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The Utilitarian Role of a Restatement of Conflicts in a Common Law System: How Much Judicial Deference Is Due to the Restaters or "Who are these guys, anyway?"

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I. INTRODUCTION

Modern judges in choice-of-law cases must necessarily feel some kinship to Butch Cassidy and the Sundance Kid, waiting for their pursuers to ride over the hill to force them to move on. The theoretical debate over the scope and meaning of the *Restatement (Second) of Conflict of Laws* ("*Second Restatement*")[1] has regularly exposed courts who "adopt" that document's approach not only to normal critical evaluation of the practical results of those decisions but to critical analysis focused on whether the court had properly applied the "significant contacts—governmental interests" theory that informs the *Second Restatement*'s recommendations. Such criticism arose even when the result in the case, as distinguished from the language used to explain it, was clearly unexceptionable.

This combination of theoretical criticism and functional review necessarily left the courts, whose principal duty is to arrive at a result in each case that is both rational and utilitarian, somewhat perplexed about the nature of the task committed to them. Critiques of judicial decisions invoking the *Second Restatement* are just as likely to focus on whether the opinion properly articulated the principles and rules of the *Second Restatement* as on whether the result in the case made common sense. Judges who believe it is their principal duty to arrive at just results in the light of prior decisions in similar cases must necessarily feel a bit confused when it is their *description* of the reasons for the result, rather than the result itself, that becomes the focus of criticism.[2]

This conflict between the scholar's role as commentator and the judge's role as ultimate decisionmaker is present throughout much modern conflict of laws analysis. Thus, an answer to the question whether a new restatement should revisit choice-of-law theory or whether it should concern itself with synthesizing cases decided under

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

2. This is not to suggest that scholarly criticism of decisional theory is either unimportant or inappropriate. Rather, the proposition is that a new restatement should start out to synthesize rules from existing decisions to say what the law (as distinguished from the theory) now is in various factual contexts. Wherever sufficient case law exists to permit such an exercise, the new restatement should undertake it. Once this is accomplished, critical analysis of the rules produced by this synthesis is highly appropriate. But, since the American Law Institute does not (and should not) attempt to write new law, especially under the guise of issuing a restatement, it ought to determine what law the lawmakers have made before going on to recommend other approaches for situations in which authoritative decisionmakers have not yet acted or have done so erratically without apparent consistency.

existing theories is central to determining whether the bar, the academy or the courts are ready for a new American Law Institute effort in the choice-of-law field.

Before the *Restatement of the Law of Conflict of Laws* ("*First Restatement*")[3] was published in 1934, the idea that the field of conflict of laws could provide a battleground for important scholarly debate might have been rejected out of hand. Although there were, of course, books and articles stating differing views on private international law in the late nineteenth and early twentieth centuries,[4] generally choice of law in the courts was treated as a set of firmly established common law rules with a limited set of exceptions. In 1935, Professor Joseph Henry Beale, discussing conflict of laws, could comfortably write: "Pondering over the subject of Conflict of Laws, after ten years spent in teaching it, the author evolved a Summary of the subject which in the thirty years that followed he has seen little reason to alter."[5]

But the quiet certitude reflected in Professor Beale's statement above changed with the emergence of Legal Realist analysis and the entry of Legal Realist scholars into the choice-of-law field.[6] Those scholars rejected the proposition that a few words in a legal rule could explain the propriety of the results in cases in which the court was determining not only the rights of the parties, but the *rights* of territorial lawmakers as well.

The *rules* of choice of law were not, of course, the simple and easy predictors that their written forms suggested. Rather, those rules oversimplified and, therefore, obscured a complex interaction of governmental policies and private concerns whose synthesis did not lend itself to the appealing simplicity of universal conclusory statements based on general concepts of sovereignty and state authority.[7]

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3. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934).

4. For a useful short survey of this period, see EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS §§ 2.4-.12 (2d ed. 1992).

5. JOSEPH H. BEALE, SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS at iii (student ed. 1935).

6. The Legal Realists shifted the emphasis from the language of the law to the results achieved by authoritative decisionmakers. This shift, in turn, necessarily required analysis aimed at determining the social impact of the result in a given case and asking which state should determine whether such an impact should occur. The best known of these scholars in the conflicts field was Professor Walter Wheeler Cook whose work, culminating in the book, WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942), strongly influenced the development of the *Second Restatement.*

7. Perhaps the clearest statement of this proposition is by Professor Hardy Cross Dillard, *The Policy-Oriented Approach to Law*, 40 VA. Q. REV. 626, 629 (1964).

