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# COURTS AND THE SECOND CONFLICTS RESTATEMENT: SOME OBSERVATIONS AND AN EMPIRICAL NOTE

PATRICK J. BORCHERS\*

## INTRODUCTION

As the name of this Symposium suggests, the *Restatement (Second) of Conflict of Laws*<sup>1</sup> has been with us for a quarter of a century. In some senses it has been around longer. The American Law Institute began the endeavor in 1952<sup>2</sup> and approved it in May 1969.<sup>3</sup> In draft form, the *Second Restatement* attracted early attention from courts, including a prominent citation in the New York Court of Appeals pathbreaking 1963 *Babcock v. Jackson*<sup>4</sup> decision. With good reason, *Babcock* is viewed as the beginning of the conflicts revolution,<sup>5</sup> and, thus, the *Second Restatement* has been a prominent feature of the conflicts revolution since the beginning.

Like the revolution itself, the project of re-restating American conflicts law was controversial. Although the first *Restatement of Conflict of Laws*,<sup>6</sup> adopted in 1934, was under attack from its beginning,<sup>7</sup> it represented a synthesis of a stable, territorial, multilateral choice-of-law system whose American roots dated at least to Justice Story's 1834 treatise,<sup>8</sup> and whose European ancestry predated Story by centuries.<sup>9</sup> Even among those who favored modification or abandonment of the

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

2. See Willis L.M. Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679, 680 (1963).

3. See W. Noel Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration*, 13 PEPP. L. REV. 23, 38 (1985).

4. 191 N.E.2d 279, 282 (N.Y. 1963).

5. See, e.g., *Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1212 (1963) (referring to *Babcock* as a repudiation of the traditional rule); *Symposium on Conflict of Laws: Celebrating the 30th Anniversary of Babcock v. Jackson*, 56 ALB. L. REV. 693, 694 (1993) (referring to *Babcock* as the "big bang" in conflicts law).

6. RESTATEMENT OF CONFLICT OF LAWS (1934).

7. See, e.g., David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 208 (1933) (stating that the *First Restatement* "elevate[s] certainty and uniformity above all other objectives [of the choice-of-law] branch of the conflict of laws," thereby stifling further inquiry and scholarship in the field).

8. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834).

9. See FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 10-31 (1993).

multilateral system embodied in the *First Restatement*, however, the *Second Restatement* came in for criticism.<sup>10</sup>

Despite the slings and arrows launched toward it, the *Second Restatement* has risen to prominence. More than half of the states now purport to follow it, while only a dozen follow its predecessor.<sup>11</sup> Even among states that follow some other choice-of-law approach, certain provisions in the *Second Restatement* have proven influential.<sup>12</sup> Thus, in a sense, one could say that the *Second Restatement* now represents the dominant American conflicts methodology.

But what does it mean to say that the *Second Restatement* is “dominant”? What is it that courts actually do in “following” the *Second Restatement*? Does saying that a state is a *Second Restatement* jurisdiction mean anything more than that it does not follow the *First Restatement*?

This Article suggests that the reason the *Second Restatement* has attracted such a large following—in name, anyway—is its open-ended general provisions.<sup>13</sup> Its general provisions are cited with considerable frequency, while its more narrow, specific provisions are often ignored, even in cases in which they offer explicit answers to the case at hand.<sup>14</sup> The result, which will surprise no one who has closely followed American conflicts doctrine, is that citation to the *Second Restatement* is often little more than a veil hiding judicial intuition.

The remedy this Article proposes is that courts nominally following the *Second Restatement* should make an effort to follow the entire document, including analysis of relevant specific provisions. To the extent that courts wish to depart from the narrower, presumptive rules contained in the *Second Restatement*, they should candidly set forth their reasons for doing so. As Professor Leflar and others have recognized,<sup>15</sup> courts have a strong preference for applying the better

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10. See *infra* note 18 and accompanying text.

11. See Symeon C. Symeonides, *Choice of Law in the American Courts in 1995: A Year in Review*, 44 AM. J. COMP. L. 181, 195 (1996).

12. See, e.g., *Allstate Ins. Co. v. Stolarz*, 613 N.E.2d 936, 939 (N.Y. 1993) (following § 188 of the *Second Restatement* while still adhering to the “center-of-gravity” approach to resolve conflicts).

