)*, under which the law governing tort issues "determines the effect of a release . . . given to one joint tortfeasor upon the liability of the others."[206] The court pointed out that Cessna was not a party to the release and that determining the effect of the release on Cessna's liability implicated contract issues not adequately dealt with by automatically applying the law that would apply to tortious liability of the parties.[207]

Thus, the court set out a four-step model for choosing law: (1) if one of the parties requests displacement of forum law, determine the content of the law of the other state and the content of forum law;[208] (2) if the two would produce different results when applied to the facts before the court, determine the purposes underlying the laws of each state;[209] (3) determine whether, if each state's law is not applied, the contacts of the parties or the occurrence with that state would produce consequences there that its law is designed to prevent;[210] and (4) if only one state has contacts that trigger the policies underlying its law, apply the law of that state.[211]

The court's form of analysis was admirable, although one might quarrel with its implementation. The court found that "no New Mexico defendant or injured party is involved" and, therefore, "New Mexico has no governmental interest" in whether Cessna is discharged.[212] This overlooks the fact that Cessna counterclaimed against the estate of the New Mexico instructor pilot.[213] New Mexico might well have a policy of discharging all tortfeasors, whether specifically named in the release or not, in order to prevent just this sort of occurrence—re-

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202. *Id.* The court did not consider Kansas's interests because "Cessna has not asserted any error in the trial court's application of New Mexico law." *Id.* at 422 n.6.

203. *Id.* at 422.

204. *Id.*

205. *Id.* at 420 n.4.

206. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 170(1) (1971).

207. *Duncan*, 665 S.W.2d at 420 n.4.

208. *Id.* at 419-20.

209. *Id.* at 420-21.

210. *Id.* at 421-22.

211. *Id.* at 422.

212. *Id.* at 421.

213. *Id.* at 418.

leased defendants hauled back into court for contribution and indemnity when the plaintiff sues others.

The court did better in appraising Texas's interests. The opinion noted that one purpose underlying the Texas rule that tortfeasors not specifically named in a release are not discharged is "to ensure that Texas claimants do not inadvertently lose their valuable rights against unnamed and perhaps unknown tortfeasors."[214] The facts of this case—separate and distinct claims against one whose conduct caused the crash and the manufacturer whose negligence aggravated the injuries—are exactly the ones that would trigger this policy.

Even more cogently, the court noted that the release was negotiated and executed in Texas to settle a Texas suit.[215] The lawyers and their clients would be expected to look to Texas law to determine the effect of the release.[216] Texas had "an interest in protecting [the plaintiff's] reasonable contractual expectations."[217]

Thus, the court shaped the *Restatement (Second)* to fit a content and policy-oriented analysis of choice-of-law problems and rejected a specific *Restatement (Second)* rule that it found inconsistent with that form of analysis. In a survey of state conflicts methods, Texas may be listed in the *Restatement (Second)* column, but as Professor Symeonides points out, this is a far-from-satisfactory description of what Texas and other states so listed are actually doing.[218]

B. Functional Insights

The *Restatement (Second)* contains many valuable insights into the implications of a choice-of-law regime that focuses on the content and purposes of laws rather than blindly sticking pins in maps. Perhaps the most amazing is section 8, dealing with when a court should take account of the choice-of-law rules of another jurisdiction.[219] This

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214. *Id.* at 422.

215. *Id.*

216. *Id.*

217. *Id.*

218. *See* Symeonides, *supra* note 187, at 194-95 (describing the various levels of commitment states have in their use of the *Restatement (Second)*).

219. Section 8 provides:

> Applicability of Choice-of-Law Rules of Another State (Renvoi)
>
> (1) When directed by its own choice-of-law rule to apply "the law" of another state, the forum applies the local law of the other state, except as stated in Subsections (2) and (3).
>
> (2) When the objective of the particular choice-of-law rule is that the forum reach the same result on the very facts involved as would the courts of another state, the forum will apply the choice-of-law rules of the other state, subject to considerations of practicability and feasibility.

problem, often referred to as *renvoi*, was, in the context of territorial conflicts rules, a framework for intellectual games. There was the fascinating prospect of two jurisdictions with conflicts rules pointing to one another. If each referred to the "whole law" of the state selected by its own rule, it might find itself going around forever. Each rule would be a mirror pointing at the other.[220]

One of the challenges of changing from a territorial conflicts regime is determining the effect the change will have on the relevance and treatment of *renvoi*. Section 8 meets the challenge in exemplary fashion. Its black letter and comments identify three situations in which a court applying the new methodology should refer to another state's conflicts rules.

The circumstance of most practical importance is found in comment (k): "An indication of the existence of a state interest in a given matter, and of the intensity of that interest, can sometimes be obtained from an examination of that state's choice-of-law decisions."[221] This will be particularly true if that other state is also engaged in a method of choosing law that focuses on state interests.[222] For example, a resident of Texas borrows money from a New York lender and agrees to pay interest that is legal under New York law but usurious under Texas law. A New York court deciding the case preliminarily finds a "true conflict" because both states are "interested" in having their own laws applied: New York to give effect to the lender's bargain, and Texas to protect the borrower. The court discovers a Texas case that applied the foreign rule in favor of the lender and stated that Texas did not want to discourage commercial loans to Texas businesses.[223] The New York court can apply its own law to enforce the

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(3) When the state of the forum has no substantial relationship to the particular issue or the parties and the courts of all interested states would concur in selecting the local law rule applicable to this issue, the forum will usually apply this rule.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1971).