> The "law" is thus not a "something" impelling obedience; it is a constantly evolving process of decision making and the way it evolves will depend on the knowledge and insights of the decision makers. So viewed, norms of law should be considered less as compulsive commands than as tools of thought or instruments of analysis. Their impelling quality will vary greatly depending on the context of application, and, since the need for stability is recognized, the norms may frequently provide for a high order of predictability. But this is referable back to the expectations entertained and is not attributable to some existential quality attaching to the norms themselves. In other words, our concept of "law" needs to be liberated from the cramping assumption that it "exists" as a kind of "entity" imposing restraints on the decision maker.

Whatever criticisms may be aimed at the two *Restatements*, together they have stimulated a great outpouring of scholarly and judicial commentary during the last seventy-five years. Much of that discussion has taken the form of critiques of the manner and means that courts have used to implement the analytical processes recommended by the *Second Restatement* or, in some instances, defense of the "simplicity" of the *First Restatement* (which defense often includes what seems to be an ill-disguised yearning for the "good old days").

The especially abstract nature of choice-of-law rules makes them peculiarly appropriate targets for Legal Realist analysis. The impact of that scholarship has reached beyond the field of conflicts and has contributed significantly to a better understanding of what the characterization *law* means in all its various contexts. Furthermore, the Legal Realist writers have effectively destroyed the proposition that a reference to *law* can only mean reference to the verbal form of a sovereign's normative statements issued by that sovereign's courts or legislature. Holmes's aphorism that law is what courts do came to life.[8]

The nature of the decisionmaking process in choice-of-law cases makes a definitive answer to the question "Do We Need a New Restatement?" both important and difficult. Should we set out to produce a true "Restatement"? Such a restatement would synthesize the results in cases decided under the principles of the *Second Restatement* in order to document and articulate the new *rules* that describe how courts have used the governmental interests—significant contacts analysis. Or do we need a third restatement to review and revise the theories that inform choice-of-law decisionmaking in order to articulate a more accurate form of analysis for use in future choice-of-law cases? These questions cannot be answered effectively until we learn how far we have come on the path from unreasonable rules through a morass of unruly reasonableness to arrive at an articulation of rules that are reasonable in the light of the social needs they are designed to serve and in the light of the practical necessity of assisting courts and lawyers in addressing those needs.

II. THE COMMON LAW METHOD IN CONFLICT OF LAWS

Conflict of laws is one of the few remaining areas in which the common law method holds sway as a principal mechanism for judicial decisionmaking. Because common law methodology is so prevalent in conflict of laws decisions, a brief review the nature of that methodology is helpful.[9]

Id.

8. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, Address Delivered at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), *in* THE MIND AND FAITH OF JUSTICE HOLMES 71, 75 (Max Lerner ed., 1989); *cf.* "Rules are not self-applying but are wielded by people acting as decisionmakers." MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY 5 (1981).

9. There is an important distinction between the "common law method" and "The Common Law." The first refers to the process of decisionmaking used by the king's courts in medieval England in response to King Henry I's direction to "go forth and do justice in the name of the crown." The second refers to the body of rules developed by later common law

In every case, it is the court's duty to see to it that justice is done to the parties by ensuring the evenhanded application of an appropriate set of societal norms. The proposition that parties similarly situated should be similarly treated by the courts is a fundamental principle of justice. At common law, general fundamental legal norms were originally drawn, not from statutes or royal decrees, but from concepts of social justice available to the courts (from religion, philosophy, and the judges' experience as human beings) and applied by them to specific real world situations.