13. See *infra* tbl.I (documenting the frequency of citation to the general provisions of the *Second Restatement*).

14. See *infra* tbls.II & III (documenting the frequency of citation to specific tort (tbl. II) and contract (tbl.III) provisions of the *Second Restatement*).

15. See, e.g., JUENGER, *supra* note 9, at 191-94 (“Openly or covertly, the better law principle now permeates case law, statutes and conventions.”); Robert A. Leflar, *Choice-Influencing Laws in Conflicts Law*, 41 N.Y.U. L. REV. 267, 295-304 (1966) (stating that the most important factor in conflicts is the application of the better rule of law); Luther A. McDougal, III, *Toward Application of the Best Rule of Law in Choice of Law Cases*, 35 MERCER L. REV. 483, 512-14 (1984) (stating that courts should not stop with the better rule of law, but

rule of law, especially in tort conflicts.<sup>16</sup> Courts that find themselves frequently departing from the narrower, presumptive rules should reconsider their status as *Second Restatement* states.

If courts were either to follow the narrower, more specific rules in the *Second Restatement*, or candidly state reasons for departing from them, this would further important goals. First, this approach would foster predictability. Predicting results based solely on the *Second Restatement's* general provisions is almost impossible, whereas the specific provisions contain many relatively sensible rules. Second, this approach would promote judicial candor. To the extent that courts reject the *Second Restatement's* guidance, they should say so forthrightly, rather than bathing in the vast expanses of the *Second Restatement's* open-ended general provisions. Certainly, those courts that routinely deviate from the *Second Restatement's* specific provisions should reconsider their professed adherence to the document.

Part I of this Article considers the *Second Restatement's* guidance and considers why the document has inspired the selective treatment it receives from courts. Part II presents some data on the frequency with which courts invoke *Second Restatement* provisions and shows that, while the general provisions are frequently cited, the more narrow provisions are rarely cited.

## I. THE *SECOND RESTATEMENT'S* STRUCTURE

The *Restatement (Second) of Conflict of Laws*<sup>17</sup> is a strange document. From a current perspective, the vigor with which the whole project was attacked while in the drafting stage is surprising. Two of the giants of that earlier era, Brainerd Currie and Albert Ehrenzweig,

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should apply the best rule of law—the law that best serves the common interest—to resolve choice-of-law cases).

16. *See, e.g.*, *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721, 728 (Cal. 1978) (in bank) (stating that the California rule is “archaic” and, thus, not to be applied); *Bigelow v. Halloran*, 313 N.W.2d 10, 12-13 (Minn. 1981) (en banc) (concluding that the rule of survival of tort liability is the better rule); *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 283 n.2 (N.Y. 1993) (describing that the New York rule of allowing contribution against impleaded employers is clearly a minority rule and its imposition on “the carefully structured workers’ compensation schemes of other States . . . is undesirable”); *see also* Patrick J. Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883, 905 (1993) (stating that the New York Court of Appeals in *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 526 (N.Y. 1961), applied the traditional approach, but applied other devices to apply the preferable substantive rule).

17. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* (1971).

insisted that the entire venture was counterproductive and should be abandoned.<sup>18</sup>

The various twists and turns taken in the drafting of the *Second Restatement* are well documented in the American Law Institute proceedings, as well as being discernable from its various tentative drafts of the *Second Restatement*. In general terms, it is apparent that the *Second Restatement* began as one kind of project and ended as another. To understand how this came about, it is necessary to return to the *Second Restatement's* nominal predecessor.

The first *Restatement of Conflict of Laws*<sup>19</sup> was begun in 1923 under the leadership of Reporter and Harvard law professor Joseph Beale.<sup>20</sup> The American Law Institute's aim in drafting the *First Restatement* was—as it was for other restatements—to produce an “orderly statement of the general common law of the United States.”<sup>21</sup> In that sense, the *First Restatement* was a reasonably successful enterprise. For the most part, it accurately restated American law as it then existed.

While there was apparently fairly broad agreement on the statement of the rules in the *First Restatement*, Beale's theory—and thus his explanation for the rules—was controversial even then.<sup>22</sup> For this reason, the *First Restatement's* drafters eliminated a good deal of the explanatory material, resulting in commentary that the Reporter for the *Second Restatement*, Professor Willis Reese, accurately described as “terse.”<sup>23</sup> Although eliminating the controversial explanatory material might have been expedient, it resulted in a document more dogmatic than perhaps even Beale wanted.