220. See *In re Annesley*, 135 L.T.R. 508 (Ch. 1926), in which the English forum's choice-of-law rule pointed to France, and the French rule, as interpreted by the English court, pointed to England. *Id.* at 513. The court broke the circle by deciding the case just as would a French court; the court found that a French court would accept the reference back to its own law, and applied French law to invalidate a will. *Id.*

221. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 cmt. k (1971).

222. *See* Pfau v. Trent Aluminum Co., 263 A.2d 129, 137 (N.J. 1970) (refusing to apply the law of the place of wrong chosen by Connecticut's conflicts rule because "*[l]ex loci delicti* was born in an effort to achieve simplicity and uniformity, and does not relate to a state's interest in having its law applied to given issues in a tort case").

223. *Cf.* Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co., 642 F.2d 744, 750 (5th Cir. Apr. 1981) (enforcing a clause choosing Mississippi law, which provides lesser penalties for usury than Texas law, and stating that parties to interstate commercial loan

promises to the New York lender, confident that it has reached the result that best accommodates the interests of both states.[224]

A second situation identified by section 8 in which the forum should apply the choice-of-law rules of another state is "[w]hen the objective . . . is that the forum reach the same result on the very facts involved as would the courts of another state."[225] Although not mentioned in the comments,[226] the best example is the "eight-hundred-pound gorilla" situation. The other jurisdiction has ultimate control over the result and will not recognize a contrary adjudication at the forum. This might occur when the dispute concerns interests in realty situated in a foreign country that will not recognize a United States court's *in personam* adjudication of the parties' rights.[227]

The third situation in which section 8 counsels reference to another state's choice-of-law rules is when "the forum has no substantial relationship to the particular issue or the parties and the courts of all interested states would concur in selecting the local law rule applicable to this issue."[228] This circumstance will not occur frequently, but when it does,[229] the *Restatement (Second)*'s position is eminently sensible.

There are further valuable functional insights scattered throughout the *Restatement (Second)*. Perhaps the most important is that when "a question . . . would be decided the same way by the relevant local

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transactions should be able "to stipulate for the higher of the two applicable rates of interest").

224. *But see* Bushkin Assocs. v. Raytheon Co., 473 N.E.2d 662, 667 (Mass. 1985) (permitting New York finder to recover against a Massachusetts client under Massachusetts law even though a New York court would apply the New York statute of frauds and deny recovery).

225. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8(2) (1971).

226. Comment (h) provides two examples. The first is when "the other state clearly has the dominant interest in the issue to be decided and its interest would be furthered by having the issue decided in the way that its courts would have done." *Id.* § 8 cmt. h. Then cited is section 223, which relates "to the validity and effect of a transfer of interests in land." *Id.* This is nonsense. *See supra* Part II.B. The second example is "where there is an urgent need that all states should apply a single law in resolving a certain question." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 cmt. h (1971). The example provides that "the forum will apply the choice-of-law rules of the state of the decedent's domicil at death to determine questions relating to succession to interests in movables." *Id.*

227. *Cf. In re* Schneider's Estate, 96 N.Y.S.2d 652, 657 (Sur. Ct. 1950) (referring to the Swiss choice-of-law rule to validate the testamentary disposition of Swiss realty).

228. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8(3) (1971).

229. *See In re* Zietz's Estate, 96 N.Y.S.2d 442, 446 (Sur. Ct. 1950) (applying the law of a foreign decedent's nationality at death rather than his domicile to determine which administrator should control ancillary administration in New York; although New York's choice-of-law rule pointed to the domicile, both domicile and nationality agreed that nationality should govern).

law rules of all the potentially interested states . . . there is no need for the forum to determine the state of the applicable law."[230] Perhaps a better way to state this is that, if the forum is one of these interested states, there is no basis for displacing forum law and a choice-of-law analysis is unnecessary. Many pages of case reports could be saved if courts would learn this common-sense lesson.[231]

CONCLUSION

A restatement, as indicated by the very name, is an inappropriate vehicle for law reform. When the law in a particular subject is stable and the results it is producing have triggered no cogent condemnation, a restatement can be a useful guide for the profession. When, on the contrary, courts and commentators are in the process of reanalyzing a subject, a restatement is a bad idea. Nevertheless, the *Restatement (Second) of Conflict of Laws*[232] persisted in its royal procession despite the threats of peasants with pitchforks. That the project did not set its face against the emerging changes and seek throughout to maintain the untenable is due in large part to the intelligence and industry of its Reporter. Professor Reese, after all, was one of the scholars pointing the way to reforming the subject.[233]

The *Restatement (Second)* is an odd mixture of territorial gibberish and functional analysis. Courts, with their overloaded dockets, cannot be expected on their own to distinguish between the two. Counsel have the duty to help the courts use the *Restatement (Second)* in a manner that facilitates rather than impedes a content and policy-based choice between conflicting laws. In turn, law schools have the obligation to prepare their students to assume this duty.

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230. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. c (1971).

231. *But see, e.g.*, Samuelson v. Susen, 576 F.2d 546, 551 (3d Cir. 1978) (stating that the court will "look to Pennsylvania's conflict-of-laws rules to determine whether Ohio's or Pennsylvania's [testimonial] privilege law applies . . . even though, it might be argued that the law, of the two jurisdictions, controlling the resolution of the privilege question is essentially the same").

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

233. *See generally* Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 961 (1952) (setting forth "the major policies underlying choice of law").