Before the twentieth century, most private law was not statutory but was derived by the common law method described above. The Common Law's content was stated in generalized rules that synthesized the results in prior cases decided by the common law method. Using such common law rules as rules of decision necessarily creates a connection between past, present, and future judicial action and serves the important purpose of guiding the court to resolve similar cases similarly. Thus, the need to formulate rules at common law is directly tied to the importance of consistent decisionmaking over time.[10]

III. TERRITORIALITY AND CHOICE-OF-LAW THEORY

A. The Role of the Territorial State

The development of the territorial nation-state as the principal building block of world society necessitated efforts by courts to take into account the rapidly increasing number of lawmaking units whose laws might be relevant to deciding cases that came before the local fora. Law was thought of as confined by territorial boundaries since its authority came solely from the will of a territorial sovereign who could not legislate authoritatively in another sovereign's territory or for her people.[11]

When the number of nation-states with defined territorial boundaries increased, the frequency of conflicts between the lawmaking authority of sovereigns with respect to particular situations or persons increased. Consequently, theoretical analysis became of great importance in conflict-of-laws cases. This was so because decisions concerning the relevance of competing governmental policies are much more abstract

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courts to synthesize the results in past cases to permit easy access to judicial precedent. Without a set of readily accessible rules, the courts had to rely on their ad hoc understanding of general principles of justice to arrive at decisions in individual cases.

10. The principle of precedent was not invented by King Henry I and given to his courts by sovereign fiat. When lawyers representing clients before the King's courts came to recognize that the courts often decided cases by referring to earlier cases for support or contradiction, the importance of "precedent" began to become evident. Since the courts did not issue written opinions (hardly surprising in the days before the invention of the printing press), lawyers began to send their law clerks into the courts on judgment day to take down shorthand summaries of the words that the court read. *See generally* 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 532-42 (3d ed. 1923). Thus, most early opinions are quite short. For illustrations, see 2 SELDEN SOCIETY, SELECTED CASES ON THE LAW MERCHANT (1930).

11. "[I]t is not the custom of England that anyone answer in the Kingdom of England for any trespass made in a region outside...." Hugh la Pape v. The Merchants of Florence Living in London, *reprinted in* 2 SELDEN SOCIETY, *supra* note 10, at 34, 38 [hereinafter *Hugh la Pape*].

and, therefore, much more difficult to explain, than decisions about whether the defendant should pay the plaintiff under a given set of local law standards. A brief review of choice-of-law theory and of the works of earlier "restaters" is helpful to put the *Second Restatement* in appropriate perspective and to address the question whether, at this time, the American Law Institute ("ALI") should begin work on a third restatement.

B. The Early "Restaters"

The great Dutch scholar, Ulricus Huber, was challenged with an apparent contradiction between the concept of absolute territorial sovereignty and the need to use rules of law created by foreign sovereigns in order to facilitate international economic intercourse by recognizing property (and other) rights created in one country but asserted in another.[12] He resolved that contradiction by pointing out that, as a matter of practice (but not necessarily of law), "[t]hose who exercise sovereign authority so act from comity, that the laws of every nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the powers or rights of another state, or its subjects."[13] Huber's "comity theory" became the basis for the recognition and enforcement of foreign law and judgments in English common law.[14] Consequently, the comity theory was "received" in the United States along with other elements of British Common Law. Justice Joseph Story made comity the theoretical basis of his early nineteenth century treatise on private international law.[15] Thus, Story's theory emphasized the importance of a

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12. *See* Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 260-61 (1991).

13. D.J. Llewelyn Davies, *The Influence of Huber's* De Conflictu Legum *on English Private International Law*, 18 BRIT. Y.B. INT'L L. 49, 57 (1937) (quoting ULRICH HUBER, De Conflictu Legum Diversarum in Diversis Imperiis, *in* PRAELECTIONES JURIS ROMANI ET HODIERNI § 2 (1689)); *see* Ernest G. Lorenzen, *Huber's* De Conflictu Legum, 13 ILL. L. REV. 375, 375-77 (1918); Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 26 (1966-67).

14. *See* Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 282-83 (1982). In *Hugh la Pape*, *supra* note 11, the Court refused to hear a claim brought by an English knight for destruction of his palace on the hills outside Florence, Italy. The palace had been destroyed as a military measure by the Florentine government. The court wrote: "[I]t is not the custom of England that anyone answer in the Kingdom of England for any trespass made in a region outside . . . ." *Id.* at 38. This rule prevailed until Lord Mansfield's decision, based on Huber's "comity" principle, in *Holman v. Johnson*, 1 Cowp. 341, 343-44, 98 Eng. Rep. 1120, 1121 (K.B. 1775). For a discussion of how the British courts evaded the otherwise disastrous effects of the *Hugh la Pape* rule, see Harold G. Maier, *International Issues in Common Law Choice of Law: American Conflicts Teaching Exits the Middle Ages*, 28 VAND. J. TRANSNAT'L L. 361, 361-63 (1995) [hereinafter Maier, *International Issues*].

15. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (Morris L. Cohen et al. eds., Arno Press 1972) (1834). Story wrote:

> The true foundation on which the administration of international law must rest is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconvenience, which would result from a contrary

cooperative judicial attitude toward the use of foreign law to resolve forum cases. The theory contained an element of "presumed reciprocity" based on a kind of interstate golden rule: "Apply the local law of another state or nation when, if the circumstances were reversed, you would prefer that state or nation to apply the local law of your own forum."

Story's "comity theory" held sway until the late nineteenth century when the "Theory of Vested Rights" became the accepted justification for choice-of-law decisions. That theory was little more than a revival of the strict territoriality of medieval England[16] in reverse. This theory viewed law as functioning automatically, without the intervention of a court or other decisionmaker, on the occurrence of a triggering event. Thus, rights vested automatically under a sovereign's law because the last event necessary to create a cause of action under that law occurred within that sovereign's territory. Thereafter, the legal rights and duties thus created followed the parties into whatever forum became the site of the litigation. Since the Vested Rights theory left little room for policy analysis, it appeared to be particularly amenable to having its rules set down in a restatement. This was, of course, the *First Restatement.*

The attack on the *First Restatement* was led principally by the Legal Realists[17] who

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> doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.

Id. at 34; *cf.* SAMUEL LIVERMORE, DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS 28 (New Orleans, B. Levy 1828).

16. *See, e.g., Hugh la Pape, supra* note 11. For a brief summary of this case and its role in early choice-of-law reasoning, see Maier, *International Issues, supra* note 14, at 365.

17. Perhaps the best known of the Realists in the conflict-of-laws field was Professor Walter Wheeler Cook. Professor Cook carried the Realist torch throughout the debates in the ALI while the *First Restatement* was being drafted and, ultimately, accepted. Cook lost that battle but not the war. His ideas ultimately provided the theoretical base for the *Second Restatement.* Professor Joseph Henry Beale, the *First Restatement*'s Chief Reporter, was the leading Vested Rights theorist whose policies prevailed in the *First Restatement.* Professor Elliot E. Cheatham and his colleague (and former student) Professor Willis L.M. Reese laid the groundwork and created the format for the *Second Restatement* in a seminal article entitled *Choice of the Applicable Law,* 52 COLUM. L. REV. 959 (1952). Reese was named Chief Reporter for the *Second Restatement* whose format and theory strongly resembles the approach in the Columbia piece. Although neither Cheatham nor Reese would probably have called themselves "Legal Realists" their analytical style fits that model precisely. Three other important influences on judicial interpretations of the *Second Restatement* were Professors David Cavers, Brainerd Currie, and Robert A. Leflar, each of whom were important commentators on court decisions applying the *Second Restatement*'s methodology. Professor Currie's views on governmental interests analysis eventually won the day when courts began to use that analysis to determine which contacts were "most significant" as that term is used in section 6 of the *Second Restatement. See* Babcock v. Jackson, 191 N.E.2d 279, 282 (N.Y. 1963). It is the relationship between the facts of the case and the states or nations involved that creates the "governmental interests" that should be reflected in the ultimate result arrived at by the court. For a summary of the views of most of the principal choice-of-law scholars at the time that the *Second Restatement* was gaining a foothold in the courts, see Harold G. Maier, *Coordination of Laws in a National Federal State: An Analysis of the Writings of Elliot Evans Cheatham,* 26 VAND. L. REV. 209, 242-5 (1973).

had objected to the Vested Rights theory throughout the preparation of the ALI drafts. The Legal Realists eschewed choice-of-law rules, even as they objected to rules in general when they were used by courts as general indicators of just results in all cases. Since their view was that the law was the result of an authoritative decisionmaking process tied to the specific facts of a case, any "restatement" created under Legal Realist theory would not restate rules but, rather, would state a methodology for solving choice-of-law problems. This is, of course, precisely what the *Second Restatement* does. The question now before the house is whether a third restatement should be developed to replace it.