The *First Restatement's* dogmatic character, combined with the devastating criticisms launched by David Cavers,<sup>24</sup> Walter Wheeler Cook,<sup>25</sup> Hessel Yntema,<sup>26</sup> Ernest Lorenzen,<sup>27</sup> and others foretold its

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18. See Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 755 (1963) (“We certainly do not need a new *Restatement*, although we are threatened with one.”); Albert A. Ehrenzweig, *The “Most Significant Relationship” in the Conflicts Law of Torts: Law and Reason Versus the Restatement Second*, 28 LAW & CONTEMP. PROBS. 700, 700 (1963) (“Only the remaining hope to induce the Restaters to withdraw their latest draft on the conflicts law of torts has prompted me to offer these comments . . .”).

19. RESTATEMENT OF CONFLICT OF LAWS (1934).

20. See Reese, *supra* note 2, at 679.

21. RESTATEMENT OF CONFLICT OF LAWS viii (1934).

22. See Reese, *supra* note 2, at 679-80.

23. *Id.* at 679.

24. See *supra* note 7.

25. See WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* ix (1942) (analogizing the dogma of the *First Restatement* to a “rank weed” and stating that “until the intellectual garden is freed of the rank weeds in question useful vegetables cannot grow and flourish”).

short life. The academic criticism of its underpinnings, coupled with judicial deviation from some of its categorically stated rules, put it at the head of the line for revision. In the beginning, the *Second Restatement's* drafters apparently did not envision a work radically different from the original. They still wanted a document that "restated" the existing law in the United States.<sup>28</sup>

When work began in 1952, that hope must not have seemed too far out of reach. After all, 1952 was the year before *Grant v. McAuliffe*,<sup>29</sup> two years before *Auten v. Auten*,<sup>30</sup> nine years before *Kilberg v. Northeast Airlines, Inc.*,<sup>31</sup> eleven years before *Babcock v. Jackson*,<sup>32</sup> fifteen years before *Reich v. Purcell*,<sup>33</sup> and well in advance of the countless other cases that spawned the conflicts revolution. The revolution, however, rendered the conflicts law of the United States incapable of restatement. The diversity of new approaches destroyed any possibility of a coherent statement of the "general common law" that the *First Restatement* sought to reflect.<sup>34</sup> By the late 1960s, it was probably no more possible to "restate" choice-of-law doctrine than it was to "restate" the law of zoning or child support.

Moreover, even the task of "restating" the law of a single state might have become impossible. For instance, in the span of six years, the New York Court of Appeals decided that in guest-host cases the

26. See Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 474 (1928) (describing the *First Restatement's* method of dealing with conflict of laws as "superficial," "unscientific," and "quite inadequate").

27. See Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 748 (1924) (describing the *First Restatement's* covert mode of approach to the conflict of laws as an *a posteriori* approach).

28. See Reese, *supra* note 2, at 680.

29. 264 P.2d 944, 949 (Cal. 1953) (in bank) (holding that the issue of survival of a cause of action is a question of procedural law, and thus is governed by the law of the forum).

30. 124 N.E.2d 99, 103 (N.Y. 1954) (emphasizing "the law of the place with the most significant contacts" in a contract dispute, rather than relying upon the conventional rule "that matters of performance and breach are governed by the law of the place of performance").

31. 172 N.E.2d 526, 529 (N.Y. 1961) (holding that the public policy interests of New York prevented application of another state's damage limitation in a wrongful death action and treating the measure of damages as a procedural question controlled by the laws of the forum state).

32. 191 N.E.2d 279, 283 (N.Y. 1963) (concluding that, in tort cases with multistate contacts, justice and fairness may best be achieved "by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation").

33. 432 P.2d 727, 729 (Cal. 1967) (in bank) (noting that "when application of the law of the place of the wrong would defeat the interests of the litigant and of the states concerned," the court should not apply that law).

34. See *supra* note 21 and accompanying text.

law of the state of common domicile of the guest and host should,<sup>35</sup> then should not,<sup>36</sup> then should<sup>37</sup> apply. This prompted Maurice Rosenberg's famous assertion that "[a] New York lawyer with a guest statute case has more need of an ouija board . . . than a copy of Shepard's citations."<sup>38</sup>

With or without an ouija board, the attempt to restate the law continued. The pressures of the nineteen years that intervened between the conception and birth of the *Second Restatement* produced a document that could not—and cannot—be fairly called a "restatement" of anything. Instead, it is an amalgamation of different conflicts approaches, producing a document of a distinctly normative character. Nowhere is this normative character more evident than in section 6 and its juxtaposition with other provisions in the document.

Yet the territorial, multilateral tradition of its predecessor still shows in the *Second Restatement*, which its Reporter would describe as "eclectic and territorial."<sup>39</sup> The objections of Currie and Ehrenzweig appear, as much as anything else, to have been directed at this territorialist bent—especially in its earlier drafts.<sup>40</sup> The attempt to accommodate their objections produced section 6, which one writer somewhat uncharitably described as "a sop tossed . . . to members of the American Law Institute who were unhappy with a purely territorial methodology."<sup>41</sup>

As uncharitable as this characterization might be, there is no denying its accuracy. As is well known, section 6's list of "factors relevant" to the choice include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,

35. *Babcock*, 191 N.E.2d at 284-85.

36. See *Dym v. Gordon*, 209 N.E.2d 792, 794-95 (N.Y. 1965).

37. See *Tooker v. Lopez*, 249 N.E.2d 394, 398-402 (N.Y. 1969).

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

39. Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 507 (1983).

40. See *supra* note 18 and accompanying text.

41. William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645, 662 (1983).

- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.<sup>42</sup>

In structure, this list much resembles others compiled by academic authors, including the one by Elliott Cheatham and Willis Reese.<sup>43</sup> A notable omission, however, is any explicit reference to “‘justice in the individual case’” or any similar consideration.<sup>44</sup> Even as late as 1963, Reese insisted that individualized justice was an appropriate concern in multistate cases, which he explained with the observation that “no judge will willingly reach a result which he deems to be unjust.”<sup>45</sup> The absence in section 6 of any explicit reference to such a consideration is also the major distinction between the *Second Restatement’s* list and the one proffered by Professor Leflar, who included “[t]he better rule of law” as the fifth of five coequal factors.<sup>46</sup>

Whether or not the “better rule” is explicitly made a factor, section 6 gives almost unlimited discretion to a court in choosing the applicable law.<sup>47</sup> Moreover, the factors often pull in opposite directions. A rule that protects justified expectations, for instance, may not be the easiest to apply. Application of the rule that promotes the forum’s policies may not lead to predictability and uniformity of result.

Of course, section 6 is but one of many provisions in the *Second Restatement*. It coexists with numerous other sections more in the mold of the *First Restatement* and the earlier, more rigidly territorial, *Second Restatement* drafts. An examination of the tort chapter is illustrative. The tort chapter begins with section 145, a section nearly as

42. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 34 (1971).

43. See Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 961 (1952) (listing the following as “at least some of the major policies underlying choice of law”: (1) the needs of the interstate and international systems; (2) application of local law unless there is a good reason for not doing so; (3) effectuating the purpose of relevant local law; (4) certainty, predictability, and uniformity of result; (5) protecting justified expectations; (6) applying the law of the state of dominant interest; (7) convenience and ease in determining applicable law; (8) the fundamental policy underlying the broad local law field involved; and (9) justice in the individual case).

44. See Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 817 & n.6 (1983) (quoting Cheatham & Reese, *supra* note 43, at 980-81, and commenting that individualized justice is “[n]otably omitted from section 6”).

45. Reese, *supra* note 2, at 690.

46. Robert A. Leflar, *Conflicts Laws: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1585-88 (1966); see also Reppy, *supra* note 41, at 657-58 (commenting that “the addition of section 6 makes the Restatement Second’s choice of law methodology a ‘hybrid’ of territorialism and ‘Leflar’s five factor test’” (quoting *General Elec. Co. v. Keyser*, 275 S.E.2d 289, 295 (W. Va. 1981))).