C. The Role of Legal Rules

The policies that inform all legal decisions can be divided into three categories: governmental system policies, substantive rule policies, and policies of practical utility.[18] Choice-of-law cases necessarily require the court to determine which governmental unit's policies will guide the court's decisions. The answer to this question depends in turn on the systemic values that inform the governmental organizational framework within which the court represents one of many different bodies politic, each of which has laid down rules of conduct appropriate to resolving a dispute similar to that between the parties. In other words, the choice-of-law question is, which government's policies shall guide the decision in the case? The *Second Restatement* sought to establish a method for conducting this search —nothing more.

The *Second Restatement* was neither designed nor intended to provide all the answers to choice-of-law problems. Rather, it was much more concerned with identifying the proper questions. As the late Professor Willis Reese put it:

> Section 6 has both strengths and attendant weaknesses. Its strengths are that it lists the principal values that are of importance in choice of law. Its weaknesses stem directly from these strengths. In all but the simplest cases, the values stated are likely to point in different directions such that the court will be required to determine which values are of greatest importance for the purpose at hand. In other words, section 6 is eclectic in that it places emphasis upon a number of policies or values. . . .
> . . . [I]t cannot be denied that the principal weakness of the *Restatement* is the relatively little guidance that it affords. Properly viewed, *it is a transitional document.*[19]

Criticisms aimed at the *Second Restatement* because it fails to give definitive answers are, therefore, necessarily aimed, not at the execution of the *Second Restatement*'s objectives but rather at the objectives themselves. And to the extent that the *Second Restatement* has accomplished its purpose of making Legal Realist reasoning the touchstone for most judicial decisionmaking in choice-of-law cases, it has done very well.

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18. *See* Maier, *supra* note 17, at 246-47.

19. Willis L.M. Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 VAND. L. REV. 717, 733-34 (1980) (emphasis added).

It is important to remember that no restatement is ever "law." It has no legal force. It is, in theory, an educated analysis of what past judicial decisions or legislation say the law *ought* to be. This is particularly true in an area in which the common law method still functions as the principal guide to decisionmakers. A restatement *never* becomes law. It can never be anything more than a guide because, whatever the expertise, acumen, brilliance, or dedication of those who draft a restatement, they carry no authority to decide what the law *is* in a controversy between parties. Restaters are not authoritative decisionmakers. If the words and policies of the restatement become law, they do so because authoritative lawmakers adopt them, not because they receive the affirmative vote of the ALI.

There is no evidence that the Reporters for the *Second Restatement* were at all disappointed—or had reason to be—with the ultimate results of their labors. It is, of course, correct that the *Second Restatement* does not answer all the questions raised about the appropriate resolution for all choice-of-law scenarios.[20] It was never intended to do so. But it does describe a useful conceptual process for future decisionmaking. In so doing, it has freed judicial (and scholarly) attitudes from the narrow formalism[21] reflected in the Vested Rights theory the *First Restatement*[22]—and it has done this admirably! The questions are, therefore, "What should the American Law Institute do next? Do we need a Restatement (Third)?" I think the answer is "yes"—but conditionally. The condition is that the new restatement's reporters begin with an effort to synthesize the results and rationales in decided cases to find out what the *new* choice-of-law rules are. This is not the same as asking, "What analytical principles did the courts follow in arriving at these results?" Once this collection and synthesis has been done, the need, if any, for new choice-of-law theories will become much more evident. Perhaps all that is really needed is more common law method experience with the theories that are already reflected in the *Second Restatement*,[23] the analysis now used in a majority of states.

I propose that the ALI begin by finding out what the conflict landscape really looks like, where the gaps are, what the courts have actually done. That task might even go on to critique the existing case law and to make recommendations about how any holes should be filled. Such a new work should certainly address the question, where should the courts go next? But, let us first find out where they have actually been?

New restaters should now be concerned with the question, "What have the authoritative decisionmakers done with the guidance that the ALI has provided for them and in what choice-of-law categories have they done it?" Once we know the answer to that question, we will know a great deal more about the current state of choice of law in the courts of the United States and about the direction to be followed in researching and drafting a third restatement of conflict of laws.

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20. *See generally* Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232 (1997); Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437 (2000).

21. Judge Roger Traynor called it "the brooding background of a petrified forest." Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 670 n.35 (1959).

22. *See* Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 379-85 (1944).

23. *See generally*, Borchers, *supra* note 20.