47. See *supra* note 42 and accompanying text.



amorphous as section 6.<sup>48</sup> Section 145 begins with the nearly useless admonition that tort issues are to be determined so as to choose the law that “has the most significant relationship to the occurrence and the parties under the principles stated in § 6.”<sup>49</sup> Section 145 then lists four different groups of “[c]ontacts to be taken into account in applying the principles of § 6.”<sup>50</sup> These contacts are the place of the injury, the place of the injury-causing conduct, the “domicil, residence, nationality, place of incorporation and place of business of the parties,” and “the place where the relationship, if any, between the parties is centered.”<sup>51</sup> Section 145 then concludes with the precatory statement that the contacts “are to be evaluated according to their relative importance with respect to the particular issue.”<sup>52</sup>

Thus, section 145 is no more definite than section 6, and perhaps even less so. On top of the “factors” listed in section 6, section 145 adds a generous dollop of territorial and personal contacts. Once one ventures past section 145, however, the chapter dramatically changes character. Instead of infinitely open-ended sections, the *Second Restatement*, for the most part, articulates reasonably definite rules. To be sure, these succeeding sections contain escape valves that refer to section 6.<sup>53</sup> Many of the rules echo the *First Restatement’s* preference for choosing the law of the injury state.<sup>54</sup> Others do not refer to the injury state directly, but choose connecting factors very likely, if not certain, to lead to the application of the law of the injury state.<sup>55</sup> A few presumptively choose the place of the defendant’s conduct, the domicile of one or both parties, or some other reasonably definite

48. See Friedrich Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 212 (1969) (“Although it is printed in black letters, section 145 is not much of a rule . . .”).

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

50. *Id.* § 145(2).

51. *Id.*

52. *Id.*

53. See, e.g., *id.* § 146 (“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.”).

54. See *id.* §§ 146 (Personal Injuries); 147 (Injuries to Tangible Things); 156 (Tortious Character of Conduct); 157 (Standard of Care); 158 (Interest Entitled to Legal Protection); 159 (Duty Owed Plaintiff); 160 (Legal Cause); 162 (Specific Conditions of Liability); 164 (Contributory Fault); 165 (Assumption of Risk); 166 (Imputed Negligence); 172 (Joint Torts); 175 (Right of Action for Death); 176 (Defenses); 177 (Beneficiaries: How Damages Distributed); 178 (Damages); 179 (Person to Bring Suit); 180 (Personal Representative to Bring Suit).

55. See *id.* §§ 148 (Fraud and Misrepresentation); 149 (Defamation); 150 (Multistate Defamation); 151 (Injurious Falsehood); 152 (Right of Privacy); 153 (Multistate Invasion of Privacy); 155 (Malicious Prosecution and Abuse of Process).

connection.<sup>56</sup> Only a relatively few sections refer solely to the general formula of section 145 without providing some presumptive choice.<sup>57</sup>

More could be said about the dynamics of drafting the *Second Restatement* and its overall structure. My point is simple, however. The forces that contorted choice of law between 1952 and 1971 resulted in a schizophrenic *Second Restatement*. One portion of its split personality is vague sections such as 6 and 145.<sup>58</sup> The other portion is a set of reasonably definite rules and a preference for territorial solutions, including the injury-state rule for tort cases, endorsed by its predecessor.<sup>59</sup>

## II. THE *SECOND RESTATEMENT* AS APPLIED

In applying the *Second Restatement*, one might speculate that courts would fall into one of two patterns. One possibility is that they might rely heavily on the relatively narrow, presumptive rules in the *Second Restatement* and largely ignore the general sections such as 6 and 145. The second is that courts might refer primarily to the general sections and largely ignore the specific ones. In theory, of course, a court following the *Second Restatement* might attempt to do both, but this seems unlikely. The general sections and the specific sections represent fundamentally different approaches to choice of law. The general sections are the embodiment of a free-form approach to choice of law, whereas the specific sections are quite close to the multilateral system embodied by the *First Restatement*.

There is already a good deal of evidence that courts take the free-form approach. At least two recent empirical studies of choice-of-law decisions examine the frequency with which reported cases are decided in favor of plaintiffs or defendants, local or foreign parties, and forum or foreign law.<sup>60</sup> Both studies confirm the observation that the modern theories are "pro-resident, pro-forum-law, and pro-recovery."<sup>61</sup> While states adhering to the *First Restatement* choose pro-resi-

56. See *id.* §§ 150 (Multistate Defamation); 151 (Injurious Falsehood); 154 (Interference with Marriage Relationship); 155 (Malicious Prosecution and Abuse of Process); 162 (Specific Conditions of Liability); 169 (Intra-Family Immunity).

57. See *id.* §§ 161 (Defenses); 167 (Survival of Actions); 168 (Charitable Immunity); 170 (Release or Covenant Not to Sue); 171 (Damages); 173 (Contribution and Indemnity Among Tortfeasors); 174 (Vicarious Liability).

58. See *supra* notes 42-52 and accompanying text.

59. See *supra* notes 53-57 and accompanying text.

60. See Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1988).

61. Lea Brillmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 398 (1980).

dent, pro-forum law and pro-recovery rules fairly infrequently, all of the modern theories do so with considerable frequency.<sup>62</sup>

If courts followed the narrow provisions of the *Second Restatement*, their result patterns should be closer to the *First Restatement* than to the major competing modern methodologies; neither interest analysis nor Leflar's approach gives much weight to territorial connections, and little weight to the place of the injury in tort cases.<sup>63</sup> Empirical analysis shows, however, that, with one minor exception, the *Second Restatement's* performance is statistically identical to that of the other modern approaches.<sup>64</sup> This suggests that *Second Restatement* states are inclined to rely on the general, not the specific, sections.

There is other evidence that the general sections in the *Second Restatement* are the most important. Even a cursory examination of judicial opinions relying on the *Second Restatement* reveals that they often proceed without examining any of the specific provisions in the *Second Restatement*. The New York Court of Appeals decision in *Allstate Insurance Co. v. Stolarz*<sup>65</sup> offers a good example. *Stolarz* dealt with a two-car, New York automobile accident and focused on whether to apply New York or New Jersey law to a question of whether the policyholder's uninsured motorist coverage should be stacked on top of the coverage afforded by the other driver's policy.<sup>66</sup> New Jersey law would not have allowed such stacking;<sup>67</sup> New York law apparently would have.<sup>68</sup> New York's high court attempted to answer the conflicts question by reference to section 188—the *Second Restatement's* general contracts section—and applied New Jersey law.<sup>69</sup> Nowhere did the court refer to section 193, the section dealing with casualty insurance.

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62. See Borchers, *supra* note 60, at 374-75 (applying a binary statistical method to show totals for each approach); Solimine, *supra* note 60, at 50 (stating that "the modern approaches are usually 'pro-resident, pro-forum-law, [and] pro-recovery'" (quoting Brilmayer, *supra* note 61, at 398)).

63. See Borchers, *supra* note 60, at 361-67 (discussing the conflicts revolution and the analytical arguments therein).

64. See *id.* at 377-79. The minor exception is that the ninety-five percent confidence intervals for *Second Restatement* and Leflar states do not overlap with regard to the application of pro-recovery rules. See *id.* at 378. All other ninety-five percent confidence intervals overlap.

65. 613 N.E.2d 936 (N.Y. 1993).

66. *Id.* at 936-37.

67. *Id.* at 937.

68. *Id.* Although the New York Court of Appeals applied New Jersey law, its alternative rationale was to distinguish and limit the New York case, *United Community Insurance Co. v. Mucatel*, 487 N.Y.S.2d 959 (Sup. Ct. N.Y. County 1985), *aff'd without opinion*, 501 N.Y.S.2d 761 (App. Div. 1986), *aff'd for reason stated by trial court*, 505 N.E.2d 624 (N.Y. 1987), which apparently allowed for the stacking. *Stolarz*, 613 N.E.2d at 938.

69. *Stolarz*, 613 N.E.2d at 939.

Closer inspection of that section would have revealed an illustration specifically dealing with the problem facing the *Stolarz* court.<sup>70</sup> Although the court's result was consistent with the illustration, the court appeared to be completely unaware that section 193 or its illustrations even existed.<sup>71</sup>

*Stolarz* is anecdotal evidence that courts view general sections of the *Second Restatement* as the ones that really matter. There remains, however, the question of whether the anecdotal impression can be confirmed empirically. Using LEXIS, I set out to measure the frequency with which courts cite to various sections of the *Second Restatement*.<sup>72</sup> First, I collected data on how often some of the general sections in the *Second Restatement* have been cited. The results are correlated in the following Table.

TABLE I  
FREQUENCY OF CITATION TO GENERAL PROVISIONS OF THE  
*SECOND RESTATEMENT*

RESTATEMENT SECTION	TOPIC OF SECTION	NUMBER OF CASES CITING
6	Choice-of-Law Principles	523
145	The General Principle (Torts)	610
187	Law of the State Chosen by the Parties	330
188	Law Governing in the Absence of Effective Choice by the Parties (Contracts)	494
6 and 145 Cited Together in the Same Case	Tort Considerations	210
6 and 188 Cited Together in the Same Case	Contract Considerations	94

70. This aspect of *Stolarz* is discussed in Patrick J. Borchers, *New York Choice of Law: Weaving the Tangled Strands*, 57 ALB. L. REV. 93, 109-11 (1993), wherein the author argues that courts should look to the *Second Restatement's* narrow rules rather than just to the general provisions.

71. See *id.* at 110-11.

72. I ran the searches on November 16, 1996. When searching for citations to section 6, for example, I entered the following search in the MEGA, MEGA library: "(Restatement w/4 Conflict w/4 Law w/4 Section) w/4 6." For other sections I substituted the appropriate number for 6 in the above search. Undoubtedly, this search routine produced some false positives. For instance, if another citation—such as a case citation—used the number 6 in close proximity to another citation to the *Second Restatement*, that combination would satisfy the search criteria. However, narrowing the search by using "w/1" as the connector for the section number, for instance, would have excluded some citations to multiple sections of the *Second Restatement*. In any event, individually checking a large number of the citations revealed that the vast majority of them were not false positives; they were in fact citations to the sought-after *Second Restatement* provision.

As one might expect, given the large number of states purporting to follow the *Second Restatement*, the general sections have been cited quite often. The most popular section is 145, which is not surprising given that tort cases pose most of the difficulties in the postrevolutionary period.<sup>73</sup> Next in frequency of citation is section 6, the most general section.

Having ascertained the raw number of cases citing the most general sections of the *Second Restatement*, I set out to compare their frequency of citation to the frequency of citation of the more specific sections in the *Second Restatement*. The following Table correlates the data for the tort sections.

TABLE II  
FREQUENCY OF CITATION TO TORT PROVISIONS OF THE  
*SECOND RESTATEMENT*

RESTATEMENT SECTION	TOPIC OF SECTION	NUMBER OF CASES CITING
145	The General Principle (Torts)	610
146	Personal Injuries	120
147	Injuries to Tangible Things	14
148	Fraud and Misrepresentation	43
149	Defamation	20
150	Multistate Defamation	42
151	Injurious Falsehood	3
152	Right of Privacy	6
153	Multistate Invasion of Privacy	7
154	Interference with Marriage Relationship	2
155	Malicious Prosecution and Abuse of Process	11
156	Tortious Character of Conduct	2
157	Standard of Care	2
158	Interest Entitled to Legal Protection	2
159	Duty Owed Plaintiff	1
160	Legal Cause	4
161	Defenses	3
162	Specific Conditions of Liability	1
163	Duty or Privilege to Act	5
164	Contributory Fault	4
170	Release or Covenant Not to Sue	10
171	Damages	25

73. See Borchers, *supra* note 60, at 369.

RESTATEMENT SECTION	TOPIC OF SECTION	NUMBER OF CASES CITING
172	Joint Torts	1
173	Contribution and Indemnity Among Tortfeasors	12
174	Vicarious Liability	2
175	Right of Action for Death	52
176	Defenses (Wrongful Death)	3
177	Beneficiaries: How Damages Distributed (Wrongful Death)	5
178	Damages (Wrongful Death)	10
179	Person to Bring Suit (Wrongful Death)	1
180	Personal Representative to Bring Suit (Wrongful Death)	0
Total Citations to Specific Tort Provisions	_____	435
Total Citations to Specific Tort Provisions Excluding § 146	_____	315

As one might expect, section 145 is cited with much greater frequency than any other tort section. In fact, section 145 has been cited more than five times as often as the next most popular section, section 146. Moreover, section 146's status as the second most popular section correlates with its generality. Section 146 covers all matters of "personal injury," a large subset of torts.<sup>74</sup> After section 146, no other section has been cited in more than fifty-two cases, and twenty-five of the sections have been cited in ten or fewer cases. Even more striking, however, is that the total citations to specific tort sections of the *Second Restatement* is only 71.3% of the citations to section 145. If one excludes section 146, the total becomes a mere 51.6% of the citations to section 145.

A similar pattern emerges with regard to contracts cases, which are correlated in the next table.

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74. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (Personal Injuries) (1971).

TABLE III  
FREQUENCY OF CITATION TO CONTRACTS PROVISIONS OF THE  
*Second Restatement*

RESTATEMENT SECTION	TOPIC OF SECTION	NUMBER OF CASES CITING
188	Law Governing (Contracts)	494
189	Contracts for the Transfer of Interests in Land	20
190	Contractual Duties Arising from Transfer of Interests in Land	2
191	Contracts to Sell Interests in Chattel	14
192	Life Insurance Contracts	30
193	Contracts of Fire, Surety or Casualty Insurance	127
194	Contracts of Suretyship	15
195	Contracts for the Repayment of Money Lent	5
196	Contracts for the Rendition of Services	28
197	Contracts of Transportation	2
198	Capacity to Contract	3
199	Requirements of a Writing—Formalities	12
200	Validity of a Contract in Respects Other Than Capacity and Formalities	0
201	Misrepresentation, Duress, Undue Influence and Mistake	12
202	Illegality	14
203	Usury	31
204	Construction of Words Used in Contract	5
205	Nature and Extent of Contractual Obligations	6
206	Details of Performance	8
207	Measure of Recovery	23
Total Citations to Specific Contracts Provisions	—————	385

As with tort cases, no specific section approaches the popularity of the general provision—section 188. The next most popular provision is section 193, which has been cited in 127 cases. Beyond that, no section has been cited in more than thirty-one cases. When one totals all of the cases citing specific contracts sections, the resulting amount is 385 cases, which is only 77.9% of the number of cases citing the general section.

This suggests that cases like *Stolarz* are fairly common. One possible explanation for the numerous cases citing the general sections might be that no specific section covers the problem before the court.

This seems unlikely, however, given the wide array of specific sections. The more plausible explanation appears to be that there are a large number of cases to which specific sections might apply, but courts ignore them in favor of the general sections.

#### CONCLUSIONS AND RECOMMENDATIONS

Over time, the *Second Restatement* has become something different from the document it appears to be. Even the courts that claim to adhere to the *Second Restatement* most likely do not look at it very often. Moreover, courts' indifference to the *Second Restatement* causes counsel to ignore it. Instead, courts and the attorneys practicing before them look to cases quoting sections 6, 145, 188, or some of the other popular provisions. They content themselves with block quotations of those general sections and then proceed to solve the choice-of-law problem, considering only those general sections. For judges and lawyers, the *Second Restatement* exists not as a handsome, two-volume book authored by the American Law Institute, but rather as a kind of chain letter consisting of selective block quotations.

For many courts, this chain-letter approach is comfortable. The "official" status of the *Second Restatement* is more attractive than attempting to follow theories developed in law review articles that by now are thirty or more years old.<sup>75</sup> The eclectic mix of territorial and personal connecting factors allows a court to claim that almost any result is consistent with the *Second Restatement*. Given the *Second Restatement's* schizophrenic character, the advent of such a chain-letter approach should have been foreseeable, but hardly intended by its drafters, who gave it a much more definite, territorial cast than that followed by *Second Restatement* courts.

Self-described *Second Restatement* states should reexamine their approach. If they find themselves routinely departing from the presumptive choices set forth in the narrower sections, they ought to renounce their alleged adherence to the *Second Restatement*. "Following" the *Second Restatement* ought to mean something other than a ritualized citation to sections 6 and 145. If courts actually began to follow the *Second Restatement*, however, they might well find themselves reaching unpalatable results. The fact that a court finds these results unacceptable should indicate that it is not really a *Second Restatement* court.

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75. See, e.g., Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958) (discussing various ways to resolve conflicts of interest between states); Leflar, *supra* note 46, at 1585-88 (analyzing the principles and policy considerations that judges use in resolving conflict of laws).



Courts that find themselves in this position ought to consider endorsing Professor Leflar's approach.<sup>76</sup> His explicit recognition that the relative quality of the competing rules is an important consideration in making choice-of-law decisions makes his list a more accurate "restatement" of what courts actually do.<sup>77</sup>

In any event, making a serious effort to consider the entire *Second Restatement* would improve the quality of judicial decisionmaking. Courts that are willing to follow the narrow rules of the *Second Restatement* would derive vastly more guidance than that which can be gleaned from sections 6, 145, and 188. Courts unwilling to adhere generally to its narrow rules should renounce the claim that they are *Second Restatement* states and candidly state their true preferences.

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76. See Leflar, *supra* note 46, at 1585-88.

77. See *id